

COURT OF APPEAL
BENIN DIVISION
1ST JULY, 1999. CA/B/223/93
CORAM:- I. A. SALAMI, B. A. BA'ABA, F. F. TABAI, JJCA.

NATIONAL ELECTRIC POWER AUTHORITY APPELLANT
AND
MARK OBIESE RESPONDENT

ACTIONS - *Limitation of actions - Vicarious liability - Action against principal offender - Where not commenced within the stipulated period - The trial of only the master should not go on.*

JURISDICTION - *Statute bar - Sympathy or merit of the case - Ought not affect the trial court - In considering the all important issue of jurisdiction.*

TORTS - *Negligence - Vicarious liability - Is the imposition of liability on one person - For the actionable conduct of another.*

TORTS - *Negligence - Vicarious liability - Where principal actor is not joined as a party and his liability established - The master cannot be found vicariously liable.*

FACTS

The plaintiff's/respondent's driver was plying along Benin - Sapele Road sometime in March, 1986. Felix Okpega (2nd defendant), who was driving the appellant's vehicle, left his own side of the road and collided with the respondent's vehicle which somersaulted many times and get damaged beyond economic repairs. Respondent filed an action before the Benin-City High Court claiming special and general damages against the appellant and the driver of the vehicle jointly. It would appear that the appellant had earlier agreed to pay the sum of N30,000.00 to the respondent, which sum was claimed in the alternative. In an earlier mo-

tion filed by the defendants pursuant to the Public Officers Protection Act, the trial court found that the action against the 2nd defendant was not maintainable as it was statute barred. But it ruled that the action against the 2nd defendant/appellant was proper.

At the close of hearing, the trial court found the appellant vicariously liable and awarded the total sum of N242, 741. 85 damages in favour of the respondent. Being dissatisfied, appellant has now appealed to the Court of Appeal.

ISSUE FOR DETERMINATION

"Can a master be vicariously liable for the negligence of his servant, where the servant's primary liability is statute barred?"

HELD (Unanimously allowing the appeal per lead judgment of **BA'ABA JCA**)

Vicarious liability - Is the imposition of liability

1. Vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibilities for the acts of another; for example, the liability of an employer for the acts of an employee, or a principal for torts and conducts of an agent. (p. 850 A)

Vicarious liability - Where principal actor is not joined

2. From all these authorities which I respectfully follow it is clear that in an action for negligence as in the present case if the Principal actor (the offending driver) is not joined as a party and his liability established, there can be no question of finding the master liable vicariously. In other words, once the driver is not joined in the action, the action is incompetent ab initio and the trial court should not waste its time going into the merit of the case. It can not be disputed that in the instant case, the liability of the 2nd defendant, who was responsible for the accident has not been established since the learned trial Judge dismissed the action, against the 2nd Defendant relying on the provision of the Public Officers Protection Law. (p. 853 F)

Actions - limitation of actions

3. With respect to the learned trial Judge, I agree with the submission of the learned Counsel for the appellant that the learned trial Judge was in error to have proceeded with the case, against the appellant, who was the 1st Defendant, having held that the provisions of the Public Officers Protection Law was applicable. What is sauce for the goose is sauce for the gander. The learned trial Judge ought not to have proceeded with the trial against the appellant having found that the action was not commenced within the stipulated period; it is a joint action instituted against the 1st defendant/appellant and the 2nd defendant against whom the action was dismissed. (p. 854 A)

Jurisdiction - Statute bar

4. I hold the view that the trial court acted without jurisdiction by embarking on the hearing of the suit filed outside the period stipulated by the provisions of the Public Officers Protection Law. It appears the trial court was carried away by the merits of the case in considering the application for the dismissal of the suit on the ground that it was statute barred which was taken at the early stage of the proceedings. The trial court ought not to have been affected by the merits of the case or sympathy, being faced with the most important issue of the jurisdiction of the court. As it is now, I am of the view that the judgment of the trial court dated 30/12/91 in its entirety, is a nullity and I so hold. See Madukolu & Ors. v. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 All N.L.R. 587 at 595. My answer to the only issue formulated by the appellant for determination, is therefore in the negative; - a master can not be liable vicariously for the negligence of his servant, where the servant's primary liability is statute barred. In the result, the appeal succeeds and is thereby allowed. (p. 854 C)

NOTABLE POINT OF INTEREST**BA'ABA JCA*****1. Every Issue must arise from a ground of appeal***

As the respondent has not cross-appealed, he is entitled to formulated

issue or issues based on the appellant's ground of appeal because every issue must arise from a ground of appeal. I find that the issue formulated by the respondent in this appeal is not from any of the two grounds of appeal filed by the appellant, for that reason, I am adopting the only issue B formulated by the appellant in the determination of this appeal. (p. 847 E)

REPRESENTATION

Pat. Onegbedan, Esq. - for the Appellant

C Prince A. N. Onyebuchi Esq. - for the Respondent

CASES REFERRED TO

Madukolu & Ors. v. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 All N.L.R. 587 at 595.

D Ekeogu v. Aliri, (1991) 3 NWLR (Pt.178) 258, 269-270,

Egbe v. Adefarasin (1985) 1 NWLR (Pt.3) 549 at 569,

Rose v. Plenty & Another (1976) All E.R. 97 at p. 100

Ifeanyichukwu Osondu Co. Ltd. v. Solel Boneh (Nig) Ltd., (1993) 3

E NWLR (Pt.280) 246, 251 - 252,

Nzom v. Jinadu S.C. 113/1985 ([1987] 1 NWLR (Pt.51) 533).

Skenconsult (Nig) Ltd and Anor. v. Ukey (1981) 1 S.C. 1 at p. 26.

Madukolu v. Nkemdilim (1962) 1 All N.L.R. 587 at p. 595.

F Management Enterprises Ltd. v. Otunsanya (1987) 2 NWLR (Pt. 55) 179

Nwadiaro v. Shell Petroleum (1990) 5 NWLR (Pt.150) 322 at 339

STATUTES REFERRED TO

G Public Officers Protection Act Cap 168 Laws of Bendel State 1976. s. 2 (a)

Constitution of Nigeria 1979 s. 277 (1)

LEAD JUDGMENT BY BA'ABA JCA

H This is an appeal against the judgment of the Edo State High Court, holden at Benin City delivered on 30/12/91. Briefly put, the facts of the case that led to this appeal are as follows:- On the 1st day of March, 1986, the Plaintiff/Respondent's driver, Jonathan Unagwu, (the

Plaintiff will henceforth be referred to as respondent) was the driver in charge of the respondent's vehicle Registration No. KN 4964 KJ and was plying along Benin- Sapele Road towards Sapele direction when Felix Okpega, the driver in charge of the vehicle registration NO. LA 3844 MH, (who was the 2nd Defendant before the trial Court), coming in the opposite direction from Sapele towards Benin City left his own side of the road and collided with the respondent's vehicle along Benin-Sapele Road forcing the Respondent's vehicle to somersault many times thereby damaging it beyond economic repairs. The National Electric Power Authority, the owner of the vehicle with registration No. LA 3844 MH (will henceforth be referred to as the appellant) .

Whereupon the respondent took action against the appellant and the driver, 2nd defendant jointly and severally. The claim of the respondent is stated in paragraphs 8 and 9 of the respondent's amended statement of claim as follows:-

"8. On the 1st day of March, 1986, the Plaintiff's driver, Jonathan Unagwu, was the driver in charge of the Plaintiff's vehicle Reg. No. KN4964 KJ and was plying along Benin - Sapele Road, towards Sapele direction when Felix Okpega who was the driver in charge of the vehicle Registration number LA 3844 MH coming in an opposite direction from Sapele towards Benin City left his own side of the road and collided with the Plaintiff's vehicle along Benin Sapele Road within the jurisdiction of this Honourable Court forcing the Plaintiff's vehicle to somersault several times thereby damaging it beyond economic repairs.

9. The Plaintiff avers that Felix Okpega so negligently drove, and controlled the Defendant's Lorry No. LA 3844 MH without due care and attention for other road users particularly the Plaintiff's driver at the material time on the day of the accident.

PARTICULAR OF NEGLIGENCE

(a) Driving at an excessive speed.

(b) Driving into the wrong side of the Road and there colliding with the Plaintiff's vehicle.

(c) Failing to keep any proper look out or to have any sufficient regard for other traffic particularly on coming traffic on the other side

of the road.

(d) *Failing to keep any proper control of the said Mercedes Lorry.*

(e) *Failing to stop, swerved or in any other way so to manage or control the said Mercedes Lorry so as to avoid the collision."*

B "WHEREOF the Plaintiff claims against the Defendant as follows:-

SPECIAL DAMAGES

a. Cost for the repair of the Trailer 96,914.69

b. Cost for repair of Thermoking Unit 24,741.85

C c. Loss of earning at N10,000.00 per month
from March, 1986 to April, 1988 260,000.0

d. Legal fees of the Solicitor to Plaintiff 20,000.00
401,656.54

D e. The sum of N10,000.00 per month from
May 1988 till judgment 98,343.46

f. General Damages 500,000.00

OR alternatively the sum of N30,000.00 already agreed upon between the Plaintiff and the Defendant in addition to Legal fees of the E sum of N20,000.00".

The appellant denied the claim in paragraphs 4 and 5 of his statement of defence as follows:-

F "4. *Defendant asserts that paragraphs 3,8,9,10, 12,13,14,18, and 19 should be struck out since they become completely irrelevant to this suit having regard to the Ruling of this Honourable Court on Friday the 14th day of October, 1988 that:*

"The action against the 2nd Defendant, Felix Okpega, is therefore not maintainable and is dismissed."

G 5. *In further answer to paragraphs 1,4,5,6,7,11,15,16 and 17 of the Statement of Claim, Defendant maintains vehemently that in the tort of negligence "if the servant is not liable, the master cannot be vicariously liable for his act or omission."*

H Pleadings were exchanged.

Before hearing commenced in the suit, the learned trial Judge heard a motion brought by the defendants/applicant, i.e. the appellant and 2nd defendant, brought a motion pursuant to Section 2(a) of the Public

Officer's Protection Act Cap. 168 Laws of the Federation of Nigeria and Laws of Bendel State, 1976. In his ruling dated 14/10.88, the learned trial Judge, held:

"The action against the 2nd defendant, Felix Okpega, is therefore, not maintainable and is dismissed. The action against the 1st defendant, NEPA is properly before the court, is not statute barred under the Provisions of the Public Officer's Protection Law or Act, and may therefore continue."

Following the ruling of the trial Court and the dismissal of the 2nd Defendant from the suit, both the Statement of Claim and the writ of summons at pages 57- 61 of the record were amended to reflect the order of the dismissal.

At the close of the hearing of the case, in a reserved and considered judgment, the learned trial judge found the appellant liable when at page 88 of the record the learned trial judge, inter alia, held:

"In the event judgment is entered for the Plaintiff as follows:-

(a) Repairs of Thermoking Unit N24,741.85

(b) *Loss of earning at N8,000.00* E
per month, March 1986 to

April 1988	208,000.00
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(c) General Damages	10,000.00
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<i>Total</i>	<u>N242,741.85</u>	E
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Aggrieved with the judgment of the trial Court, the appellant, by his Notice of Appeal, dated 28/2/92, filed the same date, appealed to this Honourable Court. The appellant's Notice of Appeal contains two grounds of appeal as follows:-

"GROUND ONE

The learned trial Judge erred in law in holding that although an employee can escape liability by virtue of section 2 of the Public Officers Protection Act, his employer could still be liable vicariously for the employer's act. In other words, there can be vicarious liability without H primary liability.

GROUND TWO

The entire judgment is against the weight of evidence. Addi-

tional grounds may be filed on receipt of the records of proceedings."

When the appeal came up for hearing on 6/5/99, both counsel adopted their respective briefs of argument.

Learned Counsel for the appellant referred to the appellant's brief of argument dated 23/2/94 filed the same date which he adopted for the purpose of the appeal. Learned Counsel for the appellant, formulated only one issue for determination in this appeal which reads:

"Can a master be vicariously liable for the negligence of his servant, where the servant's primary liability is statute barred?"

The learned Counsel for the appellant, in his brief of argument gave a full back ground of the facts leading to this appeal and submitted that the learned trial Judge was in error in his decision. He submitted that contrary to the learned trial Judge's opinion, when an action is statute barred, the defendant's liability to the Plaintiff abates or is wiped out; the plaintiff ceases to have any right or claim against the defendant because the statute prescribing limitation to the Plaintiff's right of action declares that no suit shall be maintained on such causes of action unless brought within a specified period of time after the right accrued. Learned Counsel for the appellant, further submitted that where a Public Officer escapes liability for a tort of negligence by virtue of the statute of limitation, his employer can not be held vicariously liable for the same tort which his employee had previously escaped. Learned Counsel argued further that after the ruling of the court of 14/10/88, dismissing the suit against the appellant's driver, who was the 2nd defendant, proceeding with the case was an exercise in futility because the substratum of the Plaintiff's action had been knocked off by the ruling. He cited numerous authorities in support of his submission and urged us to allow the appeal.

Learned counsel for the respondent referred to his brief of argument dated 13/4/94, filed the same date which he adopted and is relying upon for the purpose of his appeal. The issue formulated by the learned H counsel for the respondent in the respondent's brief of argument is as follows:

"Whether a party who has admitted liability or who does not dispute liability can successfully raise the defence of limitation."

Like the learned counsel for the appellant, the learned Counsel for the respondent also in his brief of argument gave the background of the facts leading to this appeal.

Learned Counsel for the respondent submitted that the respondent in the statement of claim pleaded that the respondent and the appellant have reached an agreement for the payment of the sum of N30,000.00 to the respondent. Learned Counsel for the respondent argued that the piece of evidence is not rebutted by the appellant who rested his case on that of the respondent. He referred to page 71 lines 20-21 in support of his claim.

Learned Counsel for the respondent further submitted that in determining the vicarious liability of the master for the acts of its servant, the negotiations between the parties is relevant in considering whether an act is statute barred. He contended that it would not be just and equitable to allow the appellant and Felix Okpega to resile from their agreement citing the case of Nwadiaro v. Shell Petroleum (1990) 5 NWLR (Pt.150) 322 at 339, in support of his submission. In conclusion, learned counsel for the respondent urged us to dismiss the appeal.

I have examined the issue formulated by both the appellant and the respondent in the determination of the appeal. As the respondent has not cross-appealed, he is entitled to formulated issue or issues based on the appellant's ground of appeal because every issue must arise from a ground of appeal. I find that the issue formulated by the respondent in this appeal is not from any of the two grounds of appeal filed by the appellant, for that reason, I am adopting the only issue formulated by the appellant in the determination of this appeal.

In my view, the main issue for consideration in this appeal, is the interpretation of section 2(a) of the Public Officers Protection, Laws of the Federation as well as the Laws of Bendel State, and the extent of its application to the case in question. The said section considered by the learned trial Judge, in deciding an interlocutory application, is reproduction at page 38. It reads:

"Both the Federal and the State enactment for the Protection of Public Officers have the same provision at (sic) Section 2 (a)....."2 (a) the action, prosecution, or proceeding shall not lie or be instituted unless

it is commenced within three months next after the act, neglect or default complained or in the case of a continuance of damage of injury within three months next after the ceasing thereof"

The learned trial Judge, in the ruling dated 14/10/88, considered the provision of Section 2(a) of the Public Officers Protection Law, and held that the action can not be maintained against the 2nd defendant, Felix Okpega and dismissed the case against the 2nd defendant but proceeded to hear respondent's case against the defendant/appellant.

The trial Judge at page 39 starting from line 10 to page 41 line 1, had this to say:

"A cause of action is thus said to be statute barred if in respect of its proceedings cannot be brought because the period laid down by the Limitation Law or Act has elapsed. How does one determine the period of Limitation? The answer is simple-by looking at the Writ of Summons and the Statement of Claim alleging when the wrong was committed which gave the plaintiff a cause of action and by comparing that date with the date on which the Writ of Summons was filed. This can be done without taking oral evidence from witnesses.

.....A statute of limitation removes the right of action, the right of enforcement, the right to judicial relief and leaves the plaintiff with a bare and empty cause of action which he cannot enforce." In the last quotation the expression "statute of limitation" is surely synonymous with "limitation in a statute". Applying the above to the present case, the 2nd defendant in the present matter is and was at the material time an employee of the 1st defendant, NEPA, which is a statutory authority within the meaning of Section 277(1) of the 1979 Constitution, under the definition of "public service of the Federation." This being so the 2nd defendant is a public servant and the provisions of the public servant Protection Act apply to him.

Looking at the Statement of claim it is clear from paragraph 8 that the accident giving rise to this action, that is, the cause of action, arose on 1st March 1986. Paragraph 8 states:

"8. On the 1st day of March 1986, the plaintiff's driver Jonathan Unagwu, was the driver in charge of the plaintiff's vehicle Reg. No.KN

4964 KJ and was plying along Benin-Sapele Road, towards Sapele direction when the 2nd defendant who was the driver in charge of the vehicle registration number LA 3844 MH coming in an opposite direction from Sapele towards Benin City left his own side of the road and collided with the plaintiff's vehicle along Benin-Sapele Road forcing the plaintiff's vehicle to somersault several times thereby damaging it beyond economic repairs."

The Writ of Summons says that it was signed and sealed on the 1st day of July 1986, that is exactly four months after the accident on the 1st March 1986. There is, therefore, no doubt that it is caught by the Provisions of the Public Officers Protection Law which places a limitation of three months from the date that the cause of action arose until the filing of the Writ. "With regard to any negotiations that may have been going on between the plaintiff and the 2nd defendant, and it appears from the documents that it was in fact the 1st defendant that was negotiating, the issue to be decided is whether or not the action is maintainable and not whether the 2nd defendant is liable. Egbe v. Adefarasin & Or. (supra)." It is clear from the foregoing that the action against the 2nd defendant is statute barred and cannot be maintained." With regard to the 1st defendant, the question is whether or not the Public Officers Protection Law serves to protect statutory body as well as an individual person.

As earlier stated in this judgment, it is the contention of the appellant that the learned trial Judge having held that the Public Officers Protection Law, relied upon by both the appellant and 2nd defendant is applicable in the case in question as a result of which the trial Judge dismissed the case against the 2nd Defendant, the learned trial Judge ought to have dismissed the case against the appellant as well. The facts of the case are clear and there is no dispute whatsoever as to the time of the occurrence of the cause of action and the date of instituting the action, having regards to the finding of the learned trial Judge, reproduced in the judgment. The question to be answered is whether the learned trial Judge was right in proceeding to determine the suit against the appellant who is vicariously liable having dismissed the action against the 2nd defendant, the driver of the appellant.

Vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibilities for the acts of another; for example, the liability of an employer for the acts of an employee, or a principal for torts and conducts of an agent.

The requirement for the acts of an employee to be established before an employer could be held liable was clearly stated by the Supreme Court of Nigeria, in the case of Management Enterprises Ltd. v. Otunsanya (1987) 2 NWLR (Pt.55) 179 at 188,190. The Supreme Court dealt with several issues in that case where a dead person was sued years after his death but the relevant issue that concerns us for the purposes of this appeal, was whether a master could be held vicariously liable where a case was not established against the servant, for example where the trial was held to be a nullity for lack of proper service which has the effect of ousting the jurisdiction of this Court. At page 188 of Management Enterprises Ltd. v. Otunsanya (supra) the Supreme Court dealt with the issue as follows:

"The Plaintiff's claim in the trial court was for damages for negligence. The negligence alleged was that of the 2nd Defendant, Dangana Musa. The 1st Defendant/Company is the owner of the trailer No. 9801 driven by Dangana Musa on the 22nd April, 1969 the day of the accident. The liability of the 1st Defendant is not direct but consequential and vicarious. It rests on the successful action against the 2nd Defendant. The evidence of Abraham Samakinde, 3rd P.W. at p.54 of the record was that 'the driver of the commercial vehicle No. LN 9801 died on the spot'. From paragraph 25 of the Statement of Claim the 2nd Defendant was the driver of vehicle LN 9801. He was the driver who died on the spot on 22nd April 1969. Also the evidence of Abioye Omijiakum, Police Corporal No. 26995 at p. 70 lines 8-10 was:-

'I found the corpse of Dangana the driver of vehicle LN 9801 at the scene of the accident near a river'.

It is thus put beyond doubt that the 2nd Defendant Dangana Musa died on 22nd April, 1969. The Writ of Summons in this case was

filed per Treasury Receipt CR. No. 843221 on 9th July, 1972, almost 3 years and 3 months after the death of the 2nd Defendant. 1st Question for Determination

Was the action against the 2nd Defendant valid or voidable or void? Was the Ijebu-Ode High Court competent to entertain the alleged action against the 2nd Defendant? Was the case against the 2nd Defendant initiated by due process of law? Was the 2nd Defendant a legal persona, a juristic person who could be sued? If there is any defect in competence then the proceedings in HCJ/29/72 will be a nullity and it does not matter how well conducted and how well decided that suit was: Madukolu & Ors v. Nkemdilim (1962) 1 All N.L.R. 587 at p. 595. If Suit HCJ/29/72 is a nullity vis-'a-vis the 2nd Defendant then the vicarious liability of the 1st Defendant will not arise. Now, service of process on a defendant is one of the fundamental conditions precedent to the exercise of jurisdiction. Skenconsult (Nig) Ltd and Anor. v. Godwin Sekondy Ukey (1981) 1 S.C. 1 at p.26. Unless the Court otherwise directed (and there is nothing on record to show that the Ijebu-Ode High Court did) service on the 2nd Defendant should have been personal. In this case the 2nd Defendant was served through the 1st Defendant. This obviously does not amount to proper service on the 2nd Defendant. The Court handled a similar problem in Margaret Nzom & Anor. v. S. O. Jinadu S.C. 113/1985 decided on 27th February, 1987 ([1987] 1 NWLR (Pt.51) 533). But in that case the Plaintiff, Jinadu obtained an order of Court to effect substituted service by publication in the Daily Times Newspaper." The Supreme Court at page 190 of Management Enterprises Ltd. v. Otusanya (supra) concluded thus:

"From the above the Writ issued against the 2nd Defendant, Dangana Musa deceased, is not ex facto and ipso facto a nullity. But issuing a Writ is one thing and having a defendant to carry on the action is an entirely different thing. And this is where the present action against the 2nd Defendant is still defective. There was here no application as required by Ord. 15 r 6A/4 R. S. C. by the Plaintiff/Respondent for an order appointing a person to represent the estate of the 2nd Defendant, Dangana Musa deceased. It is against the person so appointed that

service of process ought to have been made especially service of the Writ of Summons without which service the Plaintiff cannot proceed any further in the action against the 2nd Defendant. On the authority *Madukolu's case supra*, of *Skenconsult's case supra*, and of Ord. 15 r 6A/4, I hold
 B that the *Ijebu-Ode High Court* lacked the necessary competence to carry on this case against the 2nd Defendant. If then the trial Court could not validly deliver any judgment against the 2nd Defendant, and since the liability or otherwise of the 1st Defendant depended wholly on a verdict
 C against the 2nd Defendant then the Court of Appeal was wrong in its judgment against the 1st Defendant/Appellant."

The important issue of the competence of an action for vicarious liability where a servant is not joined was also fully discussed in the case of *Ifeanyichukwu Osondu Co. Ltd. v. Solel Boneh (Nig) Ltd.*, (1993) 3 NWLR
 D (Pt.280) 246, 251 - 252, this Court, in a leading judgment delivered by my learned brother, Ogebe, J.C.A. relied on *Management Enterprises Ltd. v. Otusanya*, (*supra*) and other authorities in dealing with a similar issue in his judgment as 251 - 252 which reads:

E "In *Rose v. Plenty & Another* (1976) All E.R. 97 at p. 100 Lord Denning M. R. stated this general principle regarding the use of vehicles in negligence cases:-

'In every case where it is sought to make the master liable for
 F the conduct of his servant the first question is to see whether the servant was liable. If the answer is Yes, the second question is to see whether the employer must shoulder the servant's liability.' "

In the unreported case of *Consortium Steel Plant Aladja v. Mrs. Angelina Akindejoye & Others* (*Supra* my learned brother, Salami, J.C.A. had this
 G to say at p. 6 of the judgment:-

"The plaintiff/respondent to succeed against the appellant must join the driver of the offending vehicle to the suit because the liability of the appellant is predicated or consequent upon that of the driver. In
 H other words, the driver must be found liable before the appellant can be held vicariously liable for the liability of the driver. But, in this case, not only is the driver not a party to the action, indeed his identity remains unknown. Even the particulars of the vehicle, the nine-seater bus, has

not been disclosed to the court. The liability of the driver can only be established if he is made a party to the action. Since he was not made a party he was not ascribed with any liability. The liability of the appellant which solely depends on the liability of a driver who, incidentally, has not been found with any, cannot stand."

In Ekeogu v. Aliri, (1991) 3 NWLR (Pt.178) 258, 269-270, dealing with a similar issue, Kawu, J.S.C. delivering the leading judgment of the Supreme Court of Nigeria, relied on the judgment of Karibi Whyte J.S.C. in Egbe v. Adefarasin (1985) 1 NWLR (Pt.3) 549 at 569, when he concluded as follows:-

"I am satisfied the appellant was a public officer at the material time, that the act complained of occurred in pursuance of his duty as a public officer and that action was not brought against him within the period stipulated by the law. Consequently, the action was statute barred. The judgment of the Court of Appeal affirming that of the High Court which dismissed the appellant's application and directed him to file his statement of defence within twenty-one days is hereby set aside. The respondent's action filed on 20th of July, 1987, not having been brought within three months of the occurrence of the act complained of, is hereby struck out."

In the instant case going by the finding of the trial court, the act complained of, occurred on the 1st of March, 1986 and the action was instituted on the 1st of July, 1986, certainly not within the three months stipulated by the law considered by the learned trial Judge. **From all these authorities which I respectfully follow it is clear that in an action for negligence as in the present case if the Principal actor (the offending driver) is not joined as a party and his liability established, there can be no question of finding the master liable vicariously. In other words, once the driver is not joined in the action, the action is incompetent ab initio and the trial court should not waste its time going into the merit of the case. It can not be disputed that in the instant case, the liability of the 2nd defendant, who was responsible for the accident has not been established since the learned trial Judge dismissed the action, against the 2nd Defendant relying on**

the provision of the Public Officers Protection Law.

With respect to the learned trial Judge, I agree with the submission of the learned Counsel for the appellant that the learned trial Judge was in error to have proceeded with the case, against the appellant, who was the 1st Defendant, having held that the provisions of the Public Officers Protection Law was applicable. What is sauce for the goose is sauce for the gander. The learned trial Judge ought not to have proceeded with the trial against the appellant having found that the action was not commenced within the stipulated period; it is a joint action instituted against the 1st defendant/appellant and the 2nd defendant against whom the action was dismissed. Relying on the authorities cited herein, I hold the view that the trial court acted without jurisdiction by embarking on the hearing of the suit filed outside the period stipulated by the provisions of the Public Officers Protection Law. It appears the trial court was carried away by the merits of the case in considering the application for the dismissal of the suit on the ground that it was statute barred which was taken at the early stage of the proceedings. The trial court ought not to have been affected by the merits of the case or sympathy, being faced with the most important issue of the jurisdiction of the court. As it is now, I am of the view that the judgment of the trial court dated 30/12/91 in its entirety, is a nullity and I so hold. See Madukolu & Ors. v. Nkemdilim (1962) 2 SCNLR 341; (1962)1 All N.L.R. 587 at 595.

My answer to the only issue formulated by the appellant for determination, is therefore in the negative; - a master can not be liable vicariously for the negligence of his servant, where the servant's primary liability is statute barred.

In the result, the appeal succeeds and is thereby allowed. The judgment of the trial court delivered on 30/12/91 is hereby set aside and substituted with an order striking out suit No. B283/86, which is now the decision of the lower court in the said suit. I award costs assessed at N1,000.00 at the lower court and N2,000.00 in this Court in favour of the appellant against the respondent.

SALAMI JCA

I agree.

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TABAI JCA

I have the privilege of reading, in draft, the judgment just delivered by my learned brother BA' ABA J.C.A. and I agree with his reasoning and conclusions contained therein. I also abide by all consequential orders contained therein. C

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