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IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO. 262 0F 2017

BETWEEN:

MWAI KATHEBWE.....CLAIMANT

-and-

MAJOR MKANDAWIRE.....FIRST DEFENDANT

-and-

ALMEIDA TRANSPORT.....SECOND DEFENDANT

CORAM: Justice Jack Nriva, Judge

Mr. Kazembe, of counsel for the claimant
Mr. Malijani, of counsel for the second defendant
Ms. Mtegha, court clerk

JUDGMENT

The claimant, Mwai Kathebwe, commenced this case against the defendants.

The first defendant, Major Mkandawire, was the driver of a motor vehicle whose owner was Almeida Transport, the second defendant. The claimant was a passenger on board in the vehicle as it was travelling towards Zalewa Trading Centre from the direction of Phalula Trading Centre. Upon arrival at Tchenga Trading Centre near Fatima Mosque, Mr Mkandawire hit a Truck. In the process the claimant got severely injured. The claimant argues that the incident happened because Mr. Mkandawire negligently drove the vehicle.

In particular, the claimant made allegations that Mr Mkandawire

- was driving without due care and attention for other road users;

- failed to stop, slow down, swerve or in any manner so to manage and control the said motor vehicle so as to avoid hitting the vehicle in front;
- paid a fine of MK 10, 000.00 for the offence of reckless driving under the Road Traffic Act.

In claiming for damages, the claimant alleged that, as a result of the accident, she sustained multiple bruises, sustained injuries to the left arm and suffered traumatic amputation of the left arm. She is unable to do manual work, such as household chores and farming activities. As such, he cannot do anything to earn a living.

The matter came for determination whether to enter summary judgment against the second defendant for vicarious liability. The claimant argued that the second defendant has no defence to the claim for vicarious liability. The second defendant's case is that it is not vicariously liable for the actions of the driver. They base their defence on fact that the driver was driving a vehicle that was not supposed to carry passengers. The vehicle had an inscription with words "No unauthorised passengers are allowed". The second defendant, therefore, argues that the claimant was an unauthorised passenger, arguing that it was against both policy and the driver's conditions of service for him to have carried the passenger.

At the end of the hearing, we agreed that we have to deal with the question of whether the second defendant could be vicariously liable for the driver's negligence.

The law regarding vicarious liability of employers has had a long history in the common law legal system. One of earliest treatises on the subject was by Sir John W. Salmon in 1907, *The law of torts: a treatise on the English law of liability for civil liabilities.* In the work, Salmond said that an employer would only be liable for the employee's wrongful conduct if it occurred in the course of employment if it was either (a) a wrongful act authorised by the employer, or (b) a wrongful and unauthorised mode of doing an authorised act. In other words, the employer ought to be liable for authorised and unauthorised acts of the employee so long as the acts took place in the course of the servant's employment.

Salmond wrote:

> a master is liable even for acts which he has not authorised provided they are so connected with acts which he has authorised that they may be regarded as modes although improper modes of doing them.

The South African case of *Feldman (Pty) Ltd v Mall* 1945 (AD) 733 is an example, among numerous other decision of this approach. Watermeyer CJ, said:

> Provided the servant is doing his master's work or pursuing his master's ends he is acting within the course and scope of his employment even if he disobeys his master's instruction as to manner of doing the work or as to the means by which the end is to be attained. A servant may even omit to do his master's work, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be legally responsible for such damage. Consequently, a servant can act in disobedience of his master's instructions and yet render his master liable for his acts.

This line of thought has met judicial interrogation and analysis. Questioning the propriety of the approach, some decisions sought to streamline cases in which employers could be liable for the acts of their servants. In *Lister v Hesley Hall Ltd* [2001] UKHL 22, the House of Lords stated that the demands for distributive justice required a new test whereby an employer would be liable for such acts that would be within the course of employment and closely connected to the employee's duties.

Much as many decisions have clung to the Salmond approach, there is some shift in the application of the law on employers' vicarious liability on wrongs that employees commit in the course of employment. The employee's acts must be closely connected to his duties.

Only if the conduct were a means (albeit wrongful) of doing an act authorised by the employer would employer's liability arise. Thus, the wrongful act need not be a means of performing an authorised act, provided its commission is adequately connected to employment.

In Australia, in *Blake v J R Perry Nominees Pty Ltd* [2012], the Court of Appeal considered and discussed several tests to determine whether the employer in that matter was vicariously liable. The tests included the following:

1. the tort must sufficiently relate to the conduct authorised by the employer to justify the imposition of vicarious liability -*Bazley v Curry* (1999) 174 DLR (4th) 45
2. the wrongful act must be so closely connected with the employment, that it would be fair and just to hold the employer vicariously liable -*Lister v Hesley Hall Ltd* [2012] 1 AC 215 [28], Lord Steyn.;
3. vicarious liability can be imposed for deliberate wrongs if the person against whom the liability is asserted is estopped from asserting that the person whose acts are in question was not acting as their servant, agent or representative when the acts occurred- *New South Wales v Lepore* [2003] HCA 4, Gaudron J.

4. for vicarious liability to exist, the wrongful act must have been intentionally performed in the interests of the employer-. *New South Wales v Lepore.*

The Court of Appeal decided that employers will not be found vicariously liable for the actions of their employees unless:

1. the employer expressly or implied authorised the wrongful act;
2. the act was so closely connected with the duties and responsibilities of an employee and therefore within the scope of employment; or
3. the act was executed in the employer's interests.

The House of Lords dealt with the issues quite extensively in *Morgans v Launchberry and Others* [1973] A C 128. Lord Wilberforce, for example, said.

> For I regard it as clear that in order to fix vicarious liability upon the owner of a car ... it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on "interest" or "concern" has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability.

He further said:

> It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well.

In summary, most decisions suggest that there has to be a connection between the employee's acts and the employer's business, interests, and authorisation. In my analysis, many Courts prefer the test of connection between the negligence of the employee and his employer's interests and authorisation.

In this matter, the driver's negligence was on the course of his employer's duties. Within the course, he did what his employer expressly prohibited- not to carry passengers. The authorities I have quoted suggest that an employee must be in the course of employment and do acts that are authorised and closely related to the employee's duties.

Catherine Elliot and Frances Quinn, in their book *Tort Law* argue at p 378, that an employer who expressly prohibits an act will not be liable if an employee commits that act unless the prohibition is the very way of carrying out the employer's business.[1]

In *Limpus v London General Omnibus Co* (1862) ER 859, a bus driver had written instructions not to race with or obstruct other buses. The driver disobeyed the order and while racing with another bus, he collided with the claimant's bus. The court held that the driver was in the course of his employment, in spite of disobeying the order. Thus, he was within the course of his employment.

In *Twine v Bean's Express Ltd* (1946) 2 TLR 155, the defendant's employee gave the claimant's husband a lift in a van. As a result of the driver's negligence, the husband died. The driver had advice not to give lifts to anyone who was not authorised as a passenger. There was also put as a notice of who the authorised passengers were. The deceased was not among the authorised passengers. The Court held that the driver was doing an unauthorized act and therefore he was outside the course of his employment. Compare this with *Rose v Plenty* [1976] 1 WLR 141. A milkman had instructions, from his employer, not to permit passengers on his float. He also had prohibition to allow children to help him deliver the milk. The milkman disregarded the order and paid the claimant, a 13 year-old, to help him. The boy was injured as a result of the milkman's negligent driving.

The Court found the employer to be vicariously liable because the prohibition did not affect the job which the milkman had to do but only the way in which he should do it. He was doing his job albeit in a manner his employer disapproved.

Elliot and Quinn (2009) argues that the difference between *Twine v Bean's Express Ltd* and *Rose v Plenty* is that in the former case, the majority of the Court of Appeal found that the driver offered a lift not for the purpose that would benefit the employer. In *Rose v Plenty,* the boy was helping in deliveries, thereby furthering the business of the milkman's employer's.

On the agreed facts of the case before me, the driver was doing acts on behalf of the employer simultaneously with his own interests, as it were. Clearly, the driver was not supposed to carry passengers. Carrying passengers was not in the interest of his employer. It was not what his employer authorised. It was prohibited. Thus, one cannot say that carrying passengers was an act authorised by, or in the interest of the employer. The driver was not doing something in the interest of the employer but

[1] Elliot and Quinn (2009) *Tort Law,* London: Pearson Education Limited

over the interest of his employer. The driver went outside the scope of his employment.

The driver was on a prolific of his own, as it were, albeit contemporaneous with his employer's business.

In the circumstances, it would not be proper to hold the second defendant liable for the misfortune that occurred to the claimant. In the circumstances, I uphold the second defendant's argument that they are not vicariously liable for the negligence of the driver, because he was not authorised to carry passengers.

DELIVERED the 7th day of September, 2018

J NRIVA

JUDGE