**T. O. KUTI**

**V.**

**MRS S. BALOGUN**

IN THE SUPREME COURT OF NIGERIA

THE 26TH DAY OF JANUARY, 1978

SC. 127/1976

**LEX (1978) - SC. 127/1976**

OTHER CITATION(S)

2PLR/1978/45 (SC)

**BEFORE THEIR LORDSHIPS**

GEORGE SODEINDE SOWEMIMO, JSC

CHUKWUWEIKE IDIGBE, JSC

KAYODE ESO, JSC

**BETWEEN**

T. O. KUTI - Appellant

AND

MRS S. BALOGUN - Respondent

**ORIGINATING COURT**

1. LAGOS STATE HIGH COURT (Odesanya, J.)

2. LAGOS CHIEF MAGISTRATES’S COURT

**REPRESENTATIONS**

T. O. KUTI. - Appellant

AND

MRS S. BALOGUN - Respondent

**MAIN JUDGMENT**

K. ESO, J.S.C. (DELIVERING THE LEADING JUDGMENT):

This is an appeal from the decision of the Lagos State High Court (Odesanya, J.) which gave judgment in favour of the plaintiff (now respondent) in a claim for damages. The claim originated in the Lagos Chief Magistrates’s Court in Suit No. 2498/1967, where the plaintiff claimed against the 1st and 2nd defendants, jointly and severally, the sum of £500 (N1,000) as special and general damages for the damage done to the plaintiff’s shop and articles therein at No. 35 Karimu Street, Surulere, when the 2nd defendant’s taxi cab, negligently driven by the 1st defendant, hit the said shop.

At the trial, the learned trial Chief Magistrate accepted the plaintiff’s evidence which was that she was in her shop sleeping when at about 11 p.m., she was woken up by a heavy bang caused by the taxi cab crashing against the walls of her shop. The taxi cab had left the main road, crossed a two feet drain, to hit the plaintiff’s shop which was three feet away from the drain. The driver of the taxi cab, that is the 1st defendant, gave no evidence, nor was there in fact any other evidence in regard to the cause of the accident.

The defence of the appellant (2nd defendant) was however that he hired the cab to one Solomon Gbadegesin under a hire purchase agreement which he tendered as Exhibit E. He also said that he kept a record of the transaction between him and Solomon Gbadegesin, and he tendered this record as Exhibit F. He denied knowledge of the 1st defendant and said he did not even know who the driver of the taxi cab was on the day of the accident.

Under cross examination, the appellant said-

“Mr Gbadegesin was a hirer and I am the owner of the vehicle. I am still the registered owner of the vehicle. The arrangement was a private one between me and Mr Gbadegesin and I insured the vehicle. The Policy of Insurance was current at the time of the accident. It is a taxi and I have it registered in my own name as a Taxi cab.”

When re-examined he said-

“The Policy of Insurance is in my name.”

After reviewing the evidence in the case, the learned Chief Magistrates held:

“I (sic) don’t accept the evidence of the 2nd defendant that the vehicle was hired out to the said Gbadegesin. Counsel for defendants said the plaintiff must show that 1st defendant was the servant or agent of the 2nd defendant. I don’t agree with him. I am guided by the decision of the Federal Supreme Court in the case of Laisi Ogunmulyiwa v. E.A. Solanke. There it was held that where the owner has the certifcate of insurance in his name and even admitted that he owned the vehicle the presumption that the vehicle was being driven by his servant or agent is well founded and it is for him to rebut by proof of evidence. There is no such evidence before me.”

The learned trial Chief Magistrate then found for the plaintiff and awarded him damages totalling £170:3/-(N340.30).

In the appeal by the 2nd defendant against the decision, to the High Court, Odesanya, J. upheld, rightly in our view, the application, by the trial court, of the maxim res ipsa loquitur to the case. We think the facts in this case justify the application of the maxim. The taxi cab left the main road, went over a drain two feet wide, carreered another three feet, to hit the wall of the shop. As the learned Judge rightly pointed out, the first defendant, that is the driver of the vehicle, did not call any evidence and so did not deny allegations made against him.

In regard to the defence of the appellant, the learned Judge held-

“The defence of the appellant, was that he never had any dealings with the first defendant and that one Solomon Gbadegesin was the person to whom the motor vehicle was hired. He admitted that the vehicle was hired. He admitted that the vehicle was his own and that it was insured in his own name and registered also as a taxi cab in his name.”

Solomon Gbadegesin was not summoned to give evidence but 3rd party process was initiated against him. The appellant’s motion for an order for substituted service was struck out and without any application for an adjournment for service of 3rd party process by appellant’s counsel the hearing began and ended with appellant’s evidence. He testified that there was a hire purchase agreement between him and Solomon Gbadegesin. He tendered two documents in proof of the agreement. The first document Exhibit ‘E’ is a one page agreement. It significantly describes itself as a Hire Agreement and not a hire purchase agreement made between Abusi-Odu Transport and Solomon Gbadegesin who purportedly signed it after it had been interpreted into Yoruba language. Neither the interpreter Onadeko nor Gbadegesin was called although the Lagos address of them appear in Exhibit ‘G’. As a matter of fact, Onadeko of 15, Idumagbo Avenue, Lagos lives or works next-door to the appellant who according to the record of appeal lives at 17 Idumagbo Avenue, Lagos. The signatures on the document were not identical. The payments endorsed on the document and purportedly made by Gbadegesin and authenticated by one Agboola were not proved. Agoobla were not called. The document refers inter alia to a hiring rate of £4 per day or £20 per week. It is a most unsatisfactory document and does not look like or read like a hire-purchase agreement. The document was no doubt meant to disguise the arrangement between the appellant and someone. It is remote from an enforceable hire-purchase agreement. The other document Exhibit ‘F’ is a massive record of payments by Solomon Gbadegesin. It is really amazing that anyone could have expected the trial court to act on this strange book as establishing or confirming a hire purchase agreement.

The learned Judge then examined the grounds of appeal filed and argued by learned Counsel, held that there was an onus on the appellant to rebut the inference that he was vicariously liable for the negligence of the 1st defendant which onus, he said, must be drawn from the fact not only of ownership but of the registration and insurance of the motor vehicle in his memo and also its registration as a taxi cab in his name.

Finally the learned Judge dismissed the appeal, holding that exhibits ‘E’ and ‘F’ were not helpful to the defence and that the appellant failed totally to rebut the presumption which the evidence clearly raised.

Against this decision, the appellant has now appealed on the following grounds-

“1. The learned trial Judge erred in law and on the facts by holding that the Appellant was liable in negligence because he owned and insured the vehicle when this is not the correct test of liability but control or the purpose of the journey as clearly laid down in Kuti vs. Jibowu (1972) NMLR 18, Morgans vs. Lauchbury (1973) A.C. 127 etc. all of which were duly brought to the attention of the learned trial Judge.

2. The learned trial Judge misdirected himself in law and on the facts by relying on Exhibits ‘G’ and ‘F’ when that issue was not raised before him by the respondent who did not cross-appeal and when in any case the said Exhibits negate the control of the driver by Appellant.

3. The learned trial Judge erred in law and on the facts relying on the decision in Ogunmuyiwa vs. Solanke (1956) I F.S.C. 53 in that there was no denial of ownership of the vehicle by the Appellant in the instant case and further the Appellant gave rebutting evidence to the effect that he was not the master or principal of the driver.

4. The learned trial Judge misdirected himself in law and on the facts in failing properly to apply his mind to the defence of the Appellant.

5. The decision is against the weight of the evidence.”

The contention of Mr Kehinde Sofola, learned Counsel for the 2nd defendant/appellant, who argued all the grounds of appeal together, may be summarised as follows-

Where there is proof of ownership of a vehicle, the presumption is that the driver is the agent of the owner. However in this case there was sufficient evidence adduced by the 2nd defendant/appellant before the trial court to warrant a conclusion by that Mr Sofola referred us to the decision of this Court in T. O. Kuti (trading as Abusi Odu Transport) & anor vs. Oludademu Jibowu and anor 1972 6 S.C. 147.

Mr Debo Akande, learned Counsel for the plaintiff/respondent urged a dismissal of the appeal on the grounds that the 2nd defandant/appellant failed to discharge the onus placed on him. The issue before the court, learned Counsel contented, was whether there was a real Gbadegesin in this case. The learned Chief Magistrate considered the whole evidence before him including exhibits ‘E’ & ‘F’.

The liability of the owner of a car for any damage for which the driver of the car was found liable has been clearly stated in the judgment of this Court in T. O. Kuti (trading as Abusi Odu Transport) and anor v. Oludademu Jibowu and anor (supra). There the court, (ibidem at p. 167) after agreeing with the statement of the law by du Pareq, L.J., in Hewitt v. Gonvin (1940) I.K.O. 188 at p. 194 and by Denning, L.J., (as he then was), in Ormrod v. Crossville Motor Services Ltd. (1953) 2. All E.R. 753 at pp. 754 and 755, held that the ownership of a car cannot of itself impose any liability on the owner. The owner, without further information is, however prima facie liable because the court is entitled to draw the inference that the car was being driven by the owner, her servant or agent. See also Ogunmyiwa v. E.A. Solanke (1956) IF.S.C. 53.

To our mind, both the learned trial Chief Magistrate and the learned Judge came to the correct decision when they held that on the facts of this case, the 2nd defendant, that is the appellant, having admitted being the registered owner of the vehicle, which he also admitted was registered as a taxi cab in his name, insured, also in his name, is prima facie liable.

The real issue is whether the appellant has by evidence rebutted the presumption against him of vicarious liability. The learned trial Chief Magistrate said there was no such evidence before him. But, indeed there was. There were Exhibits ‘E’ & ‘F’, tendered by the appellant, to which the learned Chief Magistrate made no reference what-so-ever in his judgment. So, what happended was what the learned trial Chief Magistrates failed to consider the evidence.

It was the duty of the learned Chief Magistrate to consider all the evidence placed before him, including exhibits ‘E’ & ‘F’, before he could come to a decision as to whether or not, the appellant has rebutted the presumption of vicarious liability. It is only after such consideration that he, as the trial court, could conclude whether or not the exhibits were helpful to the defence. This, however, he failed to do.

One of the main complaints of the appellant before the learned Judge, on appeal, was whether or not the learned trial Chief Magistrate was right in coming to the decision that the appellant failed to rebut the presumption against him, without considering those exhibits. But what the learned Judge did was to make an exhaustive examination of the exhibits on his own, and raise thereupon issues which were not canvassed by the parties either at the trial or on appeal before him. We think there is a lot of force in the submission of Mr Sofola that the learned Judge erred seriously in this regard. The issues as to-

(i) the agreement, exhibit ‘E’, describing itself as a ‘hire agreement’ and not a ‘hire purchase agreement’;

(ii) the interpreter of the agreement into Yoruba language one Onadeko not being called;

(iii) the Lagos address of Gbadegesin and of Onadeko living or working next door to the appellant;

(iv) the signatures on the document not being identical;

(v) the payment endorsed on the document, purportedly made by Gbadegesin, and authenitcated by one Agboola, not being proved;

(vi) the document referring inter alia to a hiring rate of £4 (N8) per day or £20 (N40) per week; and

(vii) the document being meant to disguise the arrangement between the appellant and someone;

were all raised for the first time by the learned Judge. They were not, as Mr Sofola has rightly submitted, canvassed by either party to the case, either before the trial court or before the learned Judge on appeal. It was, with respect, a case of the learned Judge going on a voyage of his own, which conduct this Court deprecated in T. O. Kuti (trading as Abusi Odu Transport) and anor v. Oludademu Jibwu (supra). There, this Court said that in this type of circumstance, it is not open to a court of appeal to raise issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. There could be instances however when a point which has not been raised is material to the determination of the appeal. When a court of appeal feels inclined to raise such point, parties must be given an opportunity to make their comments thereupon before the court takes a decision on the point. That, of course, is not the case in this appeal.

In our view, this appeal must succeed and, as the trial court failed to consider all the evidence placed before it, there shall be a retrial. Before we make our order, we would like to make reference, in passing, to a matter to which our attention has been drawn by learned Counsel for the appellant, Mr Sofola. One of the exhibits tendered in the Chief Magistrate’s Court, by the plaintiff in this case, Exhibit ‘C’, is a letter written by a firm of solicitors to an Insurance Company. The letter was written on behalf of the plaintiff/respondent by a firm of solicitors with which the learned Judge had been, apparently at one time, connected. Having regard to the contents of exhibit ‘C’ which show that the firm of solicitors must have been briefed in respect of this case, we do not think the learned Judge ought to have taken the matter when it came before him on appeal especially as the exhibit is part of the record.

This appeal succeeds and it is allowed. We make the following orders:-

(i) The judgment of Odessanya J., in suit No. LD/8A/73 delivered on 16th September, 1974, including his order as to costs is hereby set aside;

(ii) The judgment of Adetayo Awolesi, Chief Magistrate, in Suit No. 2498/67 delivered on 10th November, 1973, including his order as to costs, is also hereby set aside;

(iii) There shall be a retrial of the matter before another Chief Magistrate;

(iv) The defendant/appellant is awarded the costs of this appeal assessed at N195, costs in the High Court assessed at N25. The costs in the Magistrate’s Court shall abide the retrial.