IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NYARANGI, GACHUHI & APALOO JJA)

CIVIL APPEAL NO 119 OF 1986

KHAYIGILA ……..APPELLANT

VERSUS

GIGI & CO LTD & ANOTHER.....……...……DEFENDANT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

Apaloo JA The only question which fell for consideration in this appeal, is whether on the uncontroverted facts, the learned judge applied the law correctly when he absolved the 1st respondent company from vicarious liability for the negligence of the 1st respondent.

The 1st defendant is a partnership of two brothers. The firm owned a VW saloon car KJY 307. This car was normally driven by Zainul Dar who was an employee of the firm and a son of one of the partners. Sometime in November 1982, Zainul noticed some dents on the car. He thought they should be panel-beaten and sprayed. The normal place where this work should have been undertaken, was the well-established motor company of Cooper Motors Corporation.

Zainul thought as it was not really major work and also to economise, these minor repairs should be entrusted to the 2nd respondent, a spraypainter employed by Cooper Motors who did spray-painting in his spare time. The 2nd respondent agreed to undertake the work for a consideration which was not disclosed in the evidence. So at about 11 am on Saturday, November 29, 1982, the 2nd respondent called on Zainul and they both rode in the car to a place near a Hi-life bar, Mombasa. The car was actually driven by Zainul. At a spot near the High life Bar, Zainul alighted and handed the ignition keys of the car to the 2nd respondent in order to enable him put the car in a nearby garage and lock his things in it overnight. Zainul expressly instructed the 2nd respondent not to drive the car except for putting it in the garage and taking it out. It was agreed that Zainul was to return at 5 pm the following day to collect the car. The 2nd respondent estimated he would have completed the work by that time.

Zainul returned to the spot at around 5 pm on Sunday as agreed but neither the 2nd respondent nor the car could be traced. Apparently, the 2nd respondent drove the car to a place called “Magongo” about two miles from the “workshop” at 9 pm on Saturday and there knocked and injured the appellant, a pedestrian. When Zainul could not trace the 2nd respondent or the car, he went to the police station and lodged a complaint only to be informed of the accident the previous night. The 2nd respondent was then in police custody.

The appellant then brought the suit which culminated in the appeal against the 2nd respondent as tortfeasor and the 1st respondent on the ground that the 1st respondent firm was vicariously liable for the negligent driving of the 2nd respondent. The 2nd respondent's liability was plain enough and was not contested. The only issue fought in the court below, was the liability of the firm for the negligent driving of the 2nd respondent. The 1st respondent firm denied that it was vicariously responsible for the negligent driving of the 2nd respondent and also denied any liability to pay damages to the appellant. The learned trial judge agreed and absolved the 1st respondent firm from liability. It is this holding that provoked this appeal. The appellant, by counsel, contends that the firm was liable and that the court below's contrary holding was erroneous and invited us to set it aside.

The memorandum of appeal complains that:

a) The learned judge erred in failing to consider the facts and on law the degree of authority and control of vehicle vested by the respondent on the second defendant.

b)The learned judge erred in his distinction between a servant and an independent contractor.

c)The learned judge erred in law as well as on facts on the issue of vicarious liability.

On grounds (b) and (c) were taken together and the sum total of the argument presented on those grounds, was that Zainul was negligent in not enquiring about the arrangements for the safety of keeping the car overnight. Zainul, it was said, ought to have ensured that the 2nd respondent would not drive the car otherwise than in and out of the garage. It was also said Zainul entrusted the car to the 2nd respondent and gave him control and the keys without troubling to ascertain whether he had a driving licence. He was therefore negligent and for this, his employer, the 1st respondent firm should be held responsible. The argument on behalf of the appellant proceeded as if the mere handing over of the car by Zainul to the 2nd respondent which counsel said was negligent, is sole legal basis for fixing the 1st respondent with vicarious liability. What is the true legal basis of liability? On this, the common law has been settled for years. The most recent authoritative pronouncement of the basis of liability, is the unanimous decision of the House of Lords. *Morgans v Launchbury and Others* [1971] 2 All ER 606. It was there held that:

"In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant, or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."

This test was accepted in many common law jurisdictions including this country. (See for instance the appellate decisions in *Anyanza v Gasperby* CA 31/81, *Bachu v Wainaina* CA 14/76 and the very recent decision of this court in *Nakuru Automobile House Ltd v N Ziaudin* CA 63/86). How does the issue of liability stand judged against that authoritative statement of the legal principles? It is common ground that the respondent was not the servant of the 1st respondent within the normally accepted meaning of that word as understood in this branch of the law. On the facts, the 2nd respondent vis a vis the 1st respondent was an independent contractor. Accordingly, the 1st respondent firm would not ordinarily be vicariously liable for the tort of the 2nd respondent unless the facts show that he was the type of agent described in the Morgan's case.

That being so, one must ask the questions:

1. Was the 2nd respondent using the VW car at the material time at the request of the 1st respondent or on their instructions? and

2. If so, was he driving the car in performance of a task or duty delegated to him by the 1st respondent firm?

On the facts, the first question must be answered firmly in the negative. Not only was the 2nd respondent

not using the car at the time of the accident at the firm's request but he was using it furtively against its instructions. Indeed, had this accident not happened, the firm may well not have known that the 2nd respondent drove the car at night on his own and for purposes wholly unconnected with the spraying of the dents.

In view of the answer to the first question, the second does not arise. True, the firm gave him a task to perform, and that task was the repair of dents and spray-painting thereafter. The one task which the firm did not give him, was driving the car. That act, was, on the undisputed evidence, forbidden. In the circumstances, it is difficult to avoid the conclusion that no liability attaches to the firm on the well-known principle of "*respondeat superior*" and the learned judge's conclusion on that score cannot be faulted.

Mr Jiwaji does not contest the hitherto accepted basis of liability as expounded in the *Morgan* and the numerous cases which laid down the test for imposing vicarious liability on independent contractors. He says, the distinction drawn by the cases between a servant and an independent contractor is much too technical. He submits that where a vehicle is insured, as in this case, that distinction is immaterial and that as a matter of equity and public policy, vicarious liability should be imposed.

One cannot help admiring Mr Jiwaji's boldness and originality but his submission, though superficially attractive, is quite untenable. He says, once a car is insured, the distinction between a servant strictly so-called

and an independent contractor should be ignored. Why should the fact of insurance or non insurance, of a vehicle determine a point of principle? Mr Jiwaji's contention would mean that had the firm not been insured in this case, it should not be fixed with vicarious liability, but as it was, it should be so affixed. Mr Jiwaji talks of equity which I understand in the context of this case to mean fairness. Does fairness require that the firm be fixed with liability in a case in which its car was being driven against its express wishes? Suppose the firm had not been insured? It would ill-accord with one's notions of justice that it should be ordered to pay for a contractor whose wrong-doing it was in no sense blameable. Unless expediency is substituted for principle, the legal rule for imposing liability should be the same whether the person sought to be affixed with responsibility for the wrong-doing of another is insured or not. The fact that insurance should feature so prominently in Mr Jiwaji's earnest argument, shows the wisdom in many common law jurisdictions where the fact that a vehicle was insured, is never disclosed to the court or jury.

Then Mr Jiwaji enlists in aid of his contention "public policy". He says, as a matter of public policy, liability should be imposed. But on this, one must tread warily. Public policy has been said to be "an unruly horse".

"Once you get astride it, you do not know where it will carry you". I am not persuaded that any sound reason of public policy compels us to draw a distinction in formulating rules of law between a defendant who was insured and one who was not. That seems too fortuitous a circumstance on which to erect a legal principle. And Mr Jiwaji did not say what principle of public policy would be advanced by making such a distinction. In my opinion, the basis on which vicarious liability can be affixed on an agent who is not a servant, is too firmly established to be overthrown by sidewind; and that is, the "negligent driver" must be using the vehicle at the time of the accident, at "the owner's request or upon his instruction." As a matter of social policy, a change of this principle is desirable, one must leave it to the good sense of the legislature.

Although I acknowledge Mr Jiwaji's novel and not uninteresting submissions, I think Mr Satchu was right in contending that on the well established law, the learned trial judge was right in concluding that the 1st respondent firm was not vicariously liable for the 2nd respondent's negligent driving. Accordingly, I would dismiss this appeal with costs.

Nyarangi JA. I agree.

The problem raised in the appeal can be solved in accordance with the guidance given by this court in

Nakuru Automobile House Ltd v N Ziaudin, CA 63/66. I agree with the order proposed by Apaloo JA on costss

Gachuhi JA. I have read the judgment of Apaloo JA which I am in full agreement with. I would stress that the issue for determination in his appeal rests upon the doctrine of vicarious liability, whether the owner of the motor car is vicariously liable for the negligence of an independent contractor.

The argument for the first respondent is that the second respondent, a painter, undertook to repair dents and repaint the car for an agreed sum. The car keys were left with him in order to lock his tools in it and to put the car in the garage. Those were the instructions or agreement. The second respondent took on his own, whilst without holding a valid certificate of competency to drive, in that he drove the car at night away from where the vehicle was supposed to be locked at night. Whilst on this illegal drive, he was involved in an accident in which the appellant was injured. Judgment was entered for the plaintiff against the second defendant who never defended the suit. The appellant's argument is that the first respondent entrusted the keys of the car to the second respondent. The second respondent impliedly had authority to drive it so the first respondent was vicariously liable for the negligence of the second respondent. The appellant is of the view that since the second respondent cannot satisfy the decree, the first respondent, who is the owner, and who had insured the vehicle, should be held responsible or held vicariously responsible for the negligence of the second respondent so as to enable the appellant to recover damages awarded.

The first respondent submits that the second respondent was an independent contractor and as such no liability should attach on the partners of the firm in law.

Several decisions were cited both local and the English decision. All these decisions state that for the owner of the vehicle to be vicariously liable, the driver must be a servant or an agent. For the vehicle owner to be responsible for the negligence of the agent, that agent must have been detailed to do a task beneficial to or on behalf of the owner. The recent decision of this court in *Nakuru Automobile House Ltd v Nasiruddin Ziaudin* Civil Appeal No 63 of 1986 based its decision on *Morgan v Launchbury and Others* [1972] 2 All ER 606 and held that the owner of the car was not vicariously liable for the negligence of the driver of the car who had borrowed it to enjoy the rally. The driver was not at the time of the accident driving the vehicle as a servant or an agent of the owner. In the present appeal, the second respondent was not driving the vehicle as a servant or agent of the first respondent. The second respondent was not driving for the benefit of the first respondent nor did he have a task to do for and on behalf of the first respondent. He was driving the car for his own benefit and interest. I would also dismiss this appeal.

Dated and Delivered at Mombasa on this 26th Day of November, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL