



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**CIVIL APPEAL 93 OF 2003**

**SWIFT SHIPPING CO. & ANOR. .... APPELLANT**

**- Versus -**

**SYLVESTER ODUOR OKELLO ..... RESPONDENT**

**Coram: Before Hon. Justice L. Njagi**

**Mr. Chakera h/b for Okongo**

**Court clerk - Ibrahim**

**J U D G M E N T**

The respondent in this appeal, Sylvester Oduor Okello, sued the appellants, Swift Shipping Company and Al-Malik Brothers Motors Limited in the Chief Magistrate's Court, Mombasa. He sought to recover damages for personal injuries he claimed to have sustained in a road traffic accident on 30<sup>th</sup> April, 1998, involving an unregistered motor vehicle described as a Toyota Hiace van, Chasis No. 0053235 EN/NO 2L.

According to paragraph 4A of the amended plaint dated 13<sup>th</sup> July, 1999 and filed in court on 18<sup>th</sup> August, 1999, the plaintiff states that while he was lawfully standing beside the road at the Port of Mombasa along the Dock yard Road, he was injured by a motor vehicle negligently driven by the authorized driver, servant or agent of the 1<sup>st</sup> defendant, and that the motor vehicle was imported into the country by the 2<sup>nd</sup> defendant. The plaintiff further states that the 1<sup>st</sup> defendant were the clearing agents of the 2<sup>nd</sup> defendants. The plaint also sets out the particulars of negligence, as a result of which the plaintiff said he had laceration on the chin 2" fracture of left side jaw (mandible); Colles fracture (left wrist) contusion chest and left knee. He claimed special and general damages and costs.

The first defendant filed a defence to the original plaint but did not react to the amended plaint. In its defence, it denied being the owner and or agent in respect of motor vehicle chasis No. 0053235 which it was clearing from the port. On its part, the second defendant filed a defence to the amended plaint denying that the 1<sup>st</sup> defendant was a duly authorized agent of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant also denied being the owner or importer of the subject motor vehicle, and further denied that the injuries allegedly sustained by the plaintiff were occasioned by any negligence on the part of the 2<sup>nd</sup> defendant.

Entirely without prejudice to this denial, the 2<sup>nd</sup> defendant stated that any injuries suffered by the plaintiff occurred due to the negligence of the driver, servant and/or agent of the 1<sup>st</sup> defendant who was entirely responsible for handling the said motor vehicle.

At the trial before the Senior Principal Magistrate, the plaintiff/respondent testified that he was walking towards the port when a motor vehicle came off the road and knocked him down. The driver of that motor vehicle was overtaking some two other vehicles. In cross examination, he said that he was about 2 metres from the tarmac, and since there was a chain link acting as a barrier, he could not have gone beyond the chain. He suffered a fractured jaw and left wrist. His shoulder also cracked and he had chest and leg bruises. The vehicle belonged to Swift Shipping, the 1<sup>st</sup> appellants, and the driver was David Mburu Muiruri. The extent of his injuries was elaborated by Dr. Hermant Patel who testified as P.W.1. After examining the respondent, the witness found that the respondent had laceration on the chin and left wrist and contusion of chest and left knee. He also had residual pain on knee and chest, but did not suffer permanent injuries. The witness produced the medical report as exhibit 1. P.W.2 was PC No. 35563 David Marangu who was stationed at Port Police Station performing traffic duties. He said that on 30<sup>th</sup> April there was an accident involving a motor vehicle which had not been registered. The victim had been taken to Coast Provincial General Hospital complaining of pain in the chest. The police officer then recorded statements from both the victim and the suspect. The suspect, David Mburu Muiruri, was taken to court where he was convicted on his own plea of guilty and fined Kshs. 5,000/= . The witness added that the clearing agent was Swift Shipping, and he then produced the police abstract as exhibit No.3. in cross examination, the police officer said that he charged the driver of the vehicle with a charge of careless driving to which he pleaded guilty.

Only one witness testified for the defence. He was Abubakar Mohamed Al Amin, an accountant with Ali Malik Motors (K) Ltd., the 2<sup>nd</sup> appellants. He testified that the subject motor vehicle did not belong to them, and that according to the police abstract the owner was David Njuru Muiruri of Swift Shipping Company, which was their clearing agent. He also said that they had a branch at Kampala, Uganda, in the name of Ali Malik Motors (Uganda) Ltd. The two are the same companies but with separate legal entities.

Against the background of these pleadings and evidence, and the submissions of respective counsel for the parties, the issues which arise for determination are (a) who was to blame for this accident – the victim or the driver? (b) If it was the driver, was he driving on his own volition or on the instructions of either of the appellants? (c) If it was at the instance of any of the appellants, who should be held liable for the damage suffered by the respondent?

That there was an accident on 30<sup>th</sup> April, 1998, involving the respondent and the subject vehicle is clear beyond peradventure. It is equally clear that the person who was driving the vehicle at the time of the accident was one David Mburu Muiruri, and that consequently he was charged with careless driving of which charge he was convicted on his own plea of guilty. On account of that plea, the answer to the first issue is that it was the driver, and not the victim, who was to blame for the accident.

In the police abstract, the name and address of the owner of the vehicle are given as David Mburu Muiruri, c/o Swift Shipping ... Box 40599, Mombasa. Defence witness Mr. Al Malik took the cue from this and testified that the owner according to this police abstract was David Njuru Muiruri (sic) of Swift Shipping Company and therefore the 2<sup>nd</sup> appellants were not to blame. Two observations arise from this statement. The first one is that since the vehicle had not been registered at that point in time, it is illogical to speak of anyone as having been the owner. Secondly, we are here dealing with a case of careless driving and, on a wider perspective, a case of negligence at common law. If there is no registered owner, as yet, is this to say that the vehicle may be used to cause accidents and inflict injuries on others with impunity? I don't think so. In the first instance, the person who was driving the vehicle at the material time is clearly liable. In addition, whoever authorized the journey in the course of which the accident occurred is vicariously liable, whether that person be the owner or not.

In the instant case, the Transit Entry (Inward) and Mombasa Port Release Order, both of which

documents are on record, show that the importers of the vehicle were Al Malik Brothers Motors (U) Ltd. of P.O. Box 10469, Kampala, Uganda, and that the clearing agents were Swift Shipping Ltd. of P.O. Box 84705, Mombasa, Kenya. The second appellant is Al Malik Brothers Motors Ltd., who are described in paragraph 2A of the amended plaint as "... a limited liability company registered under the relevant laws and carrying on business both in Kenya and other places in the world ...". This description is vague as it does not tell us where the company is registered. Both in his evidence in chief and in cross examination, DW1, Al Malik, said that he worked as an accountant for Al Malik Motors (K) Ltd. In cross examination, he said that they had a branch at Kampala, Uganda, and that Al Malik Motors (Uganda) was their sister company, and that the two were the same companies but separate legal entities. This explains why the Transit Entry (Inward) gives the name of the Importers as Al Malik Brothers Motors (U) Ltd. If one of two brothers commits a misfeasance, such a wrong cannot be held against his innocent brother, but only the misfeasor, even if the brothers are twins. The same applies to associated companies or companies operating as a group. You cannot sue the one in place of the other. One can only sue the one which put a foot wrong in the context of a given transaction.

Limited liability companies are legal entities distinct alike from their shareholders and their directors. Even if Al Malik Motors (K) Ltd. and Al Malik Motors (U) Ltd. are sister companies, the one cannot be held responsible for the wrongs of the other. Since it is the Ugandan company which is shown as having been the importer of the vehicle, it is strange that it is not joined as a party to the suit, and stranger that the Kenyan sister company is joined, and yet no evidence was adduced as to what part, if any, the Kenyan company played. The question that remains is which party contracted the driver.

D.W.1, Al Amin, said in cross examination that they contract drivers who drive vehicles to Uganda. This statement was made in the context of the operations of Al Malik Motors (K) Ltd. The point was not pursued to determine whether they contract these drivers exclusively for their purposes, or whether the courtesy is extended to their sister company in Uganda. The Ugandan company itself is not a party to this suit. We shall never know, therefore, whether their instructions to the clearing agents included the hiring of drivers. Even though the driver pleaded guilty to careless driving, for which he is no doubt liable, there is no evidence to assist in determining who would be held vicariously liable for having instructed him to drive the vehicle at the fateful moment when the accident occurred. And although P.W.2, Mr. David Marangu, told the lower court that he recorded a statement from the driver before the latter was convicted on his own plea of guilty, the contents of that statement were not divulged to the court; yet, these would probably have assisted in identifying the party who authorized the driver to drive the vehicle.

In conclusion, I find that even though the driver who caused the accident admitted being guilty of careless driving, he is not a party to this suit. There is no evidence that the second appellant, Al Malik Motors (K) Ltd., played any part in this matter. On its part, Al Malik Motors (U) Ltd. who were the importers and who would have shed a lot more light in the matter were not joined as a party. There is no evidence that the 1<sup>st</sup> appellants themselves are the ones who authorized David Mburu Muiruri to drive the vehicle. They might have done so, but so could have Al Malik Motors (K) Ltd. on behalf of their sister company. The plaintiff needed to do a little more homework in order to close the gaps in the chain of liability. Instead of doing so, he left the court to speculate, whereas the court should proceed on the basis of evidence rather than speculation. With a very heavy heart, I therefore allow the appeal and set aside the judgment of the lower court. The appellants are also entitled to the costs of this appeal and also those in the lower court.

Dated and delivered in open court this 19<sup>th</sup> day of October, 2007.

L. NJAGI

JUDGE