IN THE COURT OF APPEAL FOR EAST AFRICA

AT NATROBI

(CoramWambuzi P, Musoke Ag VP & Miller J)

CIVIL APPEAL NO. 14 OF 1976

BETWEEN

SUMER SINGH BACHU .....APPELLANT

AND

NICHOLAS WAINAINA KAGO WAWERU .....RESPONDENT

JUDGMENT

Musoke Ag VP. The appellant filed a suit in the High Court at Nairobi claiming damages against the two respondents jointly and severally for injuries he sustained in a road accident when he was knocked down by a motor vehicle which was jointly owned by the defendants and was being driven by the first defendant. Neither defendant entered an appearance.

At the hearing of the suit *ex parte* under Order IXA rule 8 of the Civil Procedure Rules, it was proved that the motor vehicle in question was jointly owned by the defendants and that the first defendant was driving it negligently at the time of the accident. At the close of the plaintiff's case, Mr O Kapila, who was presenting the case, stated in answer to an enquiry from the bench, that he could not adduce any evidence against the second defendant. In his judgment, the learned trial judge dismissed the suit against the second defendant but found the case against the first defendant proved and ordered him to pay to the plaintiff a total sum of Kshs 111,965. No appeal was preferred against that decision.

However, about seven months later, an application, by way of notice of motion was made to the judge to review his decision, under Order XLIV rule 1 of the Civil Procedure Rules, on the ground that there was an error apparent on the face of the record. He was then asked to set aside the dismissal order against the second defendant and substitute an order making both the defendants liable jointly and severally. This order was being sought because the first defendant was a man of straw. After carefully considering the submissions of Mr Gautama who, together with Mr GS Vohra, appeared for the applicant and the authorities cited, however, the judge dismissed the application. This appeal is against that dismissal.

Before us Mr Gautama appeared with Mr O Kapila for the plaintiff and the submissions which were advanced in the court below were repeated. The main argument put forward is that as the allegations in the plaint of the defendants' joint ownership of the vehicle in question and the negligence on the part of the first defendant who was driving that vehicle at the relevant time were proved, a presumption in law arose that the second defendant as co-owner of the vehicle was vicariously liable for the negligence of the first defendant and that although this was a rebuttable presumption, it had not been rebutted. Accordingly, judgment should have been entered against the second defendant as well and that the judge erred in law in relying on the misleading information divulged by counsel for the plaintiff at the *ex parte* hearing when

no defence had in fact been filed.

Much reliance was placed on paragraph three of the amended plaint which reads, so far as is relevant to the alleged liability of the second defendant, as follows:

> "… a motor vehicle … owned by the defendants was so negligently driven by the first defendant either on his own account or as a partner of the second defendant and in the course of the business of such partnership…"

The allegations in the original plaint that the first defendant was driving the vehicle as a servant and or agent of the joint owners was omitted. As already pointed out, negligence on the part of the first defendant was proved, but there was no evidence that the two defendants were partners in business and that at the material time, the first defendant was driving the vehicle "in the course of the business of such partnership." In fact, there was no evidence as to the exact nature of the relationship between the two defendants, apart from their joint ownership of the vehicle in question. It is true that in law, neither defendant as joint owner could claim exclusive possession of the vehicle but it is also equally true that either of them could possess and drive that vehicle in his own right and for his own purposes and, in the absence of any evidence to the contrary, that must have been the position when the first defendant was driving the vehicle at the time of the accident.

The following authorities were cited at the hearing of the appeal: *Barnard v Sully* (1931) 47 TLR 557, Terrell's Law of Running Down Cases 3rd Edition p 127, *Hibbs v Ross* (1860) 1 QB 534 (referred in *Barnard v Sully*), *Mohamed Akbar v Williams* (1945) 12 EACA 39, Clerk and Lindsell 13th Edition p 132 para 216 and p 1 para 254, Bingham's Motor Claims 4th Edition pp 116, 117 and 118, *Hewitt v Bonvin* [1940] 1 KB p 188, *Selle v Associated Motor Boat Company* [1968] EA 123, *Redmond v Griven* [1926] KBD (unreported but referred to in Terrell's) and *Jivandas & Co Ltd v Nakadama* [1972] EA 489 at 490. With respect to the learned counsel, these authorities do not in my view assist the plaintiff's case. On the contrary, they show clearly that where a person owns a vehicle which is driven by another person, even with the permission of the owner, that owner will not be vicariously liable in tort for the negligence of the driver unless it is established that the driver was acting as a servant or agent of the owner, or was using the vehicle for the benefit of the owner or for something in which the owner had an interest either alone or jointly with the driver.

When the suit was heard *ex parte*, the plaintiff was under a legal duty to prove his case against both defendants. This he failed to do in respect of the second defendant. In my view, the fact that the proceedings were described or referred to as "formal proof" did not lessen the plaintiff's burden of proof required in a civil case. It was not sufficient to expect the court to act on the allegations in the plaint when the evidence adduced indicated clearly that the second defendant was not connected with the accident. In my judgment, the judge was justified on the material before him to dismiss the suit against the second defendant and also to dismiss the application to review his judgment.

I would dismiss the appeal and make no order as to costs.

Miller J. I fully agree with the judgment of the learned Acting Vice President and cannot help adding that when learned counsel for the plaintiff declared to the court of trial that there was no evidence against the second defendant, he had to be taken as having contemplated the relevant laws under which liability of that defendant in the suit may have been established. Furthermore, the record shows that upon the application for review, apart from a statement of the applicant's counsel that the plaintiff's lawyer made an error at the trial when he said that there was no evidence against the second defendant, nothing more was adduced for the consideration of the court although Order XLIV rule 3 provides that for the granting of an application for review, the "person considering himself aggrieved" by a decree or order should strictly prove the allegation of discovery of new matter or evidence which was not within his knowledge or could not be adduced by him when the decree or order was passed.

Wambuzi P delivered the following Judgment. I have had the benefit of reading in draft the judgment prepared by the Ag Vice President and I agree that this appeal must be dismissed.

The point before us and indeed before the learned judge in the court below is whether the second defendant, Kago Waweru, is liable in negligence. As the learned Ag Vice President pointed out in his judgment, the suit against the two defendants was not defended and the appellant proceeded to prove his case against the defendants in default of appearance. I have no doubt that the case against the first defendant was duly proved as he was in fact driving the motor vehicle at the time of the accident and there is sufficient evidence to sustain finding that he was negligent. The question is whether merely because the second defendant owned the vehicle jointly with the first defendant, he too is liable in negligence. There was no authority on the point cited to us and I can find none. All the authorities cited deal with the situation where the owner of a vehicle is made liable because his servant or agent driving the vehicle at the material time is liable or because the vehicle was being driven for a joint interest involving the person liable and the owner.

Mr Gautama relied on the presumption that a vehicle is driven either by the owner or by the owner's servant or agent. I have no quarrel with that.

In fact, in the present case, one of the two co-owners was driving. I would not, however, accept learned counsel's contention that the person driving, who in this case was one of the joint owners, had the authority or consent of the other owner. I think this is illogical as it would render one party's ownership meaningless if he has to get permission or consent of the other party to use that which he owns.

A more plausible argument put forward by the learned counsel is that the vehicle, being jointly owned, was being driven for the joint benefit of the joint owners at the material time. In this connection the allegation in the plaint was that:

> "The first defendant on his own account or as a partner of the second defendant and in the course of the business of such partnership … knocked down the plaintiff."

There is no evidence of any partnership between the defendants or that the first defendant was driving in the course of such partnership. There is no evidence whatsoever as to what purpose the vehicle was owned or being driven at the material time. In the circumstances of this case I would not go so far as to say that one defendant is necessarily liable for the torts of the other resulting from the use of the vehicle jointly owned. I think there should be some evidence of a common interest in the user of the vehicle before liability of the one can be attributed to the other.

As Miller J also agrees with the judgment of Musoke Ag VP, there would be an order in the terms proposed by the learned Acting Vice President.

Dated and delivered at Nairobi this 4th day of September, 1976.

S.W WAMBUZI

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P**RESIDENT**

J.S MUSOKE

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AG VICE-PRESIDENT

C.H.E MILLER

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JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR