THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: (ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, JJSC)

CIVIL APPEAL NO. 4 OF 2001

BETWEEN

MUTWALIBU LUKUNGU ***APPELLANT***

VERSUS

SIMON LOBIA ***RESPONDENT***

(Appeal from the judgment and Decree of the Court of Appeal at Kampala (by Hon. Justice Berko, Twinomujuni and Okello, JJJA) dated the 4th October, 2000 in Civil Appeal No. 36 of 1999).

REASONS FOR THE DECISION OF THE COURT.

This is an appeal against the judgment of the Court of Appeal dated 4/10/2000 which reversed the High Court decision dated 25/6/1999. We heard the appeal on 6/11/2001 and dismissed it. We reserved our reasons to be given later on notice. We now give the reasons.

The facts of the case are that the respondent took his Tata lorry Reg. No. UXO 390 to Robert Kawuma's garage on plot 51 Spire Road, Jinja, on 23/6/93, for overhauling the engine and general repairs. He agreed with Robert Kawuma, the garage owner, on the cost of spare parts and repair charges of the lorry. He left the ignition key of the lorry with Kawuma. He never authorised anybody to drive the lorry in his absence. The mechanics overhauled the engine and started it when he was present. Most of the work involving

replacing of spare parts was done in his presence. He was last seen in Kawuma's garage on 8/7/93.

Between then and 16/7/93 he was looking for money to pay the balance of repair charges. On 16/7/93 at 8:30pm while at his residence he learnt of an accident involving a Tata lorry and a mini-bus, belonging to appellant. On the following morning he visited the scene of accident and realised that it was his lorry, UXO 390, which had been involved in the accident. The lorry and the mini-bus were still at the scene of accident. He went to Kawuma's garage and learnt that it was Kawuma who had driven the lorry and that Kawuma had sustained injuries in the accident and that he was in Jinja Hospital. The respondent reported the matter to Jinja Police Station where he learnt that Robert Kawuma had just died in the Hospital from the injuries he had sustained in the accident.

The respondent was later charged with and acquitted in the Magistrate's Court of Traffic offence of "Permitting the use of a motor vehicle on the road in a dangerous mechanical condition."

Because the mini-bus was damaged beyond repair, the owner, Mutwalibu Lukungu, now the appellant, brought an action against the respondent claiming general and special damages on the ground that the said accident was caused solely by and due to the negligence of the appellant's driver for which the appellant was vicariously liable.

In his defence, the respondent denied liability since Kawuma drove the lorry without his authority.

At the trial two issues were framed for determination. The first issue was whether or not Robert Kawuma was acting as a servant or agent of the respondent at the time of the accident and the second was if so, whether the respondent was vicariously liable.

The learned trial Judge found that:-

> *"Possession of the vehicle was authorised by the defendant, who not only left the vehicle in his possession with the ignition key but the driving of the vehicle by any one in Kawuma"s garage was foreseeable as the repairs would involve or culminate in the driving of the defendant's*

vehicle. The defendant is therefore liable for the conduct of Kawuma in driving motor vehicle UXO 390".

The respondent appealed to the Court of Appeal which allowed the appeal because firstly the appellant failed to prove that Kawuma was a servant of the respondent and that he was not an independent contractor. Secondly that it was not possible to infer that Kawuma was road testing the vehicle at the time of the accident.

The appellant appealed to this court on the following grounds:-

1. The learned Justices of Appeal erred in law and fact in holding that the respondent was not vicariously liable for negligence of Robert Kawuma and/or his servant in whose hands the respondent's vehicle had been left for repair.

2. If Robert Kawuma was not driving the vehicle at the material time, which is not admitted, the learned Justices of Appeal erred in law and fact in failing to find that the respondent was vicariously liable for the negligent driving and or use of his vehicle on public road.

3. The learned Justices of Appeal erred in law and fact in interfering and thereby setting aside the learned trial Judge's award of damages to the appellant.

Mr. Kiwuwa, Counsel for appellant abandoned the 2nd ground of appeal. On the 1st ground of appeal he submitted that the Court of Appeal erred when it held that Robert Kawuma was not an agent of the respondent. He contended that much as respondent might not have had interest in what Robert Kawuma was doing at the time of the accident, still the respondent was liable.

He submitted that there was an implied authority given by the respondent when he left the lorry in the garage together with the ignition key of the lorry. He cited ***Ormrod v Crossville Motor service Ltd (1953) 2 ALL ER 753, Karisa v Another Solanki & Anor (1968) EA 318*** and ***Sella £ Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123*** for the proposition that whether the driver was an independent contractor or not, still the owner of the vehicle was vicariously liable for the negligence of its driver in whose hands the owner had placed the vehicle together with the ignition keys.

He contended that despite the instructions by respondent that the vehicle should not be driven in his absence he should be held vicariously liable.

On the other hand, Ms Nasiiwa, Counsel for respondent submitted that the issue in the 1st ground was whether Robert Kawuma was a servant or agent at the time of the accident and therefore whether the respondent was vicariously liable for the negligence of Robert Kawuma. She adopted her submission which she made before the Court of Appeal. She emphasised the fact that Robert Kawuma was an independent contractor and therefore the respondent was not vicariously liable for the negligent driving of the Lorry by Robert Kawuma. She cited ***Morgans v Launchbury & Other (1972) 2 All ER 606*** for the proposition that a person is not liable for a tort of an independent contractor and contended that whether or not (Kawuma) was acting as agent of the owner was a question of fact. On the facts, she contended that the respondent was not vicariously liable for the negligence of Robert Kawuma.

On the facts as found by the trial Judge and upheld by the Court of Appeal, we cannot fault the decision of the Court of Appeal. In the leading judgment of Berko JA, with which the other two justices agreed, when he stated:-

The only issue for determination in this appeal is whether the appellant is vicariously liable for the negligen
tdriving of Mr. Robert Kawuma on 16/7/93.

> *As I understand the authorities, the law at present makes the owner or bailee of a car vicariously responsible for the negligence of the person driving it, if, but only if, that person is (a) his servant and driving the car in the course of his employment, or (b) his authorised agent driving the car for and on his behalf. The legal principle was correctly and accurately stated by Mackinnon, LJ, in Hewitt v Bonvin (1940) 1 KB 168 at 191.*

Thus mere permission to drive the car is not enough to create vicarious responsibility for negligence. Nor is a person responsible for the negligent driving of an independent contractor; Morgans v Launchbury and Others (1972) 2 All ER. 606.

> *The learned trial judge seems to have relied on permission rather than an agency as the basis of liability. As I have said earlier on, it has never been the law that mere permission is*

enough to establish vicarious liability. This view is supported by what Viscount Bilhorne said in ***Morgans*** v ***Launchbury and Others*** *(supra)- at page 612:*

It follows that, in my opinion, applying the principles of the law I have set out above, the circumstances of the case cannot justify the judgment against the appellant. The respondent failed to prove that the appellant authorised Kawuma to drive the vehicle. Ground one therefore should succeed."

We agree with the above conclusion. We would, however, add that in order for the appellant to fix liability on the respondent for the negligence of Robert Kawuma it was cessary to show that either the driver was owner's servant or that, at the material time of the accident, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the vehicle at the owner's request, express or implied or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner.

On the contrary, throughout the evidence on record, we found that the appellant failed to prove the above essential elements. In the result we found no merit in ground one.

In view of our conclusion on the 1st ground of appeal, we found that ground three did not deserve consideration of this court. Therefore ground three had to fail.

Dated at Mengo this 27th day of February 2002.

B.J ODOKI
CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT