IN THE COURT OF APPEAL

AT NAKURU

(Coram:Law, Potter JJA & Kneller Ag JA)

CIVIL APPEAL NO 55 OF 1981

BETWEEN

CHESIRE & ANOTHER.....APPELLANT

AND

HZ & COMPANY LIMITED.....RESPONDENT

JUDGMENT

Law JA On December 30, 1979 a motor vehicle belonging to the respondent ("the employer") and driven by one Ondieki ("the employee") who was employed by the employer to drive this particular vehicle, collided with a motor car owned by the first appellant and driven by one Chesire ("the deceased"). The deceased was killed outright and the car he was driving was damaged beyond repair. As a result of the accident, the first appellant in Nakuru Civil Suit No 60 of 1980 ("the first suit"), claimed against the employee as first defendant and the employer as second defendant the sum of Kshs 60,020 being the value of the car together with the costs of the police abstract of the particulars of the accident and the widow of the deceased in Nakuru Civil Suit No 106 ("the second suit") claimed against the employee and the employer damages under the Fatal Accidents Act on behalf of herself and three children as dependants of the deceased and Kshs 5,600 special damages. The employee did not enter an appearance in either suit and we are informed that he was sentenced to a term of imprisonment on a charge to which he pleaded guilty of having caused the death of the deceased by dangerous driving. Judgment has been entered against him on liability in both suits.

The suits were consolidated for hearing. The employer withdrew all its pleaded allegations against the deceased of negligence and contributory negligence and the issues remaining for decision were stated as follows:

1. Was the first defendant acting in the course of his employment with the second defendant at the material time so as to make the second defendant liable? If so,
2. To what damages are the plaintiffs in each suit entitled?

By consent, the first issue was to be determined as a preliminary issue and it was agreed that the onus of proof on this issue was on the employer. The employer's vehicle has been variously described as a bulldozer, a wheel loader and a shovel vehicle; I will adopt the learned trial judge's terminology and call it a "shoveller". A shoveller is designed to scoop up earth and deposit it in lorries which then take the earth to where it is required. A shoveller is a four-wheeled vehicle fitted with pneumatic tyres and headlights. It is licensed like any ordinary motor vehicle to be driven on public roads.

The evidence for the employer, on whom lay the burden of establishing that the employee was not acting within the scope of his employment when the accident which caused the death of the deceased happened, was to this effect. The employer was constructing a road between Mogotio and Marigat. For that purpose it made use of two roadside quarries, one at Naiwitt, 14 kilometres from Mogotio and the other at Radadi, 36 kilometres from Mogotio. On the night of December 30, 1979, the employee was working at Radadi quarry, operating the shoveller. He had gone on duty at 6.30 pm. At about 9.00 pm, for some unknown reason, he drove the shoveller about 500 yards from the quarry along the road to Radadi Camp, a roadside camp occupied by persons employed by the employer. At the camp, he knocked down some overhead wires and people living in the labour lines came out of their houses and threw stones at him, whereupon he reversed the shoveller in the direction of the main road and at the junction of that road with the road leading out of the camp, the shoveller hit a man, John Mokhama, who was sufficiently seriously injured to have to be taken to hospital. He was in fact taken to Nakuru General Hospital later that night by Mr Ndege, (DW 1) a supervisor at the camp who had witnessed the accident. The employee, having knocked down and injured John Mokhama, then drove the shoveller all the way to the nearest police station at Mogotio, 36 kilometres away. On the way, he collided with seven vehicles, including that of the plaintiff in the first suit, and caused the death of two men, including the husband of the plaintiff in the second suit.

The employer's case is that, in driving the shoveller from Radadi Camp to Mogotio Police Station, the employee was not doing an act within the scope of his employment such as to make the employer vicariously liable for the consequences of the employee's admitted negligence.

The learned judge found that the purpose of the employee's journey to Mogotio was "in connection" with the accident at Radadi, "either to escape from angry onlookers of the accident or to report to the police", but he went on to say:

> "I cannot relate the act of (the employee) in driving the shoveller 36 kilometres to report to the police the accident in which he had been involved at the camp when driving the shoveller with his duties of driving the shoveller for loading and ancillary duties ..."

and he concluded that the case fell within the second head enunciated by Hilbery J in *McKean v Raynor Bros Ltd* [1942] 2 All ER 650 at page 652, as follows:

> "Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work and he does something outside the scope of his employment ... the master is not responsible for any mischief which he may do to a third party."

The learned judge held that the employee used the shoveller for "a personal transport purpose to report an accident in which he had been involved when driving the shoveller, a purpose not within the scope of his employment as a shoveller driver" and he accordingly found in favour of the employer and dismissed the two suits. From that decision, the plaintiffs in the two suits have appealed. They were both represented on this appeal by Mr AB Shah and Mr KM Patel. Mr Barasa appeared for the employer and also filed a notice of cross-appeal.

It is unfortunate that the employee was not called as a witness at the trial. He was available, as he was at the time detained in prison. He could have told the court precisely why he decided to do the journey from Radadi to Mogotio in such an unsuitable vehicle as a shoveller. Was it for the purely personal purpose of securing his own safety from the stone-throwing onlookers? Was it to report the accident involving John Mokhama, which he was under a statutory duty to report to the police, under Section 73 of the Traffic Act (Cap 403), assuming the accident happened on a "road" as defined in Section 2 of that Act, which would appear to be the case according to the evidence of Mr Ndege (DW 1)? Was it for a combination of both reasons, as the learned judge seems to have thought? The onus of proving, on a balance of probabilities, that the employee was acting outside the scope of his authority in driving the shoveller into Radadi Camp and after the accident at the camp in driving the shoveller to Mogotio, was admittedly on the employer and I would have expected the employer to have called the employee as a witness to discharge this onus. Instead, the employer relied on Mr Ndege (DW 1) and Mr Moche (DW 2).

Mr Ndege deposed that it was unusual for the shoveller to be brought to the camp from the quarry. If it had to be taken away from the quarry, it would travel on a low-loader. In cross-examination he said that he did not know of any instructions having been given to the employee as to where he could drive, and he admitted that shovellers were quite often driven on the road between Macheka and Marigat, along which he saw the various vehicles damaged by the employee on the night of December 30, 1979, when he took John Mokhama to hospital. Mr Moche described himself as a "supervisor of roads and contracts" employed by the employer. He deposed that shovellers were kept at both the quarries, that the drivers of these shovellers were not allowed to drive them on the roads, except possibly for one or two hundred metres at the most, and that if he saw a shoveller being driven on a road, he would sack the driver immediately. In cross-examination he admitted that he was not aware of the employee ever having been given instructions not to drive the shoveller on a road and that he personally had never given him any such instructions.

The effect of Mr Moche's evidence was largely destroyed by the uncontradicted evidence of Inspector of Police Arap Maina (PW 1) and police constable Wanjoma (PW 3) both of whom were stationed at Mogotio at the material time and both of whom deposed that they had often seen shovellers being driven on the road between Radadi and Naiwit, sometimes by the employee. Their evidence on this point was confirmed by Kipsang Kandie (PW 2) a watchman employed by the employer, who deposed that the employee used a shoveller to load earth onto lorries at both quarries, and that he often used to drive a shoveller from one quarry to another, a distance of 22 kilometres, along the road separating the two quarries.

It seems to me to be inescapable from all this that the employee was in the habit of driving a shoveller on the public road, from one quarry to the other and that this must have been within the knowledge of the employer and not contrary to any specific instructions. From this I infer that when the employee drove the shoveller from Radadi quarry to Radadi Camp, a distance of 500 metres, on the evening of December 30, 1979, he did so in the course of his employment. Certainly the employer, on whom lay the onus of proving the contrary, has not discharged that onus. It was in the course of this act of driving, that the employee knocked down and injured John Mokhama at or near the junction of the camp road and the main road, a place to which I assume the public had access, the contrary not having been proved. In these circumstances, the employee was under a duty, both statutory and moral, to report the accident to the police.

The vital questions now arise; was the employee acting within the scope of his employment in driving the shoveller all the way to Mogotio and what was his purpose in undertaking this journey? As regards his purpose, it is clear from Inspector Arap Maina's evidence that it was to report the accident. The Inspector said "I asked him why the accident had happened - he said it was because he had drunk changaa". The Inspector also said "I saw that (he) was not drunk." As regards the vital question as to whether the employee was acting within the scope of his employment when he drove the shoveller from Radadi Camp to Mogotio, we know that he was employed to drive the shoveller, that he was never instructed not to drive it on a road and that he had in fact on many occasions driven it on a road, sometimes for long distances, without objection from his employer and in the course of his employment. It was a most unsuitable vehicle to be driven at night for a long distance and it was no doubt wrong for the employee to have so driven it on the night of December 30, 1979. However, as Sir Charles Newbold P said in *Muwonge v Attorney General of Uganda* [1967] EA 17:

> "... the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the course of his employment ... The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment."

This dictum accords in my view with the principles enunciated in *Limpus v London General Omnibus Company* [1862] 1 H & C 526.

More recently, in *A & W Hemphill Ltd v Williams* [1966] 2 Lloyd's List Reports, Vol 2, 101, Lord Pearce (with whose speech the four other Law Lords concurred) referred with approval to the following extract

from Salmond on Torts, 13th Edition at page 133:

> "The master is exempt only when the servant was exclusively on his own business."

In the instant case the employee was on duty at the material time. He may have undertaken the journey to Mogotio partly for his own purposes, to seek police protection from the stone-throwing mob, but it was also to report to the police the accident which he had caused in the course of his employment. Where a vehicle is negligently driven for the purposes both of the employer and a third party, the employer is liable (*Jivandas & Co Ltd v Nakadama* [1972] EA 489).

The instant appeal is very much a border-line case. Having regard to the evidence and to the incidence of the burden of proof in cases of this nature and after the most anxious consideration, I find myself in agreement with Mr Shah's submission that, in driving the shoveller to Mogotio, the employee was not engaged on purely personal business which had nothing to do with his employer. He was, partly at least, engaged on his employer's business and his employer is accordingly, in my view, liable for the consequences of his negligence. I would allow this appeal.

As regards the cross-appeal, the first ground was that the learned judge misdirected himself in law in considering whether the employee had or had not been given specific instructions as to where he was required to perform his duties. I consider that there was no misdirection in this respect and I see no merit in this ground of cross-appeal, which was not seriously argued by Mr Barasa.

The second ground was that the judge erred in finding that the employee was driving the shoveller in connection with his duties at the time of the accident at Radadi Camp. As to this, it is common ground that the onus of proof as to whether the employee at the material time was or was not acting in the course of his employment was on the employer and I have already expressed my view that this onus was not discharged. I see no merit in this ground of appeal.

The third ground is that the learned judge failed to consider the evidence contained in the record of the criminal case in which the employee was convicted of causing death by dangerous driving, which record was admitted as an exhibit by consent at the trial of the consolidated suits. This was done to prove the conviction, which was material for the purpose of section 47A of the Evidence Act; to make available the exhibits which formed part of the criminal record and which were required in the civil proceedings, for instance sketch plans of the *locus in quo* and to enable witnesses in the civil proceedings who also gave evidence in the criminal proceedings to be cross-examined on their previous depositions. Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings, as Mr Barasa contended, a proposition for which he could produce no authority. Of course, it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is absolutely clear and unambiguous.

I would dismiss the cross-appeal.

The orders which I propose are:

1. That the appeal be allowed with costs;
2. That the judgment and decree, the subject of this appeal, be set aside and that a judgment and decree be substituted in favour of the plaintiffs in the consolidated suits on the preliminary issue as to liability, with costs;
3. That the cross-appeal be dismissed with costs.

Potter JA. I have had the advantage of reading in draft the judgment of Law JA. I agree with it and with the order proposed.

Kneller Ag JA. I agree with Law JA, the respondent employer did not prove on the balance of probabilities that its employee was exclusively on his own business when he drove the shoveller from the junction of the road to the camp and the main road to the police station at Mogotio and therefore the respondent company is liable.

I also agree with the orders he proposes.

Dated and delivered at Nakuru this 22nd day of October, 1982.

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

A.R.W KNELLER

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AG.JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR