THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, AND KANYEIHAMBA, JJSC) .

CIVIL APPEAL NO. 3 OF 2001

B E T W E E N

TEDDY SENTONGO BIRUNGI: APPELLANT

A N D

1. WILBERFORCE SEKUBWA: 1st RESPONDENT

2. ANGELA AMUGE: 2nd RESPONDENT

3. PROSPER NJAWUZI: 3rd RESPONDENT

4. AMIR NSEREKO: 4™ RESPONDENT

(Appeal from the decision of Court of Appeal of Uganda at Kampala (Mpagi-Bahigeine, Berko and Twinomujuni JJ.A), dated 21-07-2000, ir, Civil Appeal No. 32 of 1999, arising from the judgment of the High Court at Kampala (Kania, J.) dated 19-02-1999, in H.C.C.S. No. 167 of 1995).

REASONS FOR THE JUDGMENT OF THE COURT

This was a second appeal. In the High Court the 1st respondent successfully sued the appellant, the 2nd respondent, 3rd respondent and 4th respondent for damages caused to his car in a collision between it and the appellant's motor vehicle. The cause of action

was founded in negligence on the part of the 3rd respondent when driving the appellant's motor vehicle in the course of his employment as her servant or agent. The appellant appealed to the Court of Appeal against the High Court decision. She lost that appeal. Consequently, she appealed to this court. We heard the appeal and dismissed it, reserving our reasons for doing so, which we now proceed to give.

The circumstances that led to the High Court action were briefly these. The 2nd respondent and Martin Emakulat, her husband, were the owners of Mazda mini bus 407 UAF, which was, in fact, registered in the former's names. They gave the vehicle to the 4th respondent to repair and sell it, recover his costs and give them any balance of the purchase price. The appellant was also the owner of a Dutsan Pick-up UVY 185, which she wanted to dispose of. She agreed to trade-in her pick up for 407 UAF and shs.2,000, 000=. The appellant gave the 4th respondent the registration book and keys of her pick-up, plus Shs. 1,500, 000=, and took in exchange the mini bus No. 407 UAF. The registration Card of 407 UAF was to be given to her after payment of the balance of Shs. 500, 000=.In the meantime the 2nd respondent retained the registration book of 407 UAF. The appellant took possession of the vehicle and it was being driven by her driver, the 3rd respondent when the accident happened on 12-12-94, at 10.00 p.m. involving 407 UAF and the *1st* respondent's Benz saloon car. At the time of the accident, the Benz Saloon car was bearing a garage number plate No. U170 DI/UPF922. The 1st respondent was prosecuted and convicted for driving an unregistered vehicle with a garage number plate at 10.00 p.m. The 3rd respondent was also prosecuted and convicted of careless driving.

After the accident the appellant tried to repudiate the agreement to purchase the vehicle 407 UAF and used the Police and an Army Officer to force the 4th respondent to refund the Shs. 1, 500, 000= she had paid towards the purchase of vehicle 407 UAF and a return of her UVY 185. She maintained that at the time of the accident the vehicle 407 UAF was not in her possession. It was instead in the possession of the 4th respondent. She also denied that the 3rd respondent was her driver. At the trial, the following issues were agreed upon and determined:

(1) who owned the vehicle 407 UAF and was in control of it when the accident happened?

(2) whose agent or servant was in charge of the vehicle when the accident happened?

(3) was the driver in charge of the vehicle negligent?

(4) If the answer to *(3)* was in the affirmative, was the *2nd* respondent entitled to damages and, if so, what quantum?

In his lead judgment in the Court of Appeal Berko, J.A., suggested that a fifth issue should have been whether the driver was driving the car in the course of his employment. That would have clearly brought ovc the issue of vicarious liability.

In the learned Justice of Appeal's view, since judgment had already been entered against the 3rd respondent , issue *(3)* did not arise.

The learned trial judge answered the *2nd* issue that the 3rd respondent was in charge of the vehicle in the course of his employment as the servant or agent of the appellant when the accident happened; and that he was negligent because he left his lane when trying to avoid a pothole in his lane and suddenly swerved colliding with the 1st respondent in his lane. The appellant was consequently liable for the 3rd respondent's negligence.

Regarding the first issue, he found that the appellant was the owner of vehicle No. 407 UAF and that or 12-12-94, the vehicle was under her control when the accident happened. The answer to the 4th issue was that the 1st respondent was entitled to damages from the appellant *for* the damage to his car.

The learned trial judge preceded to assess damages and made an award which was not challenged in the Court of Appeal. He entered judgment for the 1st respondent against the appellant and the 3rd respondent jointly and severally for the sum of Shs. 11,

024,000= with interest at 8% from the time of filing the suit until payment in full. He also awarded costs of the suit in favour of the 1st , 2nd and 4th respondents.

The appellant's appeal to the Court of Appeal was unsuccessful. Hence this appeal, which we also dismissed, reserving our reasons for doing so.

Eleven grounds of appeal were set out in the memorandum of appeal to this Court. The manner in which the memorandum of appeal was drawn offended rule 81 of the Rules of this Court. We nevertheless allowed the grounds to be argued as they were. The first eight of the ground of appeal were repetitions in different forms, the substance of which was that the 1st respondent's cause of action was founded, and based, on illegality. The resistant judgment in his favour was therefore, a nullity, contrary to the principle of ***exturpi causa non oritur actio.***

The appellant's learned Counsel, Ms. Charity Nakabuye argued the first eight grounds together. In her submission, she criticized the trial court and the Court of Appeal for not having applied the principle of ***exturpi Causa non oritur actio.*** This was a case in which the 1st respondent was driving his motor vehicle with a garage number plate which was a traffic offence, for which he was charged in court, convicted and fined. The learned Counsel submitted that in those circumstances, the 1st respondent was illegally driving on the road at the material time. He should not take advantage of his illegal conduct. His criminal act was in breach of a statutory duty. Learned Counsel criticised the Court of Appeal for holding that the lot respondent's cause of action did not depend on the fact that his car had a garage number plate.

In support of her submission, the learned Counsel relied on the cases of ***Whiston -vs- Whiston (1998), All E.R.423; R -vs- Secretary of State for Home Department, Exparte Puttick (1981) 1, A11.E.R.778; Clunis -vs- Camden and Isling Health Authority (1998) 3 All.E.R.;*** and ***Revill -vs-Nevbery (1996) 1 All E.R.***

Mr. Sam Njuba, Counsel for the 1st respondent submitted that grounds 1 to 8 of the appeal were all based on the issue of illegality. He said that he stood by his submission in the Court of Appeal, which he wished to adopt for purposes of this appeal. He argued that if courts were to rule that any illegality, however remote, would nullify the liability of a party who acts in breach of its duty of care the result would be outrageous and cause injustice. Only an illegality relied on by a claimant should have that effect. However, if a party can sustain his claim outside illegality, then his claim should succeed.

Mr. Njuba distinguished the cases referred to by the appellant's learned Counsel from the instant case. He said that ***Whiston —vs- Whiston*** (supra) was based on illegality of a marriage. So was ***R —vs- Secretary of State for the Home Department, ex parte Puttick*** (supra). In the instant case, learned Counsel contended, the l st respondent never went out to cause an accident and benefited from it. Regarding the decision in ***Clunis —vs- Camden and Islington Health Authority*** (supra), the learned Counsel contended, that a distinction between claims for personal injury based on illegality and claims for other injuries based on illegality should not be allowed to stand. He urged us not to be persuaded by Ms. Nakabuye's arguments.

In the instant case, Mr. Njuba submitted, evidence shows that when the 1st respondent's car was knocked, he was not driving. He had stopped. The case of ***Revill —vs- Newberry*** (supra) was clearly in the 1st respondent's favour. In the instant case, the 1st respondent was not relying on illegality. Consequently, he should not be denied his claim.

In his lead judgment, with which the other two members of the Court of Appeal agreed, Berko J.A., considered at some length whether the principle ***Exturpi Causa non oritur actio*** applied to the instant case. In the end, he held that the principle did not apply to the case.

Regarding one of the decided cases he considered, Berko, J.A. said:

> ***"The only case cited to us in which the cause of action was based on negligence is Ashton —vs- Turner and Another (1981) QBD 1311***
>
> ***.....***

> **In** ***my view the application of the maxim in*** *Ashton -vs- Tunner* ***(supra) was justified on the facts of the case. Public policy would not permit one participant in a crime to maintain an action against the other participant in the same crime in relation to act done in connection with the commission of that crime.***

> ***The authorities I have referred to show that if the plaintiff can prove his case without relying, as part of his cause of action, that he has been guilty of illegality, then he can maintain his action and enforce his claim. The plaintiff in the instant case, need not, as part of his cause of action, rely on the fact that his car had a garage number plate in order to prove his case.***

> ***The argument of Mr. Mbabazi is that the plaintiff's vehicle was on the road illegally and unlawfully by reason of the fact that it was bearing a dealer's plate and therefore no duty of care was owed to him. I need only to give two examples to demonstrate the absurdity of the argument. Supposing a convict prisoner escapes from prison and whilst crossing the road to get to a get — away car, he is knocked down by an over-speeding driver and he sustains injuries. On the basis of Mr. Mbabazi's argument the escaping prisoner***

could not maintain action in negligence against the over-speeding driver because the prisoner, having escaped from prison, was not legally or lawfully on the road. Surely there is no connection between his escaping from lawful custody and his being knocked down on the road. He need not, in proving his case against the over-speeding driver, have to call in aid, as part of his cause of action, the fact that he had escaped from lawful custody. Again, it is an offence under The Road and Traffic Safety Act to drive a ***vehicle whose road licence has expired. If the argument of Mr. Mbabazi is correct, it would mean that if such 3. vehicle is damaged through the negligence of somebcdy whilst being driven when its road licence was expired, the owner of the vehicle would not be able to maintain an action against the driver who damaged the vehicle because the damaged vehicle was not lawfully on the road. In my view that cannot be the law. With due respect to Mr. Mbabazi, I think the maxim was wrongly applied to the facts in the instant case."***

We agree with the learned Justice of Appeal.

The appellant's learned Counsel relied on some decided cases in support of her arguments. We shall now proceed to consider them. In ***Whiston -vs- Whiston*** (supra), the respondent to that appeal was a bigamist. That was a fact she was not always ready to admit. In wardship proceedings, and in a defended suit when her offence of bigamy was in issue, she denied it; indeed she swore affidavits which were untruthful. Eventually she admitted her bigamy and a decree of nullity was granted to the appellant, Mr. Whiston on that ground. The respondent then claimed to be entitled to orders for ancillary relief.

The District judge awarded a lump sum of £25,000. Thorpe J, reduced that to £20,000 on appeal and granted leave to appeal, and the issue which arose on the appeal was: ***could*** a ***person who knowingly being married, had gone through a ceremony of marriage to another, subsequently claim ancillary relief by virtue of a decree of nullity which had been granted to that other person on the grounds of the claimants bigamy?*** The stack point in the appeal was, therefore, whether or not the rule of public policy which ordains that one should not benefit from one's own crime was available to the appellant and whether or not the respondent should be debarred from pursuing her claim because of ***exturpi causa non oritur actio.*** In his judgment allowing the appeal, with which the other two members of the Court of Appeal agreed, Ward L. J. concluded:

> ***"Today we have this respondent seeking to profit from the crime. Her claims derive from the crime Without her having entered into this bigamy ceremony she would not have got to the judgment seat at all. She should now be prevented from going any further. I would therefore allow the appeal. I would accordingly dismiss her application for*** **a lump sum** ***and make no award to her whatever."***

In our view the case of ***Whiston -vs- Whiston*** (supra) is distinguishable from the instant case. In the former the respondent's claim was based on her crime of bigamy whereas in the instant case the 1st respondent's claim, was based on negligence committed against him by the appellant's driver, the 3rd respondent.

In ***R -vs- Secretary of State for Home Department,*** ex parte ***Puttick*** (supra) , the applicant was a German Citizen who had committed serious crimes in Germany. She obtained entry into the United Kingdom on a false passport in the name of another German Citizen and, using that name, went through a marriage ceremony with a United Kingdom citizen at a Registrar's office and signed the marriage certificate in that name. The German authorities discovered her real identity and began extradition proceedings. In order to avoid extradition the applicant applied to the Secretary of

State in her real name for registration as a United Kingdom citizen under s 6(2) of the British Nationality Act, 1948. The Secretary of State refused her application and on appeal the Court of Appeal refused to grant her leave to apply for judicial review of the Secretary of State's decision. The applicant then applied to the court which determined that the marriage was valid but exercised its discretion by refusing to make a declaration of validity. Subsequently the Secretary of State, although accepting the court's decision that the applicant's marriage was valid, affirmed his refusal to register her as a United Kingdom citizen unless the court directed otherwise. The applicant applied for an order of mandamus requiring the Secretary of State to register her as a United Kingdom Citizen on the grounds that she fulfilled the express terms of s 6(2) of the 1948 Act for registration.

The court held that where *there was a statutory duty involving the recognition of some right, then, notwithstanding the mandatory nature of the terms imposing that duty, it was nevertheless subject to the limitation that the right would not be recognized if the entitlement to it had been obtained by criminal activity.* Since the applicant had achieved her marriage, and therefore her entitlement to registration under s 6(2), by the crimes of fraud, forgery and perjury, and could not claim to be entitled to registration without relying on her criminality, the Secretary of State was entitled, despite the mandatory terms of s 6(2), to refuse to register her as a United Kingdom citizen. The application for mandamus was therefore dismissed.

In ***Clunis -vs- Camden Islington Health Authority (1998) 3 All E.R.180.*** On 24-09-92 the plaintiff, who had a history of mental disorder and of serious violent behaviour, was discharged from the hospital where he had been detained as the result of an order under s.3 of the Mental Health Act, 1983, and moved into the area covered by the defendant health authority. Under s.117 of the 1983 Act, the health authority was under a duty to provide after care services for the plaintiff, and a psychiatrist employed by it was designated as the plaintiff's responsible medical officer. However, the plaintiff failed to attend appointments arranged for him by the medical officer, and his condition deteriorated. On 17 December, in a sudden and unprovoked attack, the plaintiff stabbed

a man to death at a tube station. He was charged with murder, but at his trial pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in a secure hospital. Subsequently, he brought an action for damages against the health authority alleging that it had negligently failed to treat him with reasonable and responsible care and skill in that, inter alia, the responsible medical officer had failed to ensure that he was assessed before 17 December, and that if he had been, he would either have been detained or consented to become a patient and would not have committee manslaughter. The health authority applied to strike out the plaintiff's claim as disclosing no cause of action on the grounds *(i)* that it was based on his own illegal act which amounted to the crime of manslaughter, and ***(ii)*** that it arose out of the health authority's statutory obligation under s.117 of the 1983 Act and those obligations did not give rise to a common law duty of care. The deputy judge dismissed the application and the defendant appealed. It was, held inter alia that the rule of public policy that the court would not lend its aid to a plaintiff who relied on his own criminal or immoral act was not confined to particular cause of action, but only applied if the plaintiff was implicated in the illegality and was presumed to have known that he was doing an unlawful act. In the instant case, the plaintiff's plea of dimished responsibility accepted that his mental responsibility was substantially impaired but did not remove liability from his criminal act, and therefore, he had to be taken to have known what he was doing and that it was wrong. It followed that the health authority had made out its plea that the plaintiff's claim was based on his crime of manslaughter.

The case of ***Revill —vs- Newberry*** (supra) was another case on which the appellant's learned Counsel relied for her submissions In that case the 76 year old defendant was sleeping in a brick-shed on his allotment in order to protect valuable items stored in it when he was awakened in the middle of the night by the sound of the plaintiff attempting to break in. He took his shot gun, loaded it and, without being able to see whether there was anybody directly in front of the door, fired through a small hole in the door, wounding the plaintiff in the arm and chest. The plaintiff was subsequently prosecuted for the various offences which he had committed that night and pleaded guilty; the defendant was also prosecuted on charges of wounding but was

acquitted. Thereafter the plaintiff brought proceedings against the defendant claiming damages for breach of the duty of care under section 1 (a) of the Occupiers' Liability Act, 1984 and negligence. The judge found that although the defendant had not intended to hit the plaintiff he could reasonably have anticipated that he might do so and was thus negligent by reference to the standard of care to be expected from the reasonable man placed in the defendant's situation.

The judge further found that the defendant, had used greater force than was justified in lawful ***s e l f*** defence and rejected the defendant's submission that he was relieved of all liability on the basis of the maxim ***extrupi Causa non oritur actio*** since the plaintiff had been involved in a criminal enterprise at the time of injury. On the question of contributory negligence the judge found the plaintiff two-thirds to blame. The defendant appealed. It was held that a plaintiff in a personal injury claim was not debarred from making any recovery by the fact that he was a trespasser and engaged in criminal activities at the time the injury was suffered. The duty of care owed to a trespasser by an occupier under s.l of the Occupiers Liability Act 1984 and by persons other than occupiers at common law, namely to take such care as was reasonable in all the circumstances of the case to see that the trespasser did not suffer injury on the premises, applied even where the trespasser was engaged in a criminal enterprise. On the facts, the judge had been justified in finding that the plaintiff was a person to whom the defendant owed some duty of care and that the defendant, who had used greater violence than was justified in lawful self - defence, was in breach of that duty, and in finding substantial contributory negligence on the part of the plaintiff. The appeal was accordingly dismissed.

In our view, the case of Revill -vs- Newberry (supra) actually supports the decision in the instant case that the maxim does not remove the duty of care.

The claims in the cases on which the appellant's learned Counsel in the instant case has relied were cases in which the causes of action were inseparable from illegal contracts. The claimants had to rely on illegality to prove their cases. The instant case, in our

view, is distinguishable. The 1st respondent did not have to rely, on the fact that his car had the dealer's number plate, in order to successfully prove that the appellant's driver owned him a duty of care. His case was based on the fact that his car was damaged by a breach of that duty of care, not because he was on the road in a car with a dealer's number place. His case was based on negligence by the 3rd respondent for which the appellant was vicariously liable. The 3rd respondent's negligent act was independent of the 1st respondent's being on the road in his car bearing a garage number plate at the material time.

In the circumstances, we found that there was no merit in the first eight grounds of appeal. They failed.

Grounds 9 and 10 were abandoned by the appellants' learned Counsel.

Under ground 11, the appellant's learned Counsel said that the complaint related to the evidence of the 1st respondent that the name of the owner of the Benz Car which was damaged in the accident was Simon Kibule. These were what No. 23095 Ouma Joseph, Cpl. had extracted from the third party insurance. The learned Counsel contented that it is the registered owner of the Benz Car who should have sued for damages. In reply, Mr. Njuba submitted that whereas the registered owner of a motor vehicle is entitled to sue, any person in possession or control of the vehicle or property can also sue for recovery of damages caused to it in an accident. In any case, the l st respondent testified that he was driving his Mercedes Benz bearing a garage No. UI 703D/UPF922. He was using a garage number, because he had already removed the Registration number in order to get a personalised number.

We wish to observe that the ownership of the Benz car by the 1st respondent was neither challenged in the pleadings nor at the trial. The evidence of the 1st respondent, to which we have just referred in this judgment, was not challenged. The appellant is therefore taken to have accepted that evidence. The issue was raised for the first time in the Court of Appeal

This is what the Court of Appeal, in the lead judgment of Berko, J.A., said:

"The arguments in support of ground 5 can be grouped into three segments. The first segment was that it was not proved that the plaintiff was the owner of the Mercedes Benz car that was involved in the accident.
My short answer is that in a claim of negligence ownership of the subject* matter is irrelevant. It is *possession that matters. At the time of the accident it was the plaintiff who was in charge of the vehicle. He could therefore maintain the action against the one who caused the damage."

As we have already pointed out unchallenged evidence showed that the 1st respondent was the owner of the Mercedes Benz car. However, even if he was not the owner of the car, we agree with the Court of Appeal that possession thereof conferred on the 1st respondent the right to claim the damages in question. In the circumstances, we saw no merit in ground 11 of the appeal. It also failed.

In the result we were satisfied that the appeal had no merit and that the Court of Appeal rightly dismissed it and upheld the decision of the trial court. It was for these reasons that we upheld the Court of Appeal's decision and dismissed this appeal with costs. The appellant shall pay the costs of the first, second and fourth respondents.

Dated at Mengo this 23rd day of April 2002.

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

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

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

J. N. MULENGA

JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT