**MALLAM NURAEN TAIWO HASSAN DINDI**

**v.**

**EKESON BROTHERS TRANSPORT COMPANY LIMITED & ANOR**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 21ST DAY OF FEBRUARY, 2020

CA/A/323/2015

**LEX (2020) – CA/A/323/2015**

**OTHER CITATIONS**

3PLR/2020/28 (CA)

(2020) LPELR-49523 (CA)

**BEFORE THEIR LORDSHIPS**

STEPHEN JONAH ADAH, JCA

PETER OLABISI IGE, JCA

EMMANUEL AKOMAYE AGIM, JCA -end!

**BETWEEN**

MALLAM NURAEN TAIWO HASSAN DINDI - Appellant(s)

AND

1. EKESON BROTHERS TRANSPORT COMPANY LIMITED

2. JUDE EZE - Respondent(s)-end!

**ORIGINATING COURT**

HIGH COURT OF THE FEDERAL CAPITAL TERRITORY [Olukayode A. Adeniyi J. Presiding] -end!

**REPRESENTATION**

ADEKOLA MUSTAPHA Esq. - For Appellant

AND

A.O. EDMOND-OKEKE Esq. - For Respondent-end!

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT AND PERSONAL INJURIES - VICARIOUS LIABILITY:- Principle that a master would be vicariously liable for the acts of his employee – Operation as an exception to the general rule that everyone is personally responsible and liable for their own faults – Conditions precedent for the successful invocation of vicarious liability .

TORT AND PERSONAL INJURIES - VICARIOUS LIABILITY:- A tortfeasor who is an employee – Denial of vicarious liability by employer on ground of exclusion clause in the employment letter of the tortfeasor - Whether covenant in any contract of employment cannot operate to sabotage the duty of care owed third parties who are not privy to the contract of employment

TORT AND PERSONAL INJURY LAW – VICARIOUS LIABILITY:- Condition(s) precedent for holding an employer vicariously liable for the action(s) of his employee – Where employer provides evidence that wrong complained of was neither authorized nor done for the purpose or in furtherance of employer’s business but that employee was on a frolic of his own when he committed the wrongful act(s) – Where the unauthorised and wrongful actions of an employee done in the course of his employment has not only injured a third party, but has also resulted in a breach of a duty of care owed by his employer to the third party under a contract of carriage between the employer and the third party – Legal effect

TORT AND PERSONAL INJURY - VICARIOUS LIABILITY:- A tortfeasor who is an employee of a bus transportation company –Assault and battery of third party by employee – Where employee expressly forbidden from molestation of passenger – When would not exculpate employer from vicarious liability – proper treatment of

TRANSPORTATION LAW – TRANSPORTATION SERVICE COMPANY – VICARIOUS LIABILITY:- Claim against transport company and employee-driver – Molestation of passenger – Express covenants between transport company and its drivers against molestation of passengers– Whether can operate to exclude transport company from vicarious liability for conduct of driver

TRANSPORTATION LAW – TRANSPORTATION SERVICE COMPANY – TRANSPORTER-PASSENGER RELATIONSHIP:- Duties of care owed by transporter to each passenger - Duty of care obligating transporter to convey the passenger safely and peacefully to his or her destination – Duty of care to use vehicles which are roadworthy and fit to safely and peacefully convey the passengers – Duty of care to employ drivers who are competent and efficient and who can ensure that the passengers in the vehicle are not molested or assaulted by servants or agents – Effect of failure thereto

TRANSPORTATION LAW – TRANSPORTATION SERVICE COMPANY – TRANSPORTER-PASSENGER RELATIONSHIP:- Where a transportation company engages a driver that assaults passengers in the bus he is driving or engages in any other misconduct that injures the passengers or their property – Defence that company did not authorise the misconduct and that the misconduct is not part of the process of driving the vehicle or incidental to it and the misconduct is not for the benefit of the company or owner of the vehicle – Attitude of court thereto

TRANSPORTATION LAW – TRANSPORTATION SERVICE COMPANY – TRANSPORTER-PASSENGER RELATIONSHIP:- Rule that the owner of a vehicle providing commercial passenger services must take the driver or any of its employees as it employed him and should bear the consequences of engaging a driver that disobey its lawful instructions to the detriment of its passengers – Basis of – Justification – Express covenant forbidding driver from engaging in such behavior – Whether evidence of the foreseeability of such conduct – Legal implication for liability of transport service provider

TRANSPORTATION LAW – CONTRACT OF CARRIAGE:- Duties of care owed by transporter to passengers – Breach of, by employee of transport company – When will be enough to found a case on vicarious liability

EMPLOYMENT AND LABOUR LAW - VICARIOUS LIABILITY:- Principle that a master would be vicariously liable for the acts of his employee – Operation as an exception to the general rule that everyone is personally responsible and liable for their own faults – Conditions precedent for the successful invocation of vicarious liability .

EMPLOYMENT AND LABOUR LAW - VICARIOUS LIABILITY:- A tortfeasor who is an employee – Denial of vicarious liability by employer on ground of exclusion clause in the employment letter of the tortfeasor - Whether covenant in a contract of employment excluding liability on employer for unauthorized act of employee can operate to shield employer from liability for duty of care owed third parties who are not privy to the said contract of employment

EMPLOYMENT AND LABOUR LAW – VICARIOUS LIABILITY:- Where employer provides evidence that wrong complained of was neither authorized nor done for the purpose or in furtherance of employer’s business but that employee was on a frolic of his own – Where the unauthorised and wrongful actions of an employee done in the course of his employment has not only injured a third party, but has also resulted in a breach of a duty of care owed by his employer to the third party under a contract of carriage between the employer and the third party – Legal effect -end!

**PRACTICE AND PROCEDURE ISSUES**

APPEAL – FINDINGS OF LOWER COURT:- Where respondents did not cross-appeal against same – Legal effect – Whether deemed as accepted, correct, conclusive and binding on them – Duty of appellate court thereto -end!

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appeal arose from a claim for damages against the 1st Respondent transportation company due to alleged battery and assault on the Appellant committed by the 2nd Respondent (who at the time was an employee of the 1st Respondent). The trial court established that –

1. the 2nd Respondent/Driver drove the 1st Respondent’s bus in the course of his employment with the Transportation company on the dates in question.

2. that the assault and battery incident was perpetrated by the 2nd Defendant against the Plaintiff inside the said bus that belonged to the 1st Defendant, whilst the 2nd Defendant was driving the same from Abuja to Lagos on the dates in question, in the course of his employment.

However, the trial court also found that -

1. the conditions of employment of employees of the 1st Defendant specifically forbid them from engaging in a fight or open quarrel during duty hours

2. the 2nd Defendant/driver acted contrary to the terms and conditions of his employment, by attacking the Plaintiff, although his wrong and unauthorized actions were carried out in the course of his employment.

The trial Court therefore ruled against the Plaintiff and dismissed their case. -end!

DECISION(S) APPEALED AGAINST

“As evidence in the present case has revealed, not only did the 1st Defendant expressly forbid the 2nd Defendant from engaging in fighting in the course of his employment; it cannot also be said that the very acts of assault and battery inflicted by the 2nd Defendant on the Plaintiff were so done for the purpose or in furtherance of the 1st Defendant’s transport business. As such, I answer the question I have raised in the foregoing in the affirmative, that is that the 1st Defendant has satisfactorily rebutted the presumption of liability on her for the acts of the 2nd Defendant against the Plaintiff. My finding here is that the 2nd Defendant indeed was on the frolic of his own when he committed the acts of assault and battery against the Plaintiff. As such, the 1st Defendant cannot be held culpable for the wrongs committed by the 2nd Defendant. I so hold.”-end!

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1. Was the learned trial Judge right to hold that the 1st Respondent was not vicariously liable for the acts of the 2nd defendant who was its servant in its employment when he carried out the alleged acts in the course of his official duty (Distilled from Ground 1).

2. Was the learned trial Judge right to excuse the 1st Respondent from liability on the basis of Exhibit D1 when contract of employment Clause 16 and 11 (IX) relied upon merely advised and warned its employees from engaging in fight and molesting passengers without clearly excusing/absolving the company from liability in event of contravention (Distilled from Ground 2).-end!

*BY RESPONDENTS*

[Adopted Appellant’s issues for determination]-end!

*AS ADOPTED BY COURT*

[Adopted Appellant’s issues for determination]-end!

DECISION OF COURT OF APPEAL

1. A distinguishing feature of this present case is that the unauthorised and wrongful actions of an employee done in the course of his employment has not only injured a third party, but has also resulted in a breach of a duty of care owed by his employer to the third party under a contract of carriage between the employer and the third party. So the vicarious liability of the 1st respondent arises not only from the fact that the 2nd respondent is its employee but also from the fact of the contract of carriage and the breach of the duty of care under the contract. Another distinguishing feature that makes it imperative to hold the 1st respondent vicariously liable for its driver’s actions is the fact that the 1st respondent’s said driver can no longer be found or traced after the incident.

In the light of the foregoing, issues 1 and 2 are resolved in favour of the appellant.

2. On the whole, this appeal succeeds as it has merit. It is allowed. Accordingly, the judgment of the High Court of the Federal Capital Territory in Suit No. FCT/HC/CV/93/2011 delivered on 29/9/2014 by Olukayode A. Adeniyi J holding that the plaintiff’s case did not succeed against the 1st defendant and dismissing the plaintiff’s case against the 1st defendant is hereby set aside. It is hereby adjudged that the plaintiff’s case also succeeds against the 1st defendant, that the 1st defendant shall pay the sum of One Million Naira to the appellant as damages for the 2nd defendant’s assault and battery of the plaintiff in the course of the 2nd defendant employment with the 1st defendant.-end!

**MAIN JUDGMENT**

EMMANUEL AKOMAYE AGIM, J.C.A. (Delivering the Leading Judgment):

This appeal No. CA/A/323/2015 was commenced on 8/12/2014 when the appellant filed a notice of appeal against the judgment of the High Court of the Federal Capital Territory in suit No: FCT/HC/CV/93/2011, delivered on 29/9/2014 by Olukayode A. Adeniyi J. The notice of appeal contains 2 grounds of appeal.

By a notice filed on 10/01/2019, the appellant withdrew the appeal against the 2nd respondent, Jude Eze.

Both sides filed, exchanged and adopted their respective briefs as follows- appellant’s brief and 1st respondent’s brief.

The appellant’s brief raised the following issues for determination-

1. Was the learned trial Judge right to hold that the 1st Respondent was not vicariously liable for the acts of the 2nd defendant who was its servant in its employment when he carried out the alleged acts in the course of his official duty (Distilled from Ground 1).

2. Was the learned trial Judge right to excuse the 1st Respondent from liability on the basis of Exhibit D1 when contract of employment Clause 16 and 11 (IX) relied upon merely advised and warned its employees from engaging in fight and molesting passengers without clearly excusing/absolving the company from liability in event of contravention (Distilled from Ground 2).

The 1st respondent’s brief restated and thereby adopted the above issues raised for determination in the appellant’s brief.

I will determine this appeal on the basis of the said issues raised for determination in the appellant’s brief.

The part of the judgment of the trial Court complained against in this appeal reads thusly-

This now leads me to the determination of the second issue under consideration, as to whether or not the 1st Defendant is vicariously liable for the assault and battery committed by the 2nd Defendant against the Plaintiff.

The general principle of law with respect to vicarious liability is that once a master employs a servant to do something for him, he is responsible for the servant’s conduct as if it were his own. If the servant commits a tort in the course of his employment, then, the master is a tortfeasor as well as the servant. The master is answerable for every wrong of the servant once it is shown to have been committed in the course of his employment.

In such a circumstance, since the servant and the master are viewed in law as joint tortfeasors, a plaintiff is at liberty to choose his victim. He may decide to sue either of the master and servant separately, or both of them jointly. See the Supreme Court decision in Ifeanyi Chukwu (Osondu) Limited Vs. Solel Boneh Limited (2000) 5 NWLR (Pt. 656) 322 (also reported in [2000] FWLR (Pt. 27) 2046]; SPDC (Nigeria) Plc. Vs. Dino [2007] 2 NWLR (Pt. 1019) 438.

As I have already found and held in the foregoing, parties are not in dispute that the 2nd Defendant drove the 1st Defendant’s bus in the course of his employment with the 1st Defendant on the dates in question. It is also established that the assault and battery incident was perpetrated by the 2nd Defendant against the Plaintiff inside the said bus that belonged to the 1st Defendant, whilst the 2nd Defendant was driving the same from Abuja to Lagos on the dates in question, in the course of his employment.

To further establish that the 2nd Defendant was an employee of the 1st Defendant at the material period, the 1st Defendant of her own volition tendered in evidence as Exhibit D1, the 2nd Defendant’s contract of employment with the 1st Defendant, which was executed between the two parties on 10/01/2008. The DW1 further testified that the 2nd Defendant left the employment of the 1st Defendant on 01/09/2011, after the incident in issue.

However, learned 1st Defendant’s Counsel had contended that the 2nd Defendant was on a frolic of his own when he committed the act of assault and battery on the Plaintiff; and in effect the 1st Defendant cannot be liable for his actions in the circumstances.

The immediate presumption this argument elicits is that the 1st Defendant admitted that the 2nd Defendant behaved in the manner alleged by the Plaintiff; but that he must be personally held responsible for his actions.

However, the position of the law is that in order for an employer to escape liability or excuse himself from the acts of his employee, the onus is on him to prove that at the material period, the said employee was on a frolic of his own. The position was captured succinctly in Tecno Mechanical (Nigeria) Limited Vs. Ogunba [2000] 1 NWLR (Pt. 639) 150, where it was held as follows:

“The principle is that once (i) there exists a master and servant relationship between an employer and a tortfeasor and (ii) it is established that the tortfeasor committed the wrong complained of in the course of his employment, there is a rebuttable presumption of the employer’s vicarious liability. In such a situation, the onus is on the employer to prove that the alleged wrong was committed by the tortfeasor not in the course of his employment but that it was committed while on a frolic of his own. See Francis Osabe Eseigbe Vs. Agholor [1993] 9 NWLR (Pt. 316) 128 at 144”

In the instant case, the 1st Defendant did not disown the 2nd Defendant. As a matter of fact, the DW1 attempted to give evidence of another version of what transpired inside the bus at the material period by stating in his expunged evidence that it was the Plaintiff that first spat at the 2nd Defendant. Therefore, rather than deny the 2nd Defendant’s act, the 1st Defendant merely attempted to justify it.

However, I have noted the testimony of the DW1 that by Clause 16 of the conditions of employment attached to Exhibit D1, employees of the 1st Defendant are specifically forbidden from engaging in a fight or open quarrel during duty hours.

I have examined clause 16 of the contract of employment, Exhibit D1. It states as follows:

“16. No EMPLOYEE shall engage in a fight or open quarrel of any kind in the business premises of the COMPANY, or during duty hours, including break periods, provided that an aggrieved EMPLOYEE may report to the COMPANY or her agent, any matter considered provocative by any person requiring attention and/or disciplinary action.”

More particularly, under the segment titled SPECIFIC CONDITIONS FOR DRIVERS, in Exhibit D1, the provision of clause 11 (ix) thereof states thus:

“11. The driver hereby covenants as follows:

(ix) To ensure that the passengers in the vehicle under his management and control are not molested and/or assaulted by servants or agents of the company or other persons.”

The question that arises here therefore is whether, on the basis of the clauses contained in Exhibit D1, reproduced in the foregoing, and the testimony the DW1, the 1st Defendant has satisfactorily rebutted the presumption of liability on her for the acts of the 2nd Defendant? in other words, does the fact that the 1st Defendant has specifically forbidden the 2nd Defendant from molesting or assaulting passengers whilst on duty, exculpate her from liability for the 2nd Defendant’s wrongful actions in the circumstances of the present case?

From the evidence adduced by the DW1, as highlighted in the foregoing, what has been clearly established is that the 2nd Defendant acted contrary to the terms and conditions of his employment, by attacking the Plaintiff, although his wrong and unauthorized actions were carried out in the course of his employment.

But then, in Afribank (Nigeria) Plc. Vs. Adigun [2009] 11 NWLR (Pt. 1152) 329 @ 349, cited by Mr. Adeniyi, it was held that the acts of an employee would be deemed to be done in the course of his employment for which the employer shall be held liable, if it is a wrongful act authorized by the employer or a wrongful and unauthorized mode of doing some act authorized by the employer.

In Awache Vs. Chime [1990) 5 NWLR (Pt. 150) 302 @ 309, the Court of Appeal, per Uwaifo, JCA (as he then was), held as follows:

“The wrongful act of a servant is deemed to be done in the course of his employment if what happened was merely a wrongful and unauthorized or prohibited mode of performing some duty the servant was employed to do.”

In the present case, the action of the 2nd Defendant, has been specifically prohibited and unauthorized by his employers, the 1st Defendant. The authorities have held that even where an employer expressly forbids the act, as in the instant case, it may still be vicariously liable if it is shown that nonetheless the act was done in the scope of the employment or for the purpose and advancement of the employer’s business. In other words, before an employer can be held vicariously liable for the actions of his employee, it must be established that the acts are done in furtherance of the course and purpose of the employer’s business. See Ruddiman & Company Vs. Smith [1889] 60 LT 708; Rose Vs. Plenty [1976] 1 All ER 97.

As evidence in the present case has revealed, not only did the 1st Defendant expressly forbid the 2nd Defendant from engaging in fighting in the course of his employment; it cannot also be said that the very acts of assault and battery inflicted by the 2nd Defendant on the Plaintiff were so done for the purpose or in furtherance of the 1st Defendant’s transport business. As such, I answer the question I have raised in the foregoing in the affirmative, that is that the 1st Defendant has satisfactorily rebutted the presumption of liability on her for the acts of the 2nd Defendant against the Plaintiff. My finding here is that the 2nd Defendant indeed was on the frolic of his own when he committed the acts of assault and battery against the Plaintiff. As such, the 1st Defendant cannot be held culpable for the wrongs committed by the 2nd Defendant. I so hold.

Accordingly, I hereby resolve issue (2) against the Plaintiff.

Learned Counsel for the appellant argued that a community reading of the clauses in exhibit D1 relied on by the trial Court show that they did not excuse the 1st respondent from liability that may arise in the event of the breach of the warnings by it to its drivers, that even though the act complained of may not have been done to advance or benefit the employer’s business, it was done within the scope of the 2nd respondent’s employment which is to drive the bus to Lagos, that it was wrong for the trial Court to hold that because exhibit D1 forbade employees from assaulting or molesting passengers in the vehicle under their control and care, the acts of their employees is not that of the employer, that although exhibit D1 warned employees from engaging in those acts, it did not in any way excuse the 1st respondent from liability for acts done by the employees contrary to that warning, that the duty of the Respondents collectively and jointly to the Appellant is to ensure that the Appellant was transported from Abuja to Lagos in the 1st Respondent bus driven and under the control of the 2nd Respondent as employee to the 1st Respondent without molestation, that therefore the acts of molestation and assault occasioned by the 2nd Respondent to the Appellant cannot be severed from the lawful duties of the 2nd Respondent which was to drive the 1st Respondent’s bus to Lagos because they all happened within the same transaction, as the 2nd Respondent did not carry out the alleged acts outside the course of his employment.

Learned Counsel for the 1st respondent argued that the act of assault and battery must be done in the course of the 1st Respondent’s business and for her benefit, that the established facts of this matter is that the 2nd Respondent was employed as Driver of the Bus of the 1st Respondent, that the contract of employment of the 2nd Respondent, Exhibit D1, specifically limited the powers to bind the 1st Respondent, that the alleged assault and battery of the Appellant by the 2nd Respondent is not so connected with the authorized act as to be a mode of doing it, but is entirely an independent act forbidden by the 1st Respondent. The physical assault and battery cannot by any imagination be stretched to be incidental to the job of the 2nd Respondent as defined by Exhibit D1 for the 1st Respondent to be held responsible, that because the 2nd Respondent in such a case is not acting in the course of his employment, but have gone outside of it, he is on a frolic of his own because the area of employment was defined by the 1st Respondent’s express instruction as contained in Exhibit D1 and the alleged assault and battery of the Appellant is so totally unrelated to the work the 2nd Respondent is employed to do that it cannot be understood to mean that it is part of it, that vicarious liability only applies where the employee does an act in carrying out his employer’s work, that if he does an act that is outside his employer’s mandate, the employer won’t be vicariously liable, that the 2nd respondent having acted contrary to the terms and conditions of his employment with the 1st respondent, the latter cannot be held vicariously liable for the said acts as the acts cannot be said to have been done within the scope of his employment to drive the bus from Abuja to Lagos, that the 2nd respondent was indeed on a frolic of his own because the act complained of was not merely a wrongful way of carrying out the job for which he is employed and cannot equally be regarded as a wrongful act authorised by the 1st respondent or a wrongful or authorised mode of doing an authorised act by the 1st respondent, that the cases of S.P.D.C (NIG) PLC VS. DINO (2007) 2 NWLR (PT. 1019) 438 at 462 and AFRIBANK (NIG) PLC vs. ADIGUN (2009) 11 NWLR (PT. 1152) 329 at 349 cited by the appellant is inapplicable and is not apposite to the present case and can rightly be distinguished from the case at hand, that in this case the 2nd Respondent veered off completely from the scope of his employment and embarked on a frolic of his own, that assault and battery on the person of the Appellant cannot by any inch be regarded as a wrongful or improper mode of driving a bus from Abuja to Lagos because the act of assault and battery is not so connected with the scope of his employment as to be a mode of doing his job but is an independent act for which the 1st Respondent cannot be held liable as rightly held by the honourable Court.

Let me now consider the merit of the arguments of both sides.

I agree with the submission of Learned Counsel for the 1st respondent that the assault and battery of the appellant by the 2nd respondent was not a method of driving the 1st respondent’s bus from Abuja to Lagos and is not incidental to or part of the process of driving the said bus, that the 1st respondent did not authorise the assault and battery of passengers in the bus he was driving from Abuja to Lagos, that in exhibit D1 it expressly forbade the molestation of passengers in the bus by its employees and that the assault and battery of the appellant was not done to advance or benefit the 1st respondent’s business. But the existence of these facts does not automatically relieve the employer of vicarious liability for the employee’s acts done in the course of carrying out their duties for their employer as in this case. Whether these facts operate to relieve the employer of such liability would depend on the peculiar facts of each case and what should be the justice of the case in the light of those peculiar facts.

The 1st respondent carries on the business of providing commercial passenger services by using its buses to carry commercial passengers to and fro various places in consideration of the fares paid to it by each passenger. To provide this commercial passenger service, the 1st respondent employs drivers to drive each of its buses to convey the passengers to respective destinations. As the owner of the bus conveying the passengers, the 1st respondent owes each passenger a duty of care that obligates it to convey the passenger safely and peacefully to his or her destination. To discharge this duty, its vehicles must be roadworthy and fit to safely and peacefully convey the passengers and the driver it employs to drive each vehicle must be a competent and efficient driver who can ensure that the passengers in the vehicle under his management and control are not molested or assaulted by servants or agents of the company such as the driver himself or other persons.

To ensure that it discharges this duty of care to its passengers, the 1st respondent engaged the 2nd respondent under a written employment contract that required the 2nd respondent ‘to ensure that the passengers in the vehicle under his management and control are not molested and/or assaulted by servants or agents of the company or other persons.’

The 1st respondent breached this duty of care to the appellant because it employed a driver who could not ensure that the appellant as a passenger in the 1st respondent’s vehicle under the management and control of the 2nd respondent as its driver conveying the appellant and other passengers from Abuja to Lagos, was not molested and assaulted. The 2nd respondent, who was to ensure that passengers in the bus he was driving were not molested or assaulted was the very one that molested and assaulted the appellant, one of the passengers in the bus under his management and control from Abuja to Lagos. It is the duty of the 1st respondent to employ as drivers, persons that would not molest and assault passengers in the bus under his control and management. If the company engages a driver that can assault passengers in the bus he is driving or engage in any other misconduct that injures the passengers or their property, the company should be liable for breaching its duty of care to the said passengers and be vicariously liable for any loss or injury suffered by the passenger due to the misconduct of the driver irrespective of the facts that the company did not authorise the misconduct, that the misconduct is not part of the process of driving the vehicle or incidental to it and the misconduct is not for the benefit of the company or owner of the vehicle. The owner of a vehicle providing commercial passenger services must take the driver or any of its employees as it employed him and should bear the consequences of engaging a driver that can disobey its lawful instructions to the detriment of its passengers. Having chosen to employ a driver that molest and assault its passengers, it cannot escape liability for the breach of its duty of care to its passengers because the driver had covenanted with it in writing not to molest and or assault passengers who are not privy to such agreement.

The 1st respondent recognised that the driver may molest and assault a passenger and thereby breach that covenant. That is why it required the driver under the written contract to provide a guarantor who shall have a landed property in any of “the major township in Nigeria” and who shall subscribe to a guarantor’s form and indemnity bond. The part of the written employment contract (exhibit D1) containing this requirement of a guarantor reads thusly-

“Unless otherwise agreed by the parties, nothing in this agreement shall be so construed as to confer to this agreement so as to ensure to the benefit of the EMPLOYEE unless prior to the execution there, the EMPLOYEE produces a substantial guarantor who accordingly signs the Guarantor’s Form and indemnity Bond in the Schedule to this agreement. PROVIDED that as long as the EMPLOYEE fails to provide the said substantial guarantor, his employment shall for all purposes be on temporary basis, notwithstanding the provision of Clause 4 hereof; and notwithstanding anything in this agreement contained, such temporary employment as may be summarily determined by the Company –

1. Every driver shall pursuant to Clause 4 of Part A of this Agreement provide a GUARANTOR who is owner of Landed property in any Major township in Nigeria.

2. For purposes of the foregoing clause, no Landed property worth less than One Million Naira (N1m) shall be acceptable to the Company.

3. It shall be the duty of the driver to provide to the satisfaction of the company, documentary evidence of the proposed Guarantor’s title and value thereof.

4. Notwithstanding clause 4 of Part A hereof, Vehicle shall be assigned to the driver only after he has subscribed to this Agreement and has produced a Guarantor as aforesaid who shall have subscribed to PART C of this Agreement.”

The driver’s contractual obligation to provide a guarantor to sign the guarantor’s form and indemnity bond is to protect the owner of the bus against any losses it may suffer as a result of the driver’s breach of any of the provisions of the said employment agreement. This is obvious from the express terms of the guarantor form and indemnity bond signed by one Mr. Sunday Odo as a guarantor that 2nd respondent shall faithfully and diligently carry out his duty. The said form and bond reads thusly-

“GUARANTOR’S FORM AND INDEMNITY BOND

TO E. EKESONS BROTHERS NIGERIA LIMITED of No. 100 Badagry Express Way, Alafia, Orile Iganmu, Lagos IN CONSIDERATION of your employing Mr/Mrs/Miss Mr Jude Eze of ... as per this Contract of Employment dated the 10/1/2008 day of ... 19 ...

1. I, Chief/Mr./Mrs./Miss ... Mr. Sunday Odo of ... HEREBY GUARANTEE to you the faithful and dill- performance of the Contract of Employment by the said Mr./ Mrs./ Miss ... Jude Eze without committing any breach of is/her obligations thereunder.

2. I hereby further bind myself and undertake to FULLY INDEMNIFY the COMPANY and her accredited representatives against all losses, damages, costs, expenses or otherwise which may be incurred by him/her by reason of any default or negligence on the part of the Employee in performing and observing the agreement and obligations on his/her part contained in this Contract.

3. I am worth well over N5,000,000 and I am owner of the following

a. Car

b. Land

c. House

4. THIS GUARANTEE is to be a continuing guarantee and is to continue to be binding on me as long as the Contract of Employment remains in force.

5. I RESERVE the right to myself or my personal representatives by one month’s notice in writing to you at any time to revoke this Guarantee as to all future dealings by you with the Employees.

DATED THE ... DAY OF ... 19 ...

SIGNED ...

Witness to the GUARANTEE:

Signed: ...

Name: Obum Ojobo

Address: Ojobo NO. 28 Towolawi street

Occupation: Business.”

So exhibit D1 gives the 1st respondent the right to recover from the 2nd respondent or the guarantor any payments to any passenger for injuries inflicted on such passenger by the misconduct of the 2nd respondent.

The DW1 who is the 1st respondent’s rescue officer testified under cross examination that the 2nd respondent verbally reported the incident involving the appellant on 23/7/2011 and ceased working for the 1st respondent from 1/9/2011. There is no explanation on how the 2nd respondent stopped working for the 1st respondent. There is no evidence of the where about of the 2nd respondent since he ceased working for the 1st respondent. The record of this appeal show that he was served the processes in this suit by the substituted method of delivering them to the office of the 1st respondent as his employer, following the order that he be so served, which order was granted on 13-12-2011, long after he had ceased to be an employee of the 1st respondent. It is clear from the record of this appeal that the 2nd respondent did not participate in the trial proceedings in person or by a legal practitioner. He did not file any process in the proceedings and did not defend the suit against him. There is nothing to show that the 1st respondent who received the originating processes on his behalf made him aware of the suit against him. What is clear from the record of this appeal is that the 2nd respondent after reporting the incident to DW1 simply disappeared into thin air and cannot be traced by anybody including the 1st respondent who had employed him as a driver. In these circumstances, considering that the 2nd respondent assaulted and battered the appellant in the course of his employment with the 1st respondent, justice cannot be done if the 1st respondent is not held vicariously liable to the appellant for the injury he suffered from the said assault and battery.

The argument of learned counsel for the respondent that the assault and battery of the appellant by the 2nd respondent cannot be regarded as having been done in the course of his employment with the 1st respondent because his contract of service with the 1st respondent, exhibit D1 expressly forbade such act is not valid because there is no ground of this appeal against the trial Court’s findings that-

“parties are not in dispute that the 2nd Defendant drove the 1st Defendant’s bus in the course of his employment with the 1st Defendant on the dates in question. It is also established that the assault and battery incident was perpetrated by the 2nd Defendant against the Plaintiff inside the said bus that belonged to the 1st Defendant, whilst the 2nd Defendant was driving the same from Abuja to Lagos on the dates in question, in the course of his employment ... From the evidence adduced by the DW1, as highlighted in the foregoing, what has been clearly established is that the 2nd Defendant acted contrary to the terms and conditions of his employment, by attacking the Plaintiff, although his wrong and unauthorized actions were carried out in the course of his employment."

The respondents did not cross-appeal against these findings. By not appealing these findings, all parties herein accepted them as correct, conclusive and binding on them. See Iyoho V Effiong. Having accepted the findings as correct, the 1st respondent cannot competently and validly argue that the battery of the appellant by the 2nd respondent was not in the course of the 2nd respondent’s employment with the 1st respondent. See Dabup V Kolo.

The trial Court also found that the 1st respondent did not disown the 2nd respondent’s actions and rather tried to justify it as the evidence of DW1 shows. What the trial Court considered in determining if the 1st respondent was vicariously liable was the fact that the 2nd respondents actions were expressly prohibited by exhibit D1 and not whether the action were carried out in the course of employment. It held that 2nd respondent assaulted and battered the appellant in the course of his employment but because the act was prohibited by his employer and was not for the benefit of his employer, he acted on his own frolic. This is clear from the part of its judgment that read thusly-

“The question that arises here therefore is whether, on the basis of the clauses contained in Exhibit D1, reproduced in the foregoing, and the testimony the DW1, the 1st Defendant has satisfactorily rebutted the presumption of liability on her for the acts of the 2nd Defendant? In other words, does the fact that the 1st Defendant has specifically forbidden the 2nd Defendant from molesting or assaulting passengers whilst on duty, exculpate her from liability for the 2nd Defendant’s wrongful actions in the circumstances of the present case”.

But then, in Afribank (Nigeria) Plc. Vs. Adigun [2009] 11 NWLR (Pt. 1152) 329 @ 349, cited by Mr. Adeniyi, it was held that the acts of an employee would be deemed to be done in the course of his employment for which the employer shall be held liable, if it is a wrongful act authorized by the employer or a wrongful and unauthorized mode of doing some act authorized by the employer.

In Awache Vs. Chime [1990) 5 NWLR (Pt. 150) 302 @ 309, the Court of Appeal, per Uwaifo, JCA (as he then was), held as follows:

“...The wrongful act of a servant is deemed to be done in the course of his employment if what happened was merely a wrongful and unauthorized or prohibited mode of performing some duty the servant was employed to do.”

In the present case, the action of the 2nd Defendant, has been specifically prohibited and unauthorized by his employers, the 1st Defendant. The authorities have held that even where an employer expressly forbids the act, as in the instant case, it may still be vicariously liable if it is shown that nonetheless the act was done in the scope of the employment or for the purpose and advancement of the employer’s business. In other words, before an employer can be held vicariously liable for the actions of his employee, it must be established that the acts are done in furtherance of the course and purpose of the employer’s business. See Ruddiman & Company Vs. Smith [1889] 60 LT 708; Rose Vs. Plenty [1976] 1 All ER 97.

As evidence in the present case has revealed, not only did the 1st Defendant expressly forbid the 2nd Defendant from engaging in fighting in the course of his employment; it cannot also be said that the very acts of assault and battery inflicted by the 2nd Defendant on the Plaintiff were so done for the purpose or in furtherance of the 1st Defendant’s transport business. As such, I answer the question I have raised in the foregoing in the affirmative, that is that the 1st Defendant has satisfactorily rebutted the presumption of liability on her for the acts of the 2nd Defendant against the Plaintiff. My finding here is that the 2nd Defendant indeed was on the frolic of his own when he committed the acts of assault and battery against the Plaintiff. As such, the 1st Defendant cannot be held culpable for the wrongs committed by the 2nd Defendant. I so hold.

A distinguishing feature of this present case is that the unauthorised and wrongful actions of an employee done in the course of his employment has not only injured a third party, but has also resulted in a breach of a duty of care owed by his employer to the third party under a contract of carriage between the employer and the third party. So the vicarious liability of the 1st respondent arises not only from the fact that the 2nd respondent is its employee but also from the fact of the contract of carriage and the breach of the duty of care under the contract. Another distinguishing feature that makes it imperative to hold the 1st respondent vicariously liable for its driver’s actions is the fact that the 1st respondent’s said driver can no longer be found or traced after the incident.

In the light of the foregoing, I resolve issues 1 and 2 in favour of the appellant.

On the whole, this appeal succeeds as it has merit. It is allowed. Accordingly, the judgment of the High Court of the Federal Capital Territory in Suit No. FCT/HC/CV/93/2011 delivered on 29/9/2014 by Olukayode A. Adeniyi J holding that the plaintiff’s case did not succeed against the 1st defendant and dismissing the plaintiff’s case against the 1st defendant is hereby set aside. It is hereby adjudged that the plaintiff’s case also succeeds against the 1st defendant, that the 1st defendant shall pay the sum of One Million Naira to the appellant as damages for the 2nd defendant’s assault and battery of the plaintiff in the course of the 2nd defendant employment with the 1st defendant.

The 1st respondent herein shall pay costs of N300,000.00 to the appellant.

**STEPHEN JONAH ADAH, J.C.A.:**

I was availed the draft of the judgment just delivered by my learned brother, Emmanuel Akomaye Agim, JCA.

I am in total agreement with his reasoning and conclusion that the appeal succeeds on merit.

The key issue or the fulcrum of the instant appeal is whether the 1st Respondent was vicariously liable for the negligence or injury caused to the Appellant by the 2nd Respondent who was an employee of the 1st Respondent. Vicarious Liability is a doctrine of law imposing liability on a person for the actionable conduct of another based on the relationship between two persons such as in Master/Servant or Principal/Agent relationship. This principle of law is a variant of the general rule that everyone is personally responsible and liable for his own faults. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty of care, and that the party complaining should be able to prove that he has suffered damage in consequence of the breach of that duty. SeeOrhue V. NEPA (1998) 7 NWLR (Pt. 557) 187.

In the instant case, there is clear evidence that the 2nd Respondent who is the tort feasor is a servant of the 1st Respondent. The lower Court also accepted the evidence that the injury caused the appellant by the 2nd Respondent was in the course of the employment of the 2nd Respondent by the 1st Respondent. It is so clear here that the 2nd Respondent was a servant of the 1st Respondent. The 1st Respondent relied on Exhibit D1 particularly clauses 16 & 11 (IX), to reject or deny liability. These clauses specify as follows:

“16 No employee shall engage in a fight or open quarrel of any kind in the business premises of the company, or during duty hours including break periods, provided that an aggrieved employee may report to the company or her agent any matter considered provocative by any person requiring attention and or disciplinary action.

11 The driver hereby covenant as follows:

(IX) To ensure that the passengers in the vehicle under his management and control are not molested and or assaulted by servants or agents of the company or other person".

It is very clear and without any dispute that these clauses are the covenant and conditions of service of the 2nd Respondent. These clauses only operate between the 1st and 2nd Respondents. Covenant in any contract of employment cannot be laid to sabotage the duty of care owed third parties who are not privy to the contract. Those clauses for what they are, are operational clauses binding the parties to the Master/Servant contract. The clauses were not meant to operate in the contract of carriage between the Appellant and the Respondents. Those clauses at best can be used by the 1st Respondent to punish the 2nd Respondent or determine the employment of the 2nd Respondent but can never be used to downgrade or jeopardize the duty of care owed the Appellant by the Respondents. In the same vein, the 1st Respondent cannot use the clauses to run away from the liability of his servant who caused the injury to the appellant in the cause of his employment. It is in this respect and for the detailed reasons advanced in the lead judgment of my learned brother that I too find this appeal meritorious.

I abide by the consequential orders as made in the lead judgment.

**PETER OLABISI IGE, J.C.A.:**

I agree.-end!