RIDE-HAILING COMPANIES – THE EVOLVING LANDSCAPE OF LEGAL LIABILITIES

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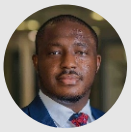
Key Contacts

Godwin Omoaka, SAN, FCIArb
Partner
godwin.omoaka@templars-law.com



Izuchukwu Ohajinwa
Senior Associate
izuchukwu.ohajinwa@templars-law.com

From Uber to Lyft; Bolt (Taxify) to Cabify or Bird; Jekalo to Gokada, ride-hailing companies ("RHC" – i.e. companies that make use of an app or website to connect passengers to drivers for on-demand car rides) have grown to become an almost indispensable sector of the transport industry in most economies; be it in terms of revenue or service delivery. For instance, Uber --the most popular RHC-- is reported to have completed not less than 10 billion rides since inception. Finance wise, a number of these RHCs have grown to become Unicorns.

In developing economies like Nigeria, cab-hailing and ridesharing apps/services have become ubiquitous as they have proven to be, not only convenient, but more reliable alternatives to the less-than-efficient public transport system.

While most of the rides are incident-free, it is not unlikely to find few instances of severe (in some cases, fatal) accidents resulting from the actions or inactions of a RHC driver, luggage loss, theft or tampering, kidnap, (sexual) assaults, etc. These incidents are becoming increasingly rampant. For instance, in 2019, Uber released a US Safety Report which acknowledged that between 2017 and 2019, there were not less than 6000 complaints of sexual assaults filed by Uber passengers[1]. Nigeria is not left out. Almost on daily basis, there are social media reports of unwholesome incidents of assaults, defamation, unauthorized video recording of undesirable encounters with RHC drivers, kidnaps, sexual assaults, and in some cases rape or outright murder.

Expectedly, these incidents throw up legal questions: what (civil) liabilities (if any) can/should be attributed to a RHC whose driver perpetrates (or is connected to) such incidents? Ultimately, the issue turns on the legal status of these drivers in relation to the RHC. Put simply, is the driver an employee or at the least agent, of the RHC, in which case his (in)actions can be legally attributed to the RHC? Also, do these drivers have any recourse against the RHCs for any losses/damages incurred in the course of their duty?

Although there is a dearth of Nigerian judicial precedents on these points, as issues involving RHC liability are yet to be tested before the Nigerian courts, we examine, in brief, these issues in the light of the recent judicial attitude (around the globe), and posit on the likely posture Nigerian courts may adopt when faced with such issues.

[1].https://www.uberassets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf

POSITION OF RHCs ON STATUS OF DRIVERS ON THEIR PLATFORM

A definite determination of the legal status of drivers on RHC platforms sits squarely at the center of any legal discourse on the liability of RHCs in relation to incidents occurring in rides with their drivers. If the drivers are employees or agents of the RHCs, then it's fairly easy – relying on the legal principles of vicarious liability or respondeat superior -- to attribute liability to the RHCs for the (in)actions of the drivers in the course of completing rides on passengers' requests. On the other hand, if the drivers are "independent contractors' – in that, although the rides were facilitated by the RHCs, the drivers are considered to be independently providing transportation services to the passenger – then the RHC would be absolved from any liabilities arising from the actions of such drivers. For obvious reasons, the CHCs/RHCs prefer the latter argument.

The go-to argument of most RHCs is that, by the nature of their business model, they are merely intermediaries, whose only job is, to use the RHC platform to arrange and link a driver with a passenger, for their separate and independent contract for transportation services; and in some cases, they (RHCs) collect fares (for a fee) on behalf of the driver. In other words, the RHCs argue that they are merely booking agents of the drivers; whose agency status are duly disclosed to the passengers.

To bolster this line of argument, the RHCs most times require, as a pre-condition to signing up on their platforms, that the prospective passengers or drivers, accept "Terms and Conditions", that stipulate that each ride is a contract for transportation service(s) entered solely between the driver and the passenger (to which the RHC is not a party), and further absolves the RHC of any liability arising from, or in connection with the rides, albeit facilitated by the RHC.

Traditionally, a determination on whether a worker is to be considered an employee or an independent contractor is dependent largely on the degree of control or subordination (both in terms of earnings and task performance) to which the worker is subjected in any given circumstances. So, where a worker enjoys relative independence as to how he performs the tasks and dictates his earnings, he is ostensibly an independent contractor.

Accordingly, beyond the seeming contractual protection offered by the Terms and Conditions that passengers and drivers are required to accept before signing-up to their platforms, the RHCs are wont to advance factual arguments based on their operations to fit drivers into the traditional mode of determining independent contractors. To this end, RHCs argue that their drivers ought to be categorized as independent contractors because:

i. the RHCs do not enjoy exclusivity of labour, as their drivers are at liberty to simultaneously sign up to multiple cab-hailing services;
ii. work hours for the drivers are not fixed, and there is considerable flexibility in work hours because the drivers are free to determine their availability as well as when and where to log-on to the RHC platform. Further, drivers are free to accept or decline requests as often as they please, so they are not employees of RHCs;
iv. although fares are regulated by the RHC, the driver retains the option to accept lesser (but not higher) fares; an option which would not have been available were they employees of the RHC; and the car used in providing the transportation service is owned or sourced by the driver and not the RHC; (except in limited instances where the RHC provides the cars until some independent arrangement – like a hire-purchase -- with the driver).

Under Nigerian law, it would be sufficient to adjudge a worker as an independent contractor, where it can be shown that the work enjoys significant control over his work hours, his tools for work, and his earnings.[2]

THE EVOLVING LANDSCAPE FOR RHC's LIABILITY

The independent contractor defense may no longer be availing to RHCs. In recent times in some jurisdictions[3], the courts have certified (or affirmed the certification of) class-action lawsuits which seek to hold RHCs liable for misdemeanors by drivers completing rides facilitated on their platforms. Remarkably, Uber, for instance, has been forced enter into undisclosed settlement of quite a number of tort claims bordering on incidents that occurred between passengers and drivers on Uber platform.[4]

More than before, these cases demonstrate a willingness by the courts to require RHCs to assume a lot more responsibility other than the seeming complacence implicit in the independent contractor defense. In this regard, the courts appear to be more open to classifying RHC drivers as, if not actual "employees", at least "agents" of the RHC, in which case they can be held vicariously liable for the (in)actions of drivers operating on their platforms.

A case in point would be the recent decision of the United Kingdom Supreme Court (UKSC) in **Uber BV v Aslam**[5] which portends significant changes for not just the RHC business model, but the general "gig economy" workers across the common law jurisdictions. In **Uber BV v Aslam**, the UKSC rejected Uber's independent contractor defense and found that the Respondents – who were drivers on Uber platform, are indeed employees of Uber and are therefore entitled to the general employee benefits and entitlements.

Discountenancing the contractual defense offered by Uber (with respect to the "Terms and Conditions" accepted by the passengers and drivers as a pre-condition for registering on Uber platforms) the UKSC reasoned that Uber's defense that it is merely a "booking agent" for the drivers -- its disclosed principals in Uber's contractual undertakings with the passengers-- is not tenable. The court held that for the drivers to be considered (disclosed) principals of Uber, the drivers needed to have been privy to the passenger's contract with Uber, or at least have expressly or impliedly authorized such Uber as its agents in the contracts with the passengers.[6]

> "It is true that Rider Terms[7] on which Uber contracts with passengers include a term (in clause 3 of Part 1…) which states that Uber London (or other local Uber company) accepts private hire bookings "acting as disclosed agent for the Transportation Provider [i.e. the driver]." It is however, trite law that a person (A) cannot create a contract between another person (B) and a third party merely by claiming or purporting to do so but only if A is (actually or ostensibly) authorized by B to act as B's agent… In order to found such an inference, it would be necessary to point, at least, to a prior communication from Uber London to the individual concerned or other background facts known to both parties which would lead reasonable people in their position to understand that, by [the drivers] producing the documents required by Uber London, an individual who did so was thereby authorizing Uber London to

[2]SSCO LTD v AFROPAK NIG. LTD, 2008 18 NWLR Pg. 94-97. See also: SHENA SECURITY CO. LTD v. AFROPAK (NIG) LTD & ORS (2008) LPELR-3052(SC)
[3]In October 2018, the Supreme Court of Canada, sanctioned the certification of a US$400 Million class-action lawsuit (in Heller v. Uber Technologies Inc.) instituted by Uber drivers.
[4]See: Day v. Parra and Uber Technologies, No. 16-005071 CA 02; Ang Liang Liu v. Uber Technologies, No. 14-536979
[5][2021] UKSC 5
[6]See paras. 50 – 55 of the Judgement of the UKSC in Uber BV v Aslam supra.
[7]That is the Terms and Conditions accepted by the Passenger upon signing up to Uber

> contract with passengers as his agent, rather than – as seems to me the natural inference – merely applying for a job as one of Uber's drivers…. Once the assertion that Uber London contracts as booking agent for drivers in rejected, the inevitable conclusion is that, by accepting booking, Uber London contracts as a principal with the passenger to carry out the booking. In these circumstances, Uber London would have no means of performing its contractual obligations to the passengers nor of securing compliance with its regulatory obligations as a licensed operator, without either employees or subcontractors to perform driving services for it. (Emphasis supplied)

Flowing from this excerpt, it is deducible that it is the drivers who are agents of Uber in the passenger's contract with Uber (and not vice-versa as Uber argues). As such, as agents of Uber, it would not be far-fetched to seek to ascribe liability for misdemeanors of such drivers to Uber as their principal.

On the independent contractor defense based on Uber's operations with the drivers, the UKSC acknowledged that although there are "*substantial measures of autonomy and independence*"[8] accorded the drivers on Uber platform (that would otherwise not be applicable in an typical employment relationship) there are remarkable aspects of Uber's operations that indicate substantial dependence and subordination of the drivers to Uber's control, so that it is sensible to consider the drivers as employees of Uber. In this regard, the UKSC identified these aspects as including:

i. The remuneration earned by drivers are fixed and determined by Uber, and the nominal point that a driver is at liberty to collect less (but not more) of the Uber determined fare cannot be of any possible benefit to the driver as to upend a determination in Uber's favor on this point.

ii. The contractual terms on which drivers perform their services are dictated by Uber. Not only are drivers required to accept Ubers standard form of written agreement, but the terms on which they transport passengers are also imposed by Uber and drivers have no say on them.

iii. Although work hours are flexible and drivers are free to choose when and where to work, once logged on to the app, drivers' choice about whether to accept requests for ride is constrained by Uber and drivers can be penalized for repeated refusal to accept nearby requests for rides.

iv. Uber exercises significant degree of control over how the drivers perform their services. Although the drivers provides the car and that means that they have more control over their work-tool (as different from a usual employer-employee relationship), Uber however vets the type of car that may be used.

Taking all these factors into consideration, the UKSC came to the conclusion that Uber's relationship with the drivers transcends that of an independent contractor and is more indicative of an employment relationship, for which the drivers ought to be entitled to standard employment benefits.

[8]See para. 90 of the Judgement of the UKSC in Uber BV v Aslam supra

LAST WORDS – POSSIBLE LEANINGS BY NIGERIAN COURTS

The UKSC decision in **Uber BV v Aslam** introduces significant changes, not only for RHCs, but for the general gig economy. Not only does it create significant disruption to Uber's (and other RHC) business model (in that it effectively transforms RHCs to global employers of drivers with considerable impact on their earnings), it impacts significantly, the operations of RHCs particularly in other common law jurisdictions – like Nigeria – who are wont to resort to English decisions on points to which there is either a paucity or absence of judicial precedents in our local jurisprudence.[9] This is more the case in Nigeria, where the labour courts – dubbed National Industrial Courts – have, in recent times been keen to import and apply what it considers global best practices in deciding employments disputes.[10]

Accordingly, other than creating an employment relationship with the drivers, the decision is also notable in that it now opens up a whole new landscape of liabilities for RHCs. If, as established, drivers are the employees of RHC's then passengers can validly maintain a claim in vicarious liability against the RHCs for the (in)actions of their drivers in the course of carrying out transportation services on behalf of RHCs. Accordingly, passengers who are involved in an accident, assaulted, kidnapped, raped, or have their luggage tampered with by drivers, while on rides facilitated by a RHC, a passenger can maintain action against the RHC if they can prove that such incidents are a direct result of the (in)actions of the driver.

[9]Nigerian courts, like most common law jurisdictions, resort to English decisions on matters to which there are no judicial precedents by Nigerian courts. See: Eboni Finance and Securities Ltd V Wole-Ojo Technical Services & 2 Ors. (1996) 7 NWLR (Pt. 461) 464 at 477-478. See also Nwankwo V Nzeribe (2004) 13 NWLR (Pt.890) 422 at 434-435

[10]Anthony Agum v. United Cement Company Ltd. (UNICEM) Anor, Suit No: NICN/CA/71/2013 unreported judgment of Hon. Justice E. N. Agbakoba, J., delivered on March 3, 2017; Diamond Bank Plc v. National Union of Banks,
Insurance and Financial Institutions Employees (NUBIFIE) SUIT NO. NICN/ABJ/130/2013: unreported judgment of Hon. Justice B. B. KANYIP, PHD delivered February 6,