



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK J.J.A)**

**CIVIL APPEAL NO. 241 OF 2008**

**ROBERT NJOKA ..... APPELLANT**

**versus**

**ALICE WAMBURA NJAGI ..... 1<sup>st</sup> RESPONDENT**

**NANCY GATURI IRERI ..... 2<sup>nd</sup> RESPONDENT**

**NICHOLAS MWANIKI ..... 3<sup>rd</sup> RESPONDENT**

**STEPHEN EZEKIEL NJIRU ..... 4<sup>th</sup> RESPONDENT**

*(Appeal from the judgment from the High Court of Kenya at*

*Embu (Khaminwa J.) dated 16<sup>th</sup> January 2008*

*in*

*HCCC No. 52 of 1999)*

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**JUDGMENT OF THE COURT**

1. A road traffic accident involving vehicle registration no. KAC 606 P took place on 23<sup>rd</sup> December 1998. Two fare paying passengers in the vehicle were injured; these were the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The driver was the 3<sup>rd</sup> respondent.
2. At all material times, motor vehicle KAC 606 P was registered and insured in the name of the appellant. The appellant employed the 4<sup>th</sup> respondent as a driver in his business to drive various vehicles.
3. On 21<sup>st</sup> November 1998 prior to the accident, the 4<sup>th</sup> respondent entered into a sale agreement with the appellant to purchase motor vehicle registration no. KAC 606 P at Ksh. 400,000/= .The 4<sup>th</sup> respondent was to complete the purchase price by way of monthly installments. The vehicle was not transferred to the name of the 4<sup>th</sup> respondent. The insurance cover remained in the name of the appellant and was not terminated. Both the Registrar of Motor Vehicles and the Insurance Company were not advised of the sale of the vehicle.
4. The appellant testified that he sold the vehicle to the 4<sup>th</sup> respondent and the 3<sup>rd</sup> respondent was not

- his employee, servant or agent.
5. The 4<sup>th</sup> respondent testified that he signed a sale agreement and took possession of the vehicle and started doing matatu work with it. That on 23<sup>rd</sup> December 1998, he gave the vehicle to the 3<sup>rd</sup> respondent to ferry passengers. That he employed the 3<sup>rd</sup> respondent on that day. The accident occurred when the 3<sup>rd</sup> respondent was driving the vehicle.
  6. The 1<sup>st</sup> and 2<sup>nd</sup> appellants filed the suit in the High Court seeking for general damages for injuries sustained in the accident. Before the High Court, there were three defendants namely the appellant, the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein. By a judgment dated 16th January 2008, the learned judge of the High Court (Khaminwa J) found the 3<sup>rd</sup> appellant liable 100% in his capacity as the driver of the vehicle. The appellant was found 100% liable as the registered owner of the vehicle and thus vicariously liable for the negligent acts of the 3<sup>rd</sup> respondent who was the driver. The 4<sup>th</sup> respondent was found not liable. In terms of quantum of damages, the 1<sup>st</sup> respondent was awarded the sum of Ksh. 401,600/= while the 2<sup>nd</sup> respondent was awarded the sum of Ksh. 301,600/=. Aggrieved by the learned judge's decision on liability, the appellant lodged an appeal before this court.
  7. The grounds of appeal are that the learned judge erred in law and fact in entering judgment against the appellant when she knew that there was overwhelming evidence by the 3<sup>rd</sup> and 4<sup>th</sup> respondents that the owner of the vehicle was the 4<sup>th</sup> respondent who had bought the vehicle from the appellant. That the learned judge erred in law and fact in entering judgment against the appellant under the doctrine of vicarious liability when there was overwhelming evidence by the appellant and the 4<sup>th</sup> respondent that the third appellant driver was not the agent and/or servant of the appellant but was an agent or servant of the 4<sup>th</sup> respondent. That the learned judge failed to consider that the vehicle had been sold to the 4<sup>th</sup> respondent at the time of the accident. In the alternative, the appellant averred that the learned judge erred in law and fact in awarding the 1<sup>st</sup> and 2<sup>nd</sup> respondents damages that were high and excessive and not commensurate with the injuries sustained.
  8. The appellant was represented by learned counsel Mr. Z. K. Muriithi while learned counsel Mr. Okwaro Muyodi appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 4<sup>th</sup> respondent, Mr. Stephen Ezekiel Njiru, appeared in person.
  9. In his submissions, counsel for the appellant abandoned the alternative ground of appeal relating to the quantum of damages. For this reason, we shall not interfere with the quantum of damages awarded by the High Court in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  10. The issue before us relates to liability of the appellant as well as liability of the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Liability of the 3<sup>rd</sup> respondent as the driver of the vehicle at the time of accident was not contested. We uphold the learned judges finding that the 3<sup>rd</sup> respondent is 100% liable. We now consider the question of liability of the appellant and the 4<sup>th</sup> respondent.
  11. The appellant submitted that as at the time of the accident, motor vehicle KAC 606 P had been sold to the 4<sup>th</sup> respondent and hence he was not liable for the accident or injuries sustained by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. From the evidence on record, it was proved that the motor vehicle was registered in the name of the appellant. Counsel submitted that the insurance cover was in the name of the appellant at the time of accident. This is over thirty days after the alleged sale agreement. Section 8 of the Traffic Act stipulates that:

**“The person whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle”**

12. Both the appellant and the 4<sup>th</sup> respondent admitted that the registration of ownership of the motor vehicle had not been transferred. That no transfer form was signed and that after the accident, the appellant re-possessed the vehicle on account of default in the installment payments. We find that from the evidence led, the appellant is the registered owner of the vehicle. The appellant cited the case of **Osapil –v – Kaddy 2000 1 EALA 187** where the Uganda Court of Appeal held that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the

- person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.
13. The next issue for us to determine is if the contrary was proved that the registered person is not the owner of the vehicle KAC 606 P as per Section 8 of the Traffic Act. The appellant testified that by a sale agreement dated 21<sup>st</sup> November 1998, he sold the vehicle to the 4<sup>th</sup> respondent. The 4<sup>th</sup> respondent testified that he signed the sale agreement and the purchase price was to be paid by installment. The sale agreement was produced as an exhibit in court. It was agreed that possession of the vehicle was to be given when the 1<sup>st</sup> installment of Ksh. 150,000/= was paid. After the accident, the appellant repossessed the vehicle and it was later sold to another person. The appellant urged us to follow the case of **Securicor Kenya Limited - v - Kyumba Holdings Limited Civil Appeal No. 73 of 2002**. This case involved a road traffic accident and this Court did not find liability on the part of Securicor Company that was the registered owner. The court held that the company had proved it sold the vehicle and was not the owner at the time of the accident
  14. Our evaluation of the evidence on record and submissions by counsel reveals that despite the sale agreement relating to motor vehicle KAC 606 P, no transfer form was signed; the insurance remained in the name of the appellant; neither the registrar of motor vehicle nor the insurance company were informed of the sale; the appellant repossessed the vehicle after the accident and the 4<sup>th</sup> respondent was refunded the installment paid when he defaulted in the rest of the installments. From this evidence, we find that the sale agreement between the appellant and the 4<sup>th</sup> respondent was a conditional sale. The appellant retained the ownership and ostensible control of the vehicle. We find that no evidence was led to the contrary to displace the presumption in Section 8 of the Traffic Act that the appellant was the owner of motor vehicle KAC 606 P.
  15. The Securicor Kenya Limited case is distinguishable and inapplicable. In the Securicor case, the motor vehicle was sold by tender without an engine. A duly signed transfer form and logbook was given to the purchaser; the purchaser took possession and control of the vehicle; he placed another engine and converted the vehicle into a matatu. Though the vehicle remained registered in the name of Securicor, a complete sale had taken place. In the present appeal, the sale was conditional with no duly signed transfer form and full purchase price had not been paid. The fact that the appellant refunded the installment paid is proof that title had not passed.
  16. As between the appellant and the 4<sup>th</sup> respondent, who is liable to pay the damages awarded to the 1<sup>st</sup> and 2<sup>nd</sup> respondent? The answer to this turns on the concept of vicarious liability. Who is liable for the negligence of the 3<sup>rd</sup> respondent who was the driver of the vehicle? No issue arises as to the liability of the driver for the accident. The 3<sup>rd</sup> respondent, the driver was arrested, tried and convicted for careless driving. The learned judge held the 3<sup>rd</sup> respondent driver 100% liable.
  17. In ground 2 of appeal, the appellant contends that vicarious liability should follow from a finding that the 3<sup>rd</sup> respondent driver was engaged by the 4<sup>th</sup> respondent. That the driver was the agent or servant of the 4<sup>th</sup> respondent. In his testimony, the 4<sup>th</sup> respondent admitted he engaged the driver on the date of the accident and that he had taken possession of the motor vehicle pursuant to the sale agreement. The appellant's argument is that the 4<sup>th</sup> respondent should be vicariously liable for the negligence of the driver. The appellant testified that the driver was not his servant or agent and he should not be vicariously liable for the driver's actions. The 3<sup>rd</sup> respondent driver testified that he was engaged by the 4<sup>th</sup> respondent and given the vehicle to drive.
  18. The learned judge of the High Court held that the appellant, as the owner of the vehicle, was vicariously liable for the negligence of the 3<sup>rd</sup> respondent driver. The learned judge held the 4<sup>th</sup> respondent not liable.
  19. In the case of **Kenya Bus Services Ltd -v- Humphrey [2003] KLR 665** which followed the case of **Karisa vs Solanki [1969] E A 318** the following proposition was made:

**“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent**

**to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”**

20. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] E A 123**, thus:

**“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).**

21. This Court further stated in **Jabane v Olenja [1986] KLR 661** at pg 664, thus:

**“More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870.”**

22. The substantial question for determination in this appeal is who, between the appellant and the 4<sup>th</sup> respondent is vicariously liable for the actions of the offending driver. This is the same issue which was given primacy by the High Court.

23. The learned judge found that the 4<sup>th</sup> respondent was not liable for the negligence of the 3<sup>rd</sup> respondent driver. She found that the driver was driving the vehicle as an employee/agent of the appellant and with his authority. That the 4<sup>th</sup> respondent was exercising control of the vehicle on that day on behalf of the appellant and as such, the 4<sup>th</sup> respondent was not liable. Are these conclusions supported by the evidence on record? The 3<sup>rd</sup> respondent driver testified that he was engaged by the 4<sup>th</sup> respondent. The 4<sup>th</sup> respondent admitted he engaged the driver and gave him the vehicle. The 4<sup>th</sup> respondent testified that pursuant to the sale agreement he took possession of the vehicle to do matatu business. The appellant testified that the driver was not his agent or servant.

24. In assigning vicarious liability, it must be appreciated that it arises “when the tortuous act is done in the scope of or during the course of his employment or authority.” We have evaluated the evidence on record and have come to the conclusion that the findings by the High Court on the central issue of vicarious liability was erroneous. There was particularly no basis for finding that the 3<sup>rd</sup> respondent driver was an employee of the appellant. There was no factual basis for excluding the 4<sup>th</sup> respondent from liability. The evidence that the driver was hired by the 4<sup>th</sup> respondent should not have been ignored. The testimony by the 4<sup>th</sup> respondent that he had possession of the vehicle pursuant to the sale agreement should have been given due consideration. Vicarious liability for the driver should not exclusively be assigned to the appellant. The chain link between the appellant and the driver is only established through the 4<sup>th</sup> respondent. If the 4<sup>th</sup> respondent is cut out, the link is broken. The learned judge erred in arriving at a conclusion that broke this link. The evidence shows that the driver was engaged by the 4<sup>th</sup> respondent; in order to reach the appellant as owner of the vehicle, the 4<sup>th</sup> respondent must take liability. We find and hold the 4<sup>th</sup> respondent liable on the basis that he had actual possession and control of the vehicle. He is also liable as the 3<sup>rd</sup> respondent driver was his agent. The vicarious

liability for the actions of the driver continued to operate against the 4<sup>th</sup> respondent and there was no basis for excluding the 4<sup>th</sup> respondent from liability. For those reasons, the judgment of the High Court finding the 4<sup>th</sup> respondent not liable must and is hereby set aside.

25. On the issue of liability of the appellant, we follow the proposition stated in **Karisa vs Solanki [1969] E A 318** as applied in the case of **Kenya Bus Services Limited –v – Humphrey (2003) KLR 665** in which it was held “that where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible”. The sale of the motor vehicle KAC 606 P was a conditional sale; the appellant is liable for the accident caused by the motor vehicle for which he was the registered owner. The liability of the appellant is based on ownership of the vehicle and that he had ostensibly control of the vehicle.
26. We conclude by noting that the appellant has succeeded in respect of the order on liability which ought to have been made against the 4<sup>th</sup> respondent. We hereby set aside the judgment of the High court given on 16<sup>th</sup> January 2008 and substitute therefore an order that judgment be and is hereby entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as against the appellant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents jointly and severally. The damages awarded in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall be borne jointly and severally as stated. The costs of the suit both at the High Court and in appeal shall be borne by the Appellant as well as 3<sup>rd</sup> and 4<sup>th</sup> respondents jointly and severally.

**Dated and delivered at Nyeri this 16<sup>th</sup> day of May, 2013**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**