IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, OMOLO & OWUOR, JJ.A)

CIVIL APPEAL NO. 92 OF 1998

BETWEEN

FRANCIS NZIOKA NGAO ..... APPELLANT

AND

SILAS THIANI NKUNGA ..... RESPONDENT

(Appeal from Judgment and Decree of the High Court of Kenya at Nairobi (Mr. Justice Githinji) dated 16th November, 1995

in

H.C.C.C. NO. 1025 OF 1989)

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JUDGMENT OF THE COURT

Silas Thiare Nkunga, the respondent herein, was once a machine operator with Thika Cloth Mills. He lived at Makongeni Estate within Thika Municipality. On 20th June, 1987 at about 6 p.m he was walking along the Thika - Garissa Road from Thika town. Along the road, he came upon a traffic accident. People were gathered watching and he joined them. He stood by the road side and while there, a vehicle appeared from Thika Town side. That vehicle ran him down. He was injured. Other people were also injured. The respondent became unconscious and when he came to, he found himself in hospital. He stayed in hospital for three days and he apparently learnt that the vehicle which had run him down was Reg. No. **KLD 077**. He thereafter started inquiries as to who was the owner of vehicle **KLD 077**. On 25th January, 1988, Thika Police Station told him that the owner of the vehicle was one Francis Nzioka Ngao of P.O. Box 331, Machakos. The police also told the respondent that the vehicle was insured by **M/s Intra-Africa Assurance Company Limited (Exh 1)**. Again on 14th April, 1988, the respondent inquired of the Registrar of motor vehicles as to the ownership of the same vehicle. The Registrar gave the respondent the same information, namely that the owner of the vehicle was **Francis Nzioka Ngao (Exhs 4 and 5)**.

Armed with that information the appellant sued Francis Nzioka Ngao for damages for injuries he **(respondent)** had sustained on 20th June, 1987. Francis Nzioka Ngao is the appellant before us and he complains to us that **Githinji J**, ought not to have found him liable for the accident in which the respondent was injured and that even if he was liable for that accident the general damages of Kshs 150,000/- awarded to the respondent by **Mr Justice Githinji** were so inordinately high that this Court ought to interfere and reduce the same.

Why does the appellant say that he ought not to have been held liable for the accident in which the respondent was injured? The appellant's case before the High Court, which he repeated before us, was that by a written agreement dated the 7th January, 1987 and which he produced as **Exh D1**, he had sold the same vehicle to one John Kwithe D. Muinde and that the latter paid Kshs 7,000/- on the spot and the balance of Kshs 6,000/- was to be paid by two instalments of Kshs 3,000/- each at the end of February and March, 1987. Upon the signing of the agreement, he also signed transfer forms, giving to the buyer two copies while retaining a copy for himself. He produced before **Githinji, J**, a copy of the transfer form **(Exh D2)** and he contended that he also handed over to Muinde the Log Book for the vehicle and the vehicle itself to enable Muinde transfer the ownership of the same into his own name. In the appellant's view, having sold the vehicle to Muinde in the manner stated herein, he could not have been responsible for the accident which occurred some five or so months after he had sold the vehicle. Needless to say, the respondent insisted throughout his case and even before us that the appellant was the owner of the vehicle when the accident occurred.

As was required of him, **Githinji J**, looked at the applicable law and the facts before him to determine who the owner of the vehicle was at the time of the accident. The learned Judge first looked at section 8 of the Traffic Act, Cap 403 Laws of Kenya and he found provided therein that:-

> ***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."***

The respondent proved by producing documents from the police and the Registrar of motor vehicles that by the 20th June, 1987, the appellant was the registered owner of the vehicle. The appellant, in the terms of **section 8,** supra, was to be deemed to be its own unless he proved to **Githinji, J**, of course upon a balance of probabilities, that he was not the owner. The appellant sought to do so through the agreement of sale to which we have referred.

Whether the property in a chattel being sold has or has not passed to the buyer is a question of fact to be determined on the facts of each individual case. **Githinji, J** held that in this particular case, the property in the vehicle had not passed to Muinde. In coming to that conclusion, the learned Judge first looked at the provisions of **section 9** of the Act. He there saw, first, that if a vehicle is transferred from a registered owner, it shall not be used on the road for more than fourteen days after the transfer unless the new owner is registered as the owner thereof. From this provision, the learned Judge concluded that had the vehicle been sold to Muinde on the 7th January, 1987 as the appellant contended, the same could not have been on the road on the 20th June, 1987, since on the latter date, the appellant remained the registered owner. We think this was an inference which the learned Judge was perfectly entitled to draw on the evidence placed before him.

The Judge next looked at **section 9(2)** of the Act and there he found it provided that if a person is registered as an owner of a vehicle and he transfers that ownership, he must inform the Registrar of motor vehicles within seven days of the change of ownership. The appellant admitted before **Githinji J**, that even at the time he was giving evidence, he had not informed the Registrar in the prescribed form that he had transferred the vehicle to Muinde. Once again the learned Judge thought and did conclude that had the appellant sold the vehicle to Muinde as he alleged, could not have deliberately violated the provisions of the Traffic Act but would have informed the Registrar. The Judge accordingly thought that no transfer had in fact taken place. Once again this inference is a reasonable one and we can find no reason for any intervention by us.

On issues of fact, the learned Judge took into account that the appellant admitted in cross-examination that Muinde had delayed in completing the payments to be made in instalments and that the last payment was made in October, 1987.

That would be some months after the accident. Again the appellant neither removed the insurance cover on the vehicle, nor did he inform his insurance company that he had transferred the vehicle. In examination in chief, the appellant told the Judge:-

> ***"On 20th June, 1987, he told me that the vehicle had been stolen. I went to Thika Police Station and found my vehicle there."***

The learned Judge asked himself:-

> ***"If this man had sold his vehicle on the 7th January, 1987 and it was stolen from the buyer on the 20th June, 1987, why should he go to Thika Police Station and why should he call the vehicle "my vehicle"?"***

We think that these were facts from which the learned Judge was entitled to conclude that the appellant had not sold the vehicle as he alleged, or at any rate the learned Judge was entitled to say that the appellant had not proved that he was not owner of the vehicle contrary to the books of the Registrar of motor vehicles. We can find nothing to quarrel with in these conclusions.

Mr Patel for the appellant cited to us the case of **ERNEST ORWA MWAYI (OBJECTOR) V VICTORIA ENTERPRISES LTD (PLAINTIFF),** Civil Appeal No.14 of 1991 (Unreported). We agree with Mr Patel that the ownership of a vehicle was directly in issue as in the present case, but there it was the purchaser of the vehicle who was asserting his title against an attaching decree-holder, and as proof of his title, the purchaser **(objector)** produced a copy of the agreement he had made with the owner of the vehicle. We think that is a different situation from the present one where it is the registered owner who is disclaiming ownership. It is to be noted that the appellant did not even call Muinde to come and testify on his behalf. We are satisfied the learned Judge came to the correct decision on the issue of liability and we see no basis for interfering with his findings.

The appellant also alleges that the award of Kshs 150,000/- given as general damages for pain and suffering is so inordinately high that we ought to interfere. We have taken into account the injuries sustained by the respondent; perhaps if we had been sitting in the High Court, we might have awarded to the respondent a somewhat lesser figure than that awarded by the Judge. But that is not the basis upon which an appellant court would interfere with a judge's exercise of discretion in the area of assessment of damages. The Judge exercised a discretion and we are not entitled to replace his discretion with ours. We think the damages awarded are not so inordinately high as to warrant our interfering.

That being the view we have taken of the whole appeal, we must then agree with Mr Chege Kirundi for the respondent that this appeal must wholly fail. Accordingly we order that the appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 18th day of December, 1998.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR