

IN THE CIRCUIT COURT ONE HELD AT ACCRA ON THURSDAY, 28<sup>TH</sup> OF  
MARCH 2024, BEFORE HER HONOUR AFIA OWUSUAA APPIAH (MRS)  
CIRCUIT COURT JUDGE

C2/139/2022

1. DANIEL DENSU OFORI

2. ABRAHAM CUDJOE

PLAINTIFF

VRS

1. DANIEL AWUKU

2. BERNARD ODEI

DEFENDANT

**JUDGMENT**

Plaintiffs herein have sued Defendants herein jointly and severally for the reliefs below;

- i. Immediate payment of the sum of GHC50,000 being the value of the car.
- ii. Damages for the loss of the use of the car
- iii. Cost inclusive of the plaintiff's lawyers professional legal fees.

Plaintiff's case is that on the 18<sup>th</sup> of August 2021, 1<sup>st</sup> Plaintiff sent his Hyundai Elantra 2012 model vehicle with trade plate number DV 7-79 to 2<sup>nd</sup> Plaintiff's workshop to be fixed. Upon completion of the works and on instructions of 1<sup>st</sup> Plaintiff, 2<sup>nd</sup> Defendant sent the vehicle to the washing bay owned by 2<sup>nd</sup> Defendant herein and supervised by 1<sup>st</sup> Defendant. They averred that the car keys were handed over to the 1<sup>st</sup> Defendant by 2<sup>nd</sup> Plaintiff and same witnesses by one Fauzia Yakubu and her friend. Later when 1<sup>st</sup> Plaintiff went to the washing bay to collect the car, same was nowhere to be found and the

Defendants could also not offer any reasonable information on the whereabouts of the vehicle. They stated that they are convinced Defendants have connived to deprive plaintiffs the use of the car which is valued GHC50,000 in the minimum hence the suit.

Defendants in their statement of defence denied the averments of Plaintiffs. According to Defendants the records of the washing bay of the date of the alleged delivery and disappearance of the Hyundai Elantra car and its keys does not reflect that such vehicle was brought to the washing bay. They denied the said vehicle ever delivered to Defendants contending that no keys and or vehicle were handed over to 1<sup>st</sup> Defendant. They further averred that 1<sup>st</sup> Defendant's attention was drawn to the alleged delivery and disappearance of the car and its keys only after Plaintiffs complained of same at the washing bay.

At the close of pleadings, the court and the parties in open court during application for directions agreed on the following issues for determination;

1. Whether or not 2<sup>nd</sup> Plaintiff delivered 1<sup>st</sup> Plaintiff's Hyundai Elantra 2012 make vehicle together with its keys to 1<sup>st</sup> Defendant.
2. Whether or not Defendants are liable for the loss of the said vehicle
3. Any other issue raised by the pleadings.

The Standard of proof in civil case such as the present action is proof of the preponderance of probabilities. **Section 14** of the Evidence Act 1975, NRCD 323 (hereinafter referred to as NRCD 323) provides "except as provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting". Section 12(2) of Act 323 defines preponderance of probabilities as "*Preponderance of the probabilities*" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that

*the existence of a fact is more probable than its non-existence.* In the case of **ADWUBENG V DOMFEH (1997-98) 1 GLR 282** it was held per holding 3 as follows: “ *And sections 11(4) and 12 of NRCD 323 clearly provided that the standard of proof in all civil actions, without exception, was proof by a preponderance of probabilities. Accordingly, the cases which had held that proof in title to land required proof beyond reasonable doubt no longer represented the present state of the law*”. This has always been the position of the law. Also in the case **Faibi vs. State Hotels Ltd [1968] GLR 411**, it has been held that the onus in law lay on the party who would lose if no evidence were led in the case and where some evidence were led, it lay on the one who would lose if no further evidence were led.

2<sup>nd</sup> Plaintiff testified on behalf of Plaintiffs and called one Fauzia Yakubu to testify as PW1. They relied on their witness statements filed on 22/3/2023 but did not tender any exhibits in evidence.

2<sup>nd</sup> Plaintiff a mechanic testified that on the said 18/03/2021, after working on the vehicle, on the instructions of 1<sup>st</sup> Plaintiff he dutifully sent the car to Passion washing bay located at Nungua. According to 2<sup>nd</sup> Plaintiff on the instructions of 2<sup>nd</sup> Defendant, he handed over the keys to the vehicle to 1<sup>st</sup> Defendant and same was witnessed by PW1. He testified that at the close of the day when he went for the vehicle same was nowhere to be found. 1<sup>st</sup> defendant who collected the keys could also not offer any tangible explanation regarding the disappearance of the car. Under cross-examination, 2<sup>nd</sup> Plaintiff insisted that he handed over the keys to the vehicle to 2<sup>nd</sup> Defendant Bernard Odei and same was witnessed by PW1. He denied counsel for Defendants contention that 2<sup>nd</sup> Defendant was not around the washing bay at the alleged time he delivered the vehicle.

PW1, Fauzia Yakubu in her evidence in chief testified that on the said 18/08/2021, she went to the washing bay in the company of her boyfriend to wash their car. She testified that she personally witnessed 2<sup>nd</sup> Defendant who is the owner of the washing bay instructing 1<sup>st</sup> defendant to collect the keys to Plaintiff's Hyundai Elantra for washing and park same at a particular spot for the car to be cleaned. Under cross-examination, PW1 denied seeing 2<sup>nd</sup> Defendant at the washing bay on the day in question. PW1 under cross-examination denied testifying that 2<sup>nd</sup> defendant was at the washing bay. She stated that she does not know the owner of the washing bay but knows only the supervisor.

2<sup>nd</sup> Defendant testified for himself and 1<sup>st</sup> Defendant by relying on his witness statement filed on 9/05/2023. Counsel for Defendants tendered through PW1 photographs of the washing bay in evidence as exhibit one whilst 2<sup>nd</sup> Defendant tendered in evidence exhibit 2 being the SPC washing bay attendance book. They also called one Seth Abrokwah Adjei to testify as Dw1.

2<sup>nd</sup> Defendant, owner of the washing bay testified that he has laid down protocols for workers and clients to follow when a client brings their vehicle for washing. He stated that the specific job request of a client is written in an attendance book. He stated further that he has conspicuously pasted notice of disclaimer on the walls cautioning clients not to hand over keys to vehicle to workers and for clients to take all valuables from the vehicle as management will not be held liable for the lose of valuables left in the vehicle. According to him on the 18/08/2021, he was on a field inspection work with LADMA Sub Technical Team of Experts in charge of inspecting and evaluating building Plans for building permit approval when he received a call at about 2 pm 1<sup>st</sup> Defendant that he had been arrested by the some people and the police for losing their vehicle at the washing bay. He stated that he informed his team and was taken back to the office where he picked up his vehicle and

went to the police station to sign the bail terms for 1<sup>st</sup> defendant after his statement had been taken. He contended that in his presence at the police station, 2<sup>nd</sup> Plaintiff admitted that he did not speak to 1<sup>st</sup> Defendant or tell him the kind of service he wanted. 2<sup>nd</sup> Defendant denied being present at the washing bay on the said date or the vehicle being serviced at the washing bay on the said date. Under cross-examination, 2<sup>nd</sup> Defendant vehemently refuted counsel for Plaintiff's contention that he was present at the washing bay and directed 2<sup>nd</sup> Plaintiff to hand over the keys to the vehicle to 1<sup>st</sup> defendant.

Dw1, Seth Abrokwah Adjei, a worker of electricity Company of Ghana, testified that on the 18/08/2021, he was with LADMA Sub Technical team which 2<sup>nd</sup> Defendant was part as an engineer. He stated that around 2 pm that day, when they got to Tse Addo, 2<sup>nd</sup> Defendant received a call and his mood and countenance changed. When asked what the issue was, he said the manager of his washing bay had been arrested at the Nungua Police Station. According to him, 2<sup>nd</sup> Defendant sought permission and was dropped at his office to pick his vehicle. Later that day at about 8 pm he called 2<sup>nd</sup> Defendant who told him he was still at the police station trying to secure bail for the manager. Dw1 stated that 2<sup>nd</sup> Defendant was not present at the washing bay and was in his presence when news of the arrest of the manager of the washing bay got to him.

**ISSUE 1 - Whether or not 2<sup>nd</sup> Plaintiff delivered 1<sup>st</sup> Plaintiff's Hyundai Elantra 2012 make vehicle together with its keys to 1<sup>st</sup> Defendant.**

Plaintiff's case is that 2<sup>nd</sup> Plaintiff delivered the keys to 1<sup>st</sup> Plaintiff's Hyundai Elantra vehicle to 1<sup>st</sup> Defendant. This assertion has been vehemently denied by the Defendants in their statement of defence thereby putting this fact in issue. In proving this fact, 2<sup>nd</sup> Plaintiff in his evidence in chief testified that at

the washing bay, he was instructed by 2<sup>nd</sup> defendant, the owner of the washing bay to give the keys of the vehicle to 1<sup>st</sup> defendant the supervisor and same was witnessed by PW1. Under cross-examination, 2<sup>nd</sup> Plaintiff insisted that he handed over the keys to the vehicle to 2<sup>nd</sup> Defendant Bernard Odei and same witnesses by PW1. He denied counsel for Defendants contention that 2<sup>nd</sup> Defendant was not around the washing bay at the alleged time he delivered the vehicle. PW1 also in her evidence in chief stated that she personally witnessed 2<sup>nd</sup> Defendant instructing 1<sup>st</sup> Defendant to collect the keys to the Hyundai Elantra vehicle and park it for washing. However under cross-examination, she denied this statement completely and stated categorically that she does not know the owner of the washing bay but only the supervisor. Below are excerpts from the cross-examination of PW1;

*“Q: So when you saw 2<sup>nd</sup> Plaintiff entering with a car what happened*

*A: When 2<sup>nd</sup> Plaintiff entered he went straight to where the supervisor sat and he gave his key to the supervisor. There were nails by the window shown in exhibit 1. The supervisor hanged the keys on the wall. I asked my friend to give his keys to the supervisor for it to be hanged there but he said no and that we would wait.*

*Q: So did the 2<sup>nd</sup> Plaintiff say anything to the supervisor*

*A: What I saw and heard was that he told the supervisor he is going and that he will be back*

*Q: Did the mechanic walk direct to the supervisor to hand over the keys to him*

*A: Yes*

*Q: I put it to you that you are being untruthful to the court because in paragraph 4 of your own witness statement you say you I witnesses the 2<sup>nd</sup> Defendant who is the owner of the washing bay instructing the 1<sup>st</sup> Defendant to collect the keys.....”*

*A: I did not see the owner of the washing bay there because I do not know the owner. It is only the supervisor I saw.”*

PW1's evidence in chief and answers under cross-examination is contradictory. PW1 under cross-examination denied the essentially her evidence on oath. The denial of her evidence in chief did not only result in contradicting her own evidence and that of 2<sup>nd</sup> Plaintiff, but same corroborated the evidence of 2<sup>nd</sup> Defendant that he was not present at the washing bay on the said date as claimed by 2<sup>nd</sup> Plaintiff and counsel for Plaintiffs. Brobbey JSC in the case of **CHOU SEN LIN V TORNADO ENTERPRISE LTD (2007-2008) 1 SCGLR 135 @140 held at**

"One point that devastated the case of the defendants was the evidence given by their own witness, the second defendant witness. His testimony was clearly against them to the extent that he even described the acquisition of the third plot to them as an error. Rather, his testimony supported the case of the plaintiff. The law on this issue is settled and it is this "When the evidence of a party remains uncorroborated but that of his opponent is corroborated even by the witness of his opponent, the court ought not to accept the uncorroborated version in preference to the corroborated one. The only exception to this rule is where the court or finds reason to reject the corroborated evidence."

2<sup>nd</sup> Defendant evidence that he was not at the washing bay as claimed by 2<sup>nd</sup> Plaintiff in his evidence in chief stands corroborated by the evidence of Dw1 and his absence from he washing bay confirmed by PW1 under cross-examination. He further testified that his perusal of the attendance book in which vehicles serviced at the washing bay is recorded does not disclose the said vehicle having been serviced at the washing bay. A perusal of exhibit 2 confirms that the said Hyundai Elantra vehicle is not listed as one of the vehicles worked on at Passion washing bay. The court also has no evidence on record to reject this corroborated evidence and therefore finds and holds

that 2<sup>nd</sup> Defendant was not at the washing bay on the day of the incident as claimed by the Plaintiffs.

2<sup>nd</sup> Plaintiff's evidence of handing over the keys to 1<sup>st</sup> Defendant on the instructions of 2<sup>nd</sup> Defendant stands contradicted by the evidence of his own witness PW1 and further is inconsistent with the claim of Plaintiffs in their statement of claim. Plaintiffs per the statement of claim averred that 2<sup>nd</sup> Plaintiff on the instructions of 1<sup>st</sup> Plaintiff handed over the keys to 1<sup>st</sup> Defendant. 2<sup>nd</sup> Plaintiff's evidence in chief seeks to depart from their claim as contained in the statement of claim. It has been held in the case of **Yaa Semanhyia & others vs. Elizabeth Bih & others [2006]2 MLRG 184 @ 195** **that**

*“It is an acceptable practice that whichever party sets up an entirely different case from that which has been pleaded must fail and or bear the consequences.*

Defendants deny 1<sup>st</sup> Defendant collecting/ receiving the keys to the vehicle from 2<sup>nd</sup> Defendant. both parties evidence in chief were damaged by their answers under cross-examination. They do not appear to the court to be credible witness on whose “inconsistent” evidence the court can reasonably make a finding of fact.

Plaintiffs therefore fail to establish on the preponderance of probabilities that 2<sup>nd</sup> Plaintiff indeed delivered 1<sup>st</sup> Plaintiff's Hyundai Elantra 2012 vehicle together with its keys to 1<sup>st</sup> Defendant on the day of the unfortunate incident.



## ISSUE 2 - WHETHER OR NOT DEFENDANTS ARE LIABLE FOR THE LOSS OF THE SAID VEHICLE.

The claim of Plaintiffs that 2<sup>nd</sup> Plaintiff delivered the vehicle to 1<sup>st</sup> Defendant at the Passion washing bay for later collection raises a claim that falls under legal principles of obligations and liabilities of a bailee against 1<sup>st</sup> Defendant and a claim of vicarious liability against 2<sup>nd</sup> defendant in his capacity as the owner of the washing bay and employer of 1<sup>st</sup> Defendant..

According to the Black's Law Dictionary, 9<sup>th</sup> edition, edited by Bryan A. Garner, at page 162 bailment has been defined as **“a delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose under an express or implied-in-fact contract”**

In the case of **KWAO ALIAS MENI v. AWURAA ALIAS FATI [1987-88] 2 GLR 66-81** it was held by the Court of Appeal thus:

*“As a general rule a bailee was liable to account for the goods entrusted to his care. However his liability to make good any loss depended on whether he received reward for his services or received no reward, i.e. whether he was or was not a gratuitous bailee.”*

In law, in order for bailment to exist, the bailee must have both the intent to possess the property, and actual possession of the property. The bailor intends that the property will be returned to him at the end of a specified period of time, or after the purpose for which the property was given has been accomplished. It does not necessarily arise from an express contract.

Vicarious liability in the legal conceptual sense is transferred liability. As a basic legal norm, liability for the consequences of a tortious act is invariably attached primarily to the tortfeasor but under the rule the law extends the

liability to another person who then becomes jointly and severally liable with the tortfeasor for the act done or committed at his instance and upon his direction or authorization or his interest or for his purposes. Relationships under which such authorization or direction or interest are often presumed in law include principal and his agent, a master and his servant, an employer and his employee among others. It is said that, the employer in such an action is sued in respect of acts or omissions of his servant/employee in the normal course of his employment and within the scope of his authority. *In ORMROD V CROSVILLE MOTOR SERVICES LTD [1953] 2 ALL ER 753, Denning LJ explaining the vicarious liability of the owner or employer in negligence cases said: "The law puts an special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is, his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."*

The reason for the employer's liability is not far-fetched. In *FIBRE BAG MANUFACTURING CO. v. SARPONG [1967] GLR 657, The Court of Appeal held "There was the duty on the employer at common law to take reasonable care, first, to provide and maintain proper machinery and appliances; secondly, to select properly skilled persons to manage and superintend the business and thirdly, to provide a proper system*

Thus, once the liability of the servant/employee is established, the employer/owner is presumed to be vicariously liable for the negligence of the servant unless the employer/owner is able to rebut that presumption by proving for instance that, the servant/driver was not at the time of the incident acting in the course of his employment or that, he drove the vehicle

without his authority. See DE GRAFT JOHNSON AND ANOTHER v. GHANA COMMERCIAL BANK (GUARDIAN ROYAL EXCHANGE ASSURANCE LTD., THIRD PARTY) [1977] 1 GLR 179

Plaintiff therefore had to establish the liability of 1<sup>st</sup> Defendant by leading sufficient evidence to establish that that 1<sup>st</sup> Defendant was entrusted with the keys to the vehicle which created a relationship of bailee/bailor between them before the issue of whether or not defendants are liable for the loss of same can be determined. Unfortunately for plaintiff, as held under issue 1 supra, they failed to establish that 1<sup>st</sup> Defendant collected the keys to the vehicle as they claim. Their evidence is so contradictory and inconsistent that it fails to tilt the scale of balance in their favour. **Brobbeey JSC** at holding 5 in the case of In RE ASHALLEY BOTWE LANDS, ADJETEY AGBOSU AND OTHERS V KOTEY AND OTHERS (2003-04) SCGLR 420 held that the effect of sections 11(I) and 14 and similar sections in the Evidence Decree 1975 may be described as follows: "A litigant who is a defendant in a civil case does not need to prove anything. The plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact, or of an issue and that determination depends on evaluation of facts and evidence the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour" Section 11(1) of, NRCD 323 provided "For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party."

The failure of Plaintiffs to establish that a bailee/bailor relationship was created between the 2<sup>nd</sup> Plaintiff and 1<sup>st</sup> Defendant, 1<sup>st</sup> Defendant cannot be held liable for the loss of the said vehicle neither can 2<sup>nd</sup> Defendant be held vicariously liable for acts 1<sup>st</sup> Defendant has not been found liable of.

Accordingly, plaintiffs claim against defendants fail in totality and same is dismissed forthwith. Cost of GHc4,000 awarded in favour of 2<sup>nd</sup> Defendant only against Plaintiffs forthwith.

**PLAINTIFFS PRESENT**

**DEFENDANTS ABSENT**

**MR FELIX ABOAGYE FOR PLAINTIFF ABSENT**

**KELVIN KABUTEY DOSO HOLDING THE BRIEF OF CHARLES**

**ZWENNES FOR DEFENDANTS PRESENT**

**(SGD)**

**H/H AFIA OWUSUAA APPIAH (MRS)**

**(CIRCUIT COURT JUDGE)**