IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO. 31 OF 1981

BETWEEN

ANYANZWA.....APPELLANT

AND

GASPERIS.....RESPONDENT

JUDGMENT

Law JA On September 21, 1973 a Volkswagen microbus carrying a party of tourists overturned in the Amboseli Game Park, injuring four of the tourists and killing the driver. The injured tourists filed a suit in the High Court, the defendants being Hansmax Tours and Travel Ltd ("Hansmax") and the three appellants. The suit did not come on for trial until July 30, 1980. By then Hansmax, who had never appeared in the suit or filed a defence, no longer existed as a legal entity having for some reason been struck off the register of companies. Two of the plaintiffs have abandoned their claims, leaving only the two respondents, Mr and Mrs De Gasperis, who flew to Nairobi from Italy to attend the hearing. The appellants, who were the registered owners of the microbus, had filed a defence on July 19, 1975. Their defence was simply that they had no knowledge of the accident, that they were strangers to the suit, and they denied that at the material time Hansmax was acting as agent of or with the prior consent and authority of the appellants.

The facts are that in September, 1973, the appellants were the owners of the microbus. On September 5, 1973, they entered into an agreement in writing with Hansmax whereby they as joint owners hired out the microbus to Hansmax for twelve days from September 19, the hirers Hansmax undertaking to pay Ksh 1 (one shilling) per kilometer covered during the period of hire and to pay all expenses such as petrol and maintenance, and to provide their own driver and pay his allowances.

The microbus was insured by the appellants against third-party risks, provided it was driven by a person holding a valid and appropriate driving licence. It has never been contended that the driver at the time of the accident was not a person authorized by the policy to drive the microbus, and I shall assume that he was an authorized person. Unfortunately he or rather his personal representative - was not made a defendant in the suit, because there seems to be no doubt that the accident was due to the driver's negligence, if only by the application of the principle of *res ipsa loquitur*. The plaint sought to make the appellants vicariously liable for this negligence, on the ground pleaded in paragraph 10 of the plaint that

"At all material times the first defendant was acting as agent of and/or with the prior consent and

authority of the second defendants."

In other words, it was sought to make the appellants liable, as owners of the vehicle, for the negligence of a driver employed by the hirers of the vehicle, on the basis that the hirers were acting as agents with the prior consent and authority of the owners.

A similar situation arose and was considered by the late Sheridan J in *Cooke v Santos Maquel & another* (Civil Case No 250 of 1973, at Mombasa). In that case Miss Cooke had hired a car from UTC Ltd. She was injured in an accident at a time when the car was being driven, with her permission, by the first defendant Maquel. The accident was due in part to Maquel's negligence. Miss Cooke sought to make UTC liable for this negligence, on the ground that UTC had rented the car to her for a consideration, authorized her to drive the car, and that when the accident happened Maquel was driving the car as an authorized driver for the joint benefit of UTC and himself, and that the UTC had a financial interest in the use of the car by Maquel. To this the UTC pleaded in its defence that Maquel drove the car either for his own purposes or for the purposes of Miss Cooke; that the UTC was not vicariously responsible or liable for the acts of Maquel; and that Maquel was not acting as UTC's servant or agent. Sheridan J held —

"1. That the car was being driven by Maquel with the consent and authority of UTC but mere ownership of the car and permission were insufficient to saddle UTC with vicarious liability;

2. That the car was not being driven for the joint benefit of Maquel and UTC but solely for Miss Cooke's purposes.

3. That UTC had no financial interest in the use of the car by Maquel."

and he dismissed UTC from the suit.

In the instant case, we do not have the benefit of any finding by the trial judge on the issue of vicarious liability - the vital issue in the suit so far as the appellants were concerned. He gave judgment against them, apparently assuming that they were vicariously liable, as owners of the car, for the negligence of the driver who was employed by the hirers of the car. The judgment, if it can be described as a judgment, consists of a recital of the evidence of the plaintiffs and of an assessment of the damages to which they were entitled. There is not even a finding of negligence on the part of the driver, and no reasons are given for making the appellants vicariously liable for any such negligence. If only judges in the High Court would comply with Order IV rule 1(5), and frame and record issues, the situation now facing this court would not arise. This has been said time and again by this court, without apparent effect.

The owners of the microbus, represented by Mr IT Inamdar, have appealed to this court. Mr Ogango for the respondents, the original plaintiffs, made no attempt to support the judgment.

Mr Inamdar stressed the fact that Hansmax had hired the microbus to enable them to fulfil their contractual obligations entered into with a tourist agency to carry tourists. They used their own employees to do the driving. Mr Inamdar submitted that to make the appellants, as owners of the vehicle, liable for the driver's negligence, it must be shown that at the material time the driver was the owner's servant or their agent. In this case the driver was not the owner's servant. To be the agent of the owners, the driver would have to be shown to have been driving at the request, express or implied, of the owners, and in pursuance of a task or duty delegated to the driver by the owners. As was said by du Parcq, LJ in *Hewitt v Bonvin and Another* [1940] 1KB 188, at pp 194-195:

"The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

The circumstances under which an owner can be held liable for an agent's negligence were examined by this Court's predecessor in *Selle and another v Associated Motor Boat Co Ltd* [1968] EA 123 in which it was held (*per* Sir Clement de Lestang, VP, at p 128):

"Where, however, a person delegates a task or duty to another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be"

and the case of *Hewitt v Bonvin* (supra) was cited as authority for this proposition. The latter case of *Morgans v Launchbury and Others* [1972] 2 All ER 606 is to the same effect. The House of Lords in that case held that to fix liability on the owner of a car for the negligence of the driver, not being a servant, it must be shown that the driver, at the material time, was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is 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 a task or duty delegated to him by the owner. The fact that the driver is using the car with the owner's permission is not sufficient to establish vicarious liability. An owner who hires out his car to a person to be used for purposes in which the owner has no interest or concern escapes liability.

Applying these principles to the facts of this case, it seems to me that:

a) the driver was driving the microbus with the permission of the owners;

b) the driver was not the owners' servant;

c) the driver was not driving at the owners' request, express or implied;

d) the owners had not delegated any task or duty to the driver, as they were under no duty to transport the tourists;

e) the owners had no interest or concern in the purposes for which the microbus was being driven when the accident occurred, as they had no control over the vehicle or its driver at that time and did not retain or share any part of the money earned by the microbus when it was on hire to Hansmax;

f) the fact that the microbus was being hired by Hansmax for a consideration is not sufficient in itself to make the owners vicariously liable for the negligence of Hansmax's driver, as the microbus was not at the material time being driven for the benefit of the owners or for the joint benefit of the owners and the driver or his employer. It follows from all this that in my view the microbus had been hired out to Hansmax to be used for purposes in which the owners had no interest or concern; it was not being driven for the owner's benefit, or on the instructions or at the request of the owners; the owners had not delegated any task or duty to the driver and had no right of control or direction over him. The appellants as owners are not, in these circumstances, vicariously liable for the driver's negligence. For these reasons this appeal must in my view succeed, and I would allow it, with costs, set aside the judgment and decree appealed from and substitute a judgment and decree in favour of the appellants, with costs of the suit. As Miller and Potter JJA agree, it is so ordered. It is accordingly unnecessary to deal with the appeal against damages, beyond saying that the awards made by the learned judge would not be easy to support, especially as to special damages.

I have reached this conclusion with regret, as it leaves the respondents without redress, a situation which would have been avoided had the driver's personal representative been joined as a defendant and the driver's negligence been established, in which case the insurance company would have had to satisfy the damages awarded, as the insured vehicle was at material time being driven by an authorized driver within the terms of the policy.

As it is, no judgment has ever been obtained against the driver or his employers Hansmax. Had such a judgment been obtained, as it could and would have been had the driver's personal representative been sued, the insurers would have been liable under the appellants' policy, and I hope they will see fit to discharge their moral liability towards the respondents by making a reasonable exgratia payment to them.

Potter JA. I also agree and have nothing to add.

Miller JA. I have had the benefit of reading in draft the judgment of Law JA in this appeal. I agree with it.

Dated and Delivered at Nairobi this 29th day of December 1981.

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

C.H.E.MILLER

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR.