



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL APPEAL NO. 37 OF 2018**

**GICHIRA PETER.....APPELLANT**

**VERSUS**

**LUCY WAMBURA NGAKU.....1<sup>ST</sup> RESPONDENT**

**REAGAN MURIUKI GACHOKI.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

**Introduction**

1. This is an appeal from the Judgment of Honourable E. O. Wambo (S.R.M.) that was delivered on 14/06/2018 in Civil Suit No. 412 of 2009 (Kerugoya). The 1<sup>st</sup> Respondent instituted the suit against the Appellant for general and special damages following a road traffic accident that claimed the life of her husband, Brian Mwangi Njeru (deceased). The appeal seeks to set aside the entire Judgment.
2. The 1<sup>st</sup> respondent alleged that on or about 12/01/2009, the deceased was a fare paying passenger aboard motor vehicle registration number KAR 943D when the accident occurred in Nyamindi area along Embu-Mwea road.
3. From the plaint dated 18/11/2009, the 1<sup>st</sup> Respondent averred that the Appellant was the registered owner of the said motor vehicle and blamed him, his driver, servant and/or agent for the negligence and carelessness which resulted to the cause of the accident.
4. The Appellant denied liability alleging that he was not the owner or the driver of the subject motor vehicle at the time of the accident. The Appellant then joined the 2<sup>nd</sup> Respondent as a third party in the suit.
5. The 1<sup>st</sup> Respondent and one David Gachanga (PW2) testified for the Plaintiff'. PW2 witnessed the accident and testified that the same was caused by the driver of the said motor vehicle KAR 943D as he was in the process of overtaking other cars recklessly.
6. The 1<sup>st</sup> Respondent produced the following documents in evidence in support of her case:
  - a. A grant of Limited Grant of letters of administration ad Litem (P.Exhibit 1);
  - b. A Police Abstract dated 11/02/2019 (P.Exhibit 2);
  - c. Copy of court proceedings in Traffic case No. 3 of 2009 – Gichugu (P.Exhibit 3);
  - d. Copy of records of the motor vehicle dated 29/09/2009 (P.Exhibit 4);
  - e. Copy of Chief's letter (P.Exhibit 5); and
  - f. Copy of birth certificate of daughter (P.Exhibit 6).
7. On liability, the trial magistrate found "...the driver of motor vehicle KAR 943D 100% liable and the owner of the said motor vehicle vicariously liable. The 3<sup>rd</sup> party having not transferred the motor vehicle to the defendant he is still liable. He ought to have ascertained the transfer was effected."

8. Regarding quantum of damages, the trial magistrate awarded the 1<sup>st</sup> Respondent a total of Kshs. 1,680,000/= as follows:

- i. Kshs. 50,000/= for pain and suffering;
- ii. Kshs. 100,000/= for loss of expectation of life;
- iii. Kshs. 1,500,000/= for loss of dependency;
- iv. Kshs. 30,000/= for special damages;
- v. Costs and interests.

### **The Appeal**

9. The Appellant, dissatisfied with the said judgment, faulted the learned trial magistrate for:

- i. Awarding the 1<sup>st</sup> Respondent special damages which were not pleaded or proved.
- ii. Finding the Appellant liable for the accident while disregarding the liability of the 3<sup>rd</sup> party.
- iii. Failing to appreciate the effect of the sale agreement entered by the Appellant and the 3<sup>rd</sup> Party as well as the intention of the parties while entering the said agreement.
- iv. Finding the Appellant liable for the accident without having determined the ownership of the motor vehicle.
- v. Disregarding the responsibility and liability of the 3<sup>rd</sup> party.
- vi. Disregarding all the evidence presented by the Appellant in support of their position that he was not the beneficial owners of the vehicle at the time of the accident.
- vii. Failing to consider the 3<sup>rd</sup> party's negligent behaviour, firstly by refusing to pay the insurance the 3<sup>rd</sup> party excess as requested and failure to honour court summons and hearing notices served upon him.
- viii. Entering a judgment that is unfair, biased, unjust and an absurdity to the norms of equity and justice.

### **Submissions**

10. The Appellant maintained that the 2<sup>nd</sup> Respondent was the owner of the motor vehicle at the time of the accident. In support of his position, he cited the cases of **General Motors East Africa Limited vs. Eunice AlilaNdeswa & Another [2015] eKLR; Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR; Mageto v. Njathi [2013] eKLR; Wellington Nganga Muthiora v. Akamba Public Road Services and Another CA Kisumu [2010] eKLR.**

11. The Appellant submitted that at the time of the accident, the driver of the accident motor vehicle was an agent of the 2<sup>nd</sup> Respondent. The Appellant further submitted that he should not be held liable for the negligence of the said driver as there was no evidence showing an agency or servant employer relationship between the Appellant and the driver. He relied on the cases of **KBS Ltd vs. Humprey [2003] KLR 665; EA 519; Tabitha Nduhi Kinyua vs. Francis Mutua Mbuvi & Anor CA no. 186/09 [2014] eKLR and Securicor Kenya Ltd vs. Kyumba Holdings Ltd [2005] eKLR.**

12. On the other hand, it was the 1<sup>st</sup> Respondent's submissions that the appeal raises only two issues namely: liability and special damages. As for liability, the 1<sup>st</sup> Respondent submitted that the appellant was still the registered owner of the motor vehicle at the date of the accident because he had not yet transferred the motor vehicle on time as required by provisions of the Traffic Act. The 1<sup>st</sup> Respondent thus urged this court to uphold the decision of the trial court.

13. As for special damages, the 1<sup>st</sup> Respondent stated that the trial court was rightly guided by the High Court case of **Jacob Ayiga and Another vs. Simon Ubayo (2005) eKLR.** The 1<sup>st</sup> Respondent submitted that Kshs. 30,000/= awarded was reasonable for funeral expenses such as coffin, mortuary, transport etc. It was thus their submission that the appeal should be dismissed with costs to the 1<sup>st</sup> Respondent.

### **Issues for Determination**

i) Liability

### **Analysis**

14. This being a first appeal, it is trite law that this Court is under a duty to reconsider the evidence adduced in the trial court, re-evaluate

the evidence and draw its own conclusions. The principles upon which this Court acts in such an appeal are well settled and were aptly stated in the cases of **Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123** and **Williamson Diamonds Ltd. V. Brown [1970] E.A.L.R.**

**i. On determining liability, the question is:-**

**Who was the owner of the motor vehicle at the time of the accident hence vicariously liable?**

15. The gravamen of this appeal is whether the Appellant was the owner of the KAR 943D and if not, whether liability for the accident should be attached to him.

16. Section 8 of the Traffic Act (Cap 403 of the Laws of Kenya) provide that:

**“The person in whose name a vehicle registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”** The section provides the general rule with regard to ownership of the motor vehicle but there may be circumstances where this may vary. Registration of a person is prima facie evidence of ownership but the contrary may be proved.

17. The 1<sup>st</sup> respondent produce P.Exhibit 4 a copy of records from the Registrar of motor vehicles which indicate that the Appellant was the registered owner of the accident motor vehicle. However, the Appellant denies ownership of the motor vehicle at the time of the accident and contends that he had sold it to the 2<sup>nd</sup> Respondent vide a sale agreement dated 16/07/2008. The Appellant further contends that on the same 16/07/2008, the 2<sup>nd</sup> Respondent took possession of the motor vehicle thereby taking over all operations of the motor vehicle.

18. There are several authorities which agree that Section 8 of the Traffic Act recognizes the fact that the often times, motor vehicles change hands but the records are not amended to reflect the change. This is mainly because there is usually a time lag between the sale and transfer of the motor vehicle and the registration of the motor vehicle. The section appreciates that the contrary may be proved and determination on the registration does not always reflect that fact.

19. As such, Section 8 of the Traffic Act contemplates that there may be actual, possessory or beneficial ownership of a motor vehicle which can exist independent of registration. In **Securicor Kenya Limited v. Kyumba Holdings Limited [2005] 1KLR 748**, the Court of Appeal found as follows:

**“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the Traffic Act when she states that the true owner of the motor vehicle was the appellant.”**

20. It is therefore crucial to determine whether the Appellant proved that ownership of the accident motor vehicle had been passed to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent cited the case of **Francis Nzioka Ngao vs. Silas Thiani Nkunga [1998] eKLR** where the Court of Appeal upheld that:

**“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.”**

21. The Appellant produced as D.Exhibit1 a sale agreement dated 16/07/2008 between himself and the 2<sup>nd</sup> Respondent. From the terms of the said agreement, the Appellant agreed to sell and the 2<sup>nd</sup> Respondent agreed to buy the subject motor vehicle at a consideration of KShs. 400,000/=. KShs. 300,000/= was paid upfront in cash while the balance of KShs. 100,000/= was to be paid in five (5) equal installments of KShs. 20,000/= starting from September 2008 to January 2009. It was also agreed that the logbook and duly signed transfer would be surrendered after the said balance was cleared.

22. From a reading of the agreement, the balance of the sale was to be cleared in January 2009 and that is when property in the subject motor vehicle was to pass to the 2<sup>nd</sup> Respondent. The accident occurred on or about 12/01/2009 and it was the Appellant’s evidence in chief that he **“did not transfer the motor vehicle as there was a balance”**. As stated by the Court of Appeal in **Nzioka Ngao -v- Silas Thiani Nkunga (supra)** whether the property in the chattel being sold has passed is a question of fact which has to be determined based on the facts of each individual case. The burden was on the appellant to prove he was not the owner of the vehicle at the time of the accident. The appellants evidence was that the 2<sup>nd</sup> respondent was the owner at the time of the accident and he relied on the police abstract. A police abstract which is an official document issued by the police giving the particulars established at the time of a road traffic accident can be used to determine and clarify the ownership. **Section 116 of the Evidence Act** provides:-

**“ When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”**

The appellant had the burden to prove that he was not the owner. The appellant relies on the police abstract to prove that he was not the owner of the motor vehicle. The 1<sup>st</sup> respondent is the one who produced and relied on the police Abstract as his evidence. The court of Appeal in the case of **Muhambi Hoja-v- Said Mbwana Abdi (2015) eKLR** stated as follows:-

**“ In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if demonstrated that the person named in the registration (log) book has since transferred and directed**

*himself of its ownership to the person named in the abstract report or in that other form of evidence,”*

The fact of registration of a person as owner will not be taken as conclusive evidence of ownership as there are other alternative forms of ownership like actual ownership, beneficial owner and possessory ownership and where it is proved with other material evidence that the person registered was not the owner, that other person will be deemed to be the owner.

In this case the police abstract gave the name of owner of the said motor vehicle as Regan Muchoki Kariuki who is the second respondent.

In Wellington Nganga Muthiora vs Akamba Public Road Services and Another CA Kisumu 2010 eKLR

*“ where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence and not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within standards of probability and not beyond reasonable doubt as it is criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicle or any other proof such as an agreement for sale of the motor vehicle which would be conclusive evidence in the absence of the proof to the contrary.”*

The appellant adduced evidence to prove that though he was the registered owner as per the records from the registrar of motor vehicles the police abstract demonstrated that 2<sup>nd</sup> respondent was the one in possession, use and beneficial owner of the motor vehicle and at the time of the accident was the insured. As submitted by the appellant, the law imposes a duty on the owner of a public service vehicle to insure it against 3<sup>rd</sup> party risks. The abstract shows that the vehicle had a valid insurance cover in the name of the 2<sup>nd</sup> respondent. The driver of the vehicle at the time of the accident who is named on the abstract as the Cyrus Karani Kiragu was the one who was charged with a traffic offence and was convicted. This material was in the knowledge of the 1<sup>st</sup> respondent. I find that from the material which was placed before the trial magistrate, there was no doubt that the appellant only owned the motor vehicle on paper, the 2<sup>nd</sup> respondent was the beneficial owner of the accident motor vehicle who was in possession at the time of the accident having bought it from the appellant. The fact that the 2<sup>nd</sup> respondent had insured the motor vehicle is conclusive evidence that he was in possession and was beneficially entitled to it.

23. I find that based on the evidence before the trial court, the learned trial magistrate erred in holding that the appellant was the owner of the vehicle. He failed to appreciate that though the appellant was the owner on papers from the registrar's office, the contrary was proved with the evidence presented before him. Section 76 A of the Insurance Act which provides.

*“ Upon change of ownership of a motor vehicle, an insurer shall-*

*(a) Only issue a temporary cover for a period not exceeding three months, pending the registration of the motor vehicle in the name of the owner;*

*(b) Not renew the temporary cover or issue any annual policy in respect of motor vehicle, unless the new owner provides proof of the registration of them motor vehicle in his name by the registrar of motor vehicles.*

It is trite that failure to comply with the provision of the Act does not invalidate any policy of Insurance. Section 77 provides: the failure on the part of the Insurer, broker or agent to comply with any provisions of the Act shall not invalidate any policy of insurance. The person who had insured the vehicle was the beneficial owner and it was proved that the person was the 2<sup>nd</sup> respondent. The appellant successfully rebutted the evidence of ownership. I find that the appellant was not the owner of the motor vehicle at the time of the accident. The vehicle was insured by the 2<sup>nd</sup> respondent at the time of the accident an indication that the appellant had sold the vehicle and had no interest in the vehicle at the time of the accident whatsoever.

#### **Liability:**

The 2<sup>nd</sup> respondent was the beneficial owner of the vehicle at the time of the accident. The driver of the vehicle at the time of the accident was an agent and or servant of the 2<sup>nd</sup> respondent. This was well documented in the police Abstract. No liability can attach on the appellant as he was not the owner in possession at the time of the accident nor was the driver his servant or agent.

24. The driver who was driving the vehicle was prosecuted for traffic offences and was convicted. Section 47A of the Evidence Act provides:-

*“ A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”*

The fact of conviction of the driver who was driving the vehicle at the time of the accident is a conclusive prove that the person was negligent. That concludes the issue of negligence. The court must come to the conclusion that there is a presumption that the driver was an agent of the 2<sup>nd</sup> respondent and the vehicle was driven by a person for whose negligence the owner is responsible. The 1<sup>st</sup> respondent did not discharge the burden to prove vicarious liability on the appellant on the appellant.

The Court of Appeal in Securicor Kenya Ltd -v- Kyumba Holdings Ltd (2005) eKLR. Stated as follows:-

In the case before us, it was proved that at the time of the accident the appellant was no longer the owner of KWJ 816. It had sold it to G.M. Thangwa to whom possession had been transferred. It appears that Mr. Karume had not been put into possession of it by the appellant. Moreover, KWJ 816 was not being driven by appellant's driver or its employee on an occasion in which the appellant had any interest, matatu business not being its concern. There was no relationship whatsoever between the appellant and the 2<sup>nd</sup> defendant. Indeed, there was no agency relationship. It is difficult therefore to see how the trial Judge could import into the case the doctrine of vicarious liability. It was simply not applicable.

Moreover, if, which we do not consider to be the position, the appellant was still the owner by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of everyone who happened to drive it.

From the above holding the respondent had the burden to prove agency or servant relationship between the appellant and the driver which I find he did not discharge the appellant can therefore not be held liable for the driver's negligence.

On costs the rule of the game is that costs follow the event, a successful litigant should not be denied the fruits of his labour. In this case costs must follow the event, the 1<sup>st</sup> respondent pursued the claim against the wrong party.

#### **In conclusion**

I find that it has been demonstrated with evidence that this case fell within the scope of the exception of the rule laid down under **Section 8 of the Traffic Act**. As such the appellant was not the owner of the vehicle at the time of the accident and cannot therefore be ordered to satisfy the 1<sup>st</sup> respondent's claim. I find that the learned trial magistrate gave a Judgment which was clearly against the weight of the evidence. The Judgment cannot be supported. I order that;

- a) The appeal has merits and
- b) The Judgment of the trial magistrate is set aside and replaced with the order dismissing, the 1<sup>st</sup> respondents suit against the appellant.
- c) I award the appellants the costs of the appeal and of the suit before the lower court.

**Dated, signed and delivered at Chuka this 13<sup>th</sup> day of May 2021.**

**L.W. GITARI**

**JUDGE**