



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 9 OF 1975

HIGHWAYS LTD.....PLAINTIFF

VERSUS

SAVANNAH TRAVEL & TOURS LTD.....DEFENDANT

JUDGMENT

The subject-matter of this suit is a Peugeot 504 saloon car (registration KJM 707). On 9th October 1974 the plaintiff company, which carries on business as car hirers, entered into a contract with the defendant company which carries on a similar business in Mombasa whereby it hired out the car for an unspecified period, the rate of hire being Shs 75 per day.

In order to appreciate the circumstances in which this was done it is necessary to start with the evidence led on behalf of the third-party company which carries on business as travel agents in Nairobi and from which the defendant claims an indemnity arising out of the loss or theft of the car after it had sub-hired it to Dr Oyieye, a customer of the third party.

[His Lordship then described how Dr Oyieye, to whom he referred as a “confidence trickster”, had vanished along with the Peugeot car. He considered the defendant’s claim against the third party, the travel agent, and dismissed it.]

Reverting to the claim between the plaintiff and defendant, on 26th November 1974, the plaintiff’s advocates wrote a letter demanding the return of the car and the outstanding hire charges of Shs 3525. No reply was received. On 3rd January 1975, the plaintiff was filed claiming (i) an order for the delivery up of the car or Shs 30,000 (its value); (ii) Shs 6375 arrears of hire up to 1st January; and (iii) damages for wrongful detention.

On 13th February the defendant’s advocate wrote that the loss of the car, while it was on hire to Dr Oyieye, had been reported to the police on 31st January. That was the first intimation which the plaintiff had received of the loss of the car or of sub-hiring. The claim for Shs 6375 is not disputed. Further hiring charges of Shs 3225 up to 13th February must also be paid.

Before deciding on claim (i), I will refer to the hiring contract, the relevant clauses of which provide:

6. I shall be fully responsible for the maintenance and proper care of the vehicle which I understand is insured against all third-party risks as required by Motor Vehicles Insurance (Third Party Risks) Ordinance 1975 and also for the set of tools and spare wheel which are provided with the car.

7. I shall be responsible in the sum of Shs 1000 for any damages caused to the third party by use of the vehicle or to the above vehicle either through my negligence or otherwise while under my custody plus charges at the rate of the hire above-mentioned for the period the vehicle is under repair ...

9 ... (a) Give notice to you without unnecessary delay of any accident or damage to or loss of the vehicle ...

(d) Not sub-let the vehicle.

I do not think that clause 9(d) has any application to a sub-let between car-hire dealers but, rather, is designed to prevent an individual hirer from sub-letting to another individual hirer. Here I prefer the evidence of Mr Abbas Buseidy, the manager of the defendant, that he was asking Mr Ramazamali Jiwa (of the plaintiff company) to help him out as a favour and that the car was not needed for the defendant's own purposes. As regards clause 9(a), I do not construe it as absolving the defendant from liability for the loss of the car by its own client through theft. It would have been otherwise if the car had been stolen by a third party after Dr Oyieye had locked it up outside the Serena Beach Hotel while he was staying there. In any event, the defendant took no steps to give notice to the plaintiff "without unnecessary delay" of the loss of the vehicle. By 13th February it was probably too late for the plaintiff to take effective steps to trace the car. Nor do I think that clauses 6 and 7 cover the facts of this case. While the defendant's liability for damages for negligence to the third party might be limited to Shs 1 000 (clause 7), I do not think it follows that it was for the plaintiff to insure against the loss of the car due to the theft of it by the defendant's client.

The legal position would appear to be that by sub-hiring the car to Dr Oyieye (of which the plaintiff as bailor was unaware) he became the defendant's agent and his tortious conversion of it would render the defendant liable to the plaintiff. This is apart from the negligent handing over of it to Dr Oyieye without proper safeguards. As was said by Sachs L J in *British Road Services Ltd v Arthur Crutchley & Co Ltd (Factory Guards Ltd, third parties)* [1968] 1 All ER 811, 824:

The bailee is responsible for proper care being taken of the goods and to my mind he cannot escape from liability merely by employing sub-contractors for that purpose, however reasonable may be his confidence in them. Any contrary decision would make a serious and unjustifiable inroad on the rights of bailors, and for this inroad there does not appear to me to be any authority.

By analogy, I think that the defendant's misplaced confidence in Dr Oyieye fixes it with liability to the plaintiff. The above case was cited with approval by Simpson J in *Estate Services Ltd v Naumann Gepp (East Africa) Ltd* (unreported). By delegating the duty to take reasonable care to the third party the bailee could not escape liability for his failure to take that degree of care. There need be no privity of contract between the third party and the bailor. The goods belonged to the bailor and were lost due to the negligence of the third party. Here the defendant, the original bailee, is also contractually liable for the loss of the vehicle. The plaintiff's claim succeeds.

On the value of the Peugeot there was the uncontradicted evidence of Mr A Raffique, a leading local car dealer. On 30th August 1971 he had sold it to the plaintiff for Shs 27,000, practically new with 3000 km on the clock. It had been first registered on 17th June 1971. When it was handed over to the defendant, on 9th October 1974, it had registered 91,203 km. To Mr Raffique's knowledge the plaintiff keeps its cars in good condition. Even the fastidious Dr Oyieye seems to have been satisfied with it. Owing to inflation, the big demand for this type of secondhand car and the prohibitive price of new cars, Mr Raffique put a value on it of Shs 30,000; and, although he had not seen it when it was hired to the defendant, I do not think that this is unreasonable. By way of damages for wrongful detention Mr Pandya, for the plaintiff, claims interest at the court rates from 13th February 1975 on the value of the car, being further damages for the loss of the use of the money representing the lost car as from the date on which the loss was notified until payment: *McGregor on Damages* (13th edn), page 324.

There will be judgment for the plaintiff against the defendant for (i) Shs 30,000 being the value of the Peugeot saloon car; (ii) Shs 9600 arrears of hire up to 13th February 1975; (iii) interest at court rates as

set out above being damages for wrongful detention; and (iv) costs and interest thereon.

Order accordingly

Dated and Delivered at Mombasa this 27th day of October 1977.

D.J.SHERIDAN

JUDGE