REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 94 OF 1975

NAIROBI CITY COUNCIL .....APPELLANT

VERSUS

URSULA KRISHNAN PATEL.....RESPONDENT

JUDGMENT

A vehicle belonging to a partnership firm was driven into a metered parking bay and outstayed its welcome. A notice requiring the payment of an excess charge was attached to the vehicle. The amount was not paid, and proceedings were commenced. A warrant of arrest was issued requiring the firm's secretary to be arrested, the warrant being backed with the usual proviso that there should be no arrest upon cash bail being deposited.

The serving officer (I shall so describe him) did not seek to serve the warrant on the secretary or any member of the firm (an unincorporated company has no secretary in the sense of a secretary of a limited liability company) and insisted on leaving it in a kiosk with the sister of one of the firm's partners, though she told him that she had nothing whatever to do with the firm. Then, notwithstanding her offer of cash bail, she was arrested. Not surprisingly, she was upset and resolved to seek damages, and she chose to sue not the serving officer and not the Government, but the appellant. She succeeded before the Court of the Senior Resident Magistrate; but the appellant maintaining, as it has all along maintained, that it is not liable for what was done, though it employs the serving officer, appeals to this Court against the lower court's decision.

Much that was done was wrong; but we need not now concern ourselves about it because, whilst on similar facts it may be of considerable importance in another case, the appellant accepts it to be so. But the appellant does not see why it should have to pay anything as it did not authorise what was done, subsequently ratify it or make itself otherwise liable for it. It says that if anyone can be vicariously liable for what the serving officer did, it is the Government. What control, the appellant asks, can it have over what a Court official does in the course of his Court duties" That it pays his salary is neither here nor there.

At the invitation of the Court, looking to the general consequences of a decision, principal State counsel appeared as *amicus curiae*. He took the view that if there were vicarious liability in the Government at common law by reason of section 4(5) of the Government Proceedings Act, the Government is nonetheless not liable. I shall express no views about it as I do not need to do so. Simpson J has recently had to consider it: see *Davis & Shirtliff Ltd v The Attorney-General.*

Is, then, the appellant vicariously liable for what the serving officer did, or is it not" Various classes of persons may find themselves liable in law for someone else's torts, but, in this case I think we can be concerned only with a master's liability for his servant's torts. In this part of the spectrum of the law there are what are generally called the older cases and the modern cases, and different judges (and others) have suggested different tests to ascertain liability. I am content, on what is before me, to rely on just one case, the *locus classicus* which has stood the test of time, ie *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd* [1947] AC 1, because, as it seems to me, the core of the issue before the Court lies in the question: who was the serving officer's master when he wrongly left the warrant of arrest with the respondent and then arrested her" In other words, he had, at the time, two masters, the appellant (his general master) and the Government (his special master) and one of them only, subject to statutory limitation, could be vicariously liable for his actions. On the facts, if the appellant was not, at the relevant time, his master, this appeal has to succeed. It is, so it has been held by the House of Lords, a question of fact: *M'Cartan v Belfast Harbour Commissioners* [1911] 2 IR 143. It has also been held that the facts of one case cannot rule the facts of another, however useful they may be as a help and guide to its solution. In arriving at that solution, it must be borne in mind that the burden is on the appellant to rebut the presumption that it remained the serving officer's master and such rebuttal is said to be difficult to achieve. Indeed, it can be achieved only by showing that the right to control the way in which the work was done was, at the relevant point of time, vested in someone else and not itself.

Lord Porter, in the *Mersey Docks & Harbour Board* case said, at page 17:

Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it.

Our subject-matter is unusual and, as I have said, it is difficult to rebut the presumption; but there are degrees of difficulty and ours is a lesser one. It is true that the appellant pays the serving officer's salary and can, perhaps, dismiss him; but one has only to ask what control the appellant could have had over the order made by a properly constituted Court presided over by a duly appointed magistrate" All that it could have done, and that would have been unnecessary, was to tell the serving officer to do what the Court told him to do. What it could not have done, was to tell him to do something else, for that might lead to a charge that it was in contempt of court. The right to control the way in which the warrant of arrest was to be executed was, at the relevant time, vested in the Court and it could not otherwise have been vested. Had the serving officer done his work properly, that work would have been done as an officer of the Court and it cannot be held that because it was not done properly, it was done as a servant of the appellant.

I have sympathy for the respondent for what she was made to undergo but that is no ground for ordering the appellant to be responsible for her solatium. The appeal is allowed.

I should add that I am obliged to Mr Shields for appearing and that the appellant very fairly will not seek to recover what it paid the respondent and does not ask for costs.

Appeal allowed.

Dated and delivered at Nairobi this 17th March 1978.

E. TREVELYAN

JUDGE

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