REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O'KUBASU & DEVERELL, JJ.A)

CIVIL APPEAL NO. 73 OF 2002

BETWEEN

SECURICOR KENYA LIMITED.....APPELLANT

AND

KYUMBA HOLDINGS LIMITED.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Ang'awa, J)

dated 7th February, 2002

in

H.C.C.C. No. 1457 OF 1998)

****

JUDGMENT OF THE COURT

This is an appeal by the 1st defendant, ***SECURICOR KENYA LIMITED***, hereinafter referred to as the appellant, against the judgment and decree of the High Court of Kenya at Nairobi (*Ang'awa, J)* given on 7th February, 2002, whereby the learned Judge awarded to the plaintiff, now the respondent, a sum of Kshs.976,895.20 together with interest being in respect of cost of repairs to the respondent's motor vehicle negligently damaged by the 2nd defendant, ***John Karume***, who is not a party to the appeal.

On 9th December, 1996, at about 9.30 p.m. *The Honourable Mr. Mutula Kilonzo*, the chairman of the respondent, a Senior Counsel and now a Member of Parliament, was driving home along Limuru Road in the respondent's motor vehicle registration No. KZY 212 when at the section of the road outside *Stima Plaza a matatu* vehicle registration No. KWJ 816 travelling at a great speed from the opposite direction knocked down a pedestrian who was crossing the road as a result of which the matatu vehicle lost control, swerved on to the respondent's lane and collided head on with KZY 212 extensively damaging the bumper and the bonnet. The *matatu* vehicle then aimlessly careered off the road and landed in a ditch on the left hand side of the road facing Limuru. The driver of the matatu vehicle and the passengers hastily got out and ran away. Luckily, thank God, *Hon. Kilonzo* was not injured. He got out of his car and controlled the situation. With the help of a Good Samaritan who was driving a pick-up, they took the injured pedestrian to Aga Khan Hospital. KZY 212 was towed to the police station and later to City Panel

Beaters where it was repaired at a cost of Kshs.976,895.25.

In its defence to the suit the appellant did not deny the fact of the accident. However, it averred that it is not vicariously liable for the negligence of the 2nd defendant who is a stranger and unknown to it. The appellant stated that it sold KWJ 816 sometime in December, 1995 to one *G.M. Thangwa* and that at the time of the accident the motor vehicle was not under its authority and or possession.

In finding for the respondent the trial Judge found as a fact that KWJ 816 had been sold by the appellant through tender for kshs.25,000/- "only as shell" without the engine. *G.M. Thangwa* won the tender and paid the sum. Though he was given a duly signed transfer form and a logbook, the transfer in his favour was never registered. However, what is known is that the motor vehicle was eventually converted into a matatu and was being used as such at the time of the accident. It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial Judge cannot be right under ***section 8*** of the Traffic Act when she states that the true owner of the motor vehicle is the appellant.

That section reads as follows:-

> ***"The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."***

We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in ***OSAPIL VS. KADDY [2000] 1 EALA 187*** in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only *prima facie* evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.

The trial Judge also found that the 2nd defendant was in possession of KWJ 816 and that he was not an employee of the appellant. She held that the accident was caused solely by the negligence of the 2nd defendant. On the question of vicarious liability, the trial Judge said:-

> ***"In the absence of Notice under Order 1 rule 21 (1) Civil Procedure Rules, Courts would normally hold both defendants if found liable so liable jointly and severally. The 1st defendant being the owner of the vehicle is vicariously liable."***

The appellant being aggrieved by this finding promptly lodged an appeal. Several grounds of appeal were raised in the Memorandum of Appeal, but, we think that they can be narrowed down to only one, namely, whether the trial Judge misdirected herself on the law relating to Vicarious Liability by holding that the appellant was vicariously liable for the negligent acts of the 2nd defendant.

What is **VICARIOUS LIABILITY? Winfield and Jolowicz ON TORT**, 14th Edn says:-

> ***"The doctrine may be stated as follows: - Where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A WILL BE VICARIOUSLY LIABLE FOR B's NEGLIGENCE IN THE OPERATION OF THE VEHICLE. Thus in ORMROD VS. CROSSVILLE MOTOR SERVICES LTD. (71) A, the owner of a car, asked B to drive the car from Birkenhead to Monte Carlo, where they were to start a holiday together. It was held that A was liable for B's negligent driving even though B might be said to be partly pursuing his own interests in driving A's car. On the other hand, liability was not imposed in MORGANS VS. LAUNCHBURY (72) where the husband, who normally used his wife's car to go to work, got a third person to drive him home after visits to several public houses. In no sense was the husband acting as his wife's agent in using the car for his work and still less was the third person her agent. It is now clear that mere permission to drive without any interest or concern of the owner in the driving does not make the owner vicariously liable, nor is there***

any doctrine of the "family car". Where, however, the facts of the relationship between owner and driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner's agent." (71: [1953] 1 W.L.R. 1120 72: [1972] A.C. 127)"

We will endeavour to be guided by these parameters.

In the case before us, it was proved that at the time of the accident the appellant was no longer the owner of KWJ 816. It had sold it to G.M. Thangwa to whom possession had been transferred. It appears that Mr. Karume had not been put into possession of it by the appellant. Moreover, KWJ 816 was not being driven by the appellant's driver or its employee on an occasion in which the appellant had any interest, matatu business not being its concern. There was no relationship whatsoever between the appellant and the 2nd defendant. Indeed, there was no agency relationship. It is difficult therefore to see how the trial Judge could import into the case the doctrine of vicarious liability. It was simply not applicable.

Moreover, if, which we do not consider to be the position, the appellant was still the owner by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of everyone who happened to drive it. See ***LAUNCHBURY AND OTHERS VS. MORGANS AND OTHERS (IBID) at P. 649 J.***

On this ground alone, this appeal is allowed. We need not revisit the other grounds of appeal. The judgment of the superior court together with all consequential orders are set aside. The appellant shall have the costs of this appeal and of the suit in the superior court.

DATED and DELIVERED at NAIROBI this 10TH day of June, 2005.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR