



REPUBLIC OF KENYA



Adeen Investment (K) Limited v Kisilu & another & another (Civil Appeal E085 & E086 of 2022 (Consolidated)) [2024] KEHC 16764 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E085 & E086 OF 2022 (CONSOLIDATED)**

NIO ADAGI, J

NOVEMBER 28, 2024

BETWEEN

ADEEN INVESTMENT (K) LIMITED APPELLANT

AND

NICHOLUS MUINDE KISILU & JOSEPH KELI MUTUNGA . 1ST RESPONDENT

KENNETH O NYONJE 2ND RESPONDENT

(Being an appeal from the judgment of the Hon. B. A Luova (RM) in Machakos CMCC NO. 28 of 2022 at Machakos delivered on 18/5/2022)

JUDGMENT

Background

1. In a Complaint dated 26/1/2022, the Plaintiff/1st Respondent instituted a suit No. E028 of 2022 in at the Machakos Chief Magistrate's Court against the Defendant/Appellant claiming the following: -
 - a) General Damages for pain, suffering and loss of amenities
 - b) Special Damages for Ksh.7,250/=
 - c) Cost of the suit
 - d) Interest on a, b and c above
 - e) Any other or further relief as this court may deem fit and just to grant.
2. The Plaintiff's case was that on or about 4/1/22. He was lawfully travelling aboard a motor vehicle registration number KDB 671S as a lawfully passenger along Machakos-Kitui road when at Thwake area along Machakos-Kitui road, when the Defendants either by themselves and/or their authorized driver, servant and/or agent negligently, carelessly and/or dangerously, controlled and/or managed that



the same that it lost control and veered off the road causing an accident wherein Plaintiff sustained the following injuries: Blunt injury to the neck Blunt injury to the abdomen Blunt injury to the back Bruises both elbow joints Blunt injury right knee.

3. The Defendant filed a memorandum of appearance, a statement of defence, list of witnesses, witness statement, list of documents all dated 7/2/2022 to the plaintiff. The Defendant further filed a Third-Party Notice as against Kenneth O. Nyonje/2nd Respondent dated 30/3/2022.
4. The Third-Party failed to enter appearance or file a defence to the Plaintiff. The matter proceeded for hearing where the Plaintiff adduced evidence supporting the claim against the Defendant.
5. The case was set down for hearing. PW1. The Plaintiff testified that he was a teacher and lived in Athi River, Machakos County. He was involved in an accident on 4/1/2022 and he recorded a statement filed together with Plaintiff on 18/3/2022 and invited the court to adopt the statement as his evidence in chief. He blamed the driver because he was over speeding and that there was no other motor vehicle that was involved in the said accident. He produced as exhibits documents attached to his list of documents as PEXT 2-8. The police abstract was marked as PMFI.1.
6. In cross examination, the Plaintiff was shown the document DMFI.1, which was a Sale Agreement dated 10/2/2021. According to the document, it shows the vehicle was sold to Kennedy Nyonje on 10/2/2021 and the accident happened on 4/1/2022. In re-examination, he stated that he had not been shown any transfer documents or a logbook in the name of the supposed buyer. The name as of 14/1/2022 was the Defendant from the copy of records.
7. The record shows that parties then agreed to take the evidence on liability adduced by both the Claimant, police officer and defence in SCC E031 of 2022 to apply to CMCC No. E028 of 2022 and thereafter parties to file submissions on quantum of damages in CMCC No. E028 of 2022 annexing the original claim supporting documents to the submissions.
8. The trial court adopted the parties' consent to have Machakos SCC E031 of 2022 marked as a test suit on liability and what was to be determined therein to apply in CMCC E028 of 2022.
9. PW2, was No. 236214, Inspector Nancy Odera attached to Masii police station at traffic section as the in charge. She had the OB report of an accident OB N0.28/4/2001/22. It was a serious self-involving road traffic accident which occurred at about 2pm at Thwake area along Machakos-Kitui road involving motor vehicle registration No. KAB 671S Toyota Townace.
10. That it happened that one Munyao Mutiso was driving the said motor vehicle towards Machakos direction from Masii direction while carrying fare paying passengers, on reaching Thwake area while negotiating a sharp corner he lost control of the motor vehicle and veered off the left side as one faces Machakos direction and rolled several times. As a result, of the accident the driver sustained injuries on his back and his hip while the following passengers sustained injuries: Moses Muthama and others. The claimant was passenger No. 3 aged 35 years. He sustained the following injuries; backache, cut on his right, chest pains and injuries on the left.
11. There was also another passenger No.5 aged 45 years (Plaintiff in CMACC E028 of 2022). The motor vehicle was extensively damaged, the victims were rushed to Machakos Level 5 for treatment, the scene was visited and motor vehicle a beneficial owner was recorded as Kenneth Nyonje and the original owner was Adeen Investments. The beneficial owner had not finished paying for the motor vehicle and the name of the owner was still in the name of the dealer (Adeen Investments).
12. In cross examination she stated that the accident is still pending under investigation because the driver has not come back to record the statement but the driver is supposed to be charged. Under paragraph



7 of P.A.R the matter is pending under investigation. The driver is to be blamed for the accident. They had recorded all statements save for that of the driver. She had handled traffic investigations. She was asked: "If the driver has not recorded his statement, then have you concluded his investigations?" and she answered: "accident is still pending under investigation". Owing to the evidence gathered, he is blamed. The demeanor of the witness showed that she was lying to court as she was evasive on the issue of pending under investigation. The insured Kenneth Nyonje was the beneficial owner-.

13. In re-examination she confirmed the Plaintiff was a passenger in the motor vehicle. The driver is the one who was supposed to be charged for the accident. Accident investigations majorly depend on the scene of the accident and witnesses themselves. The registered owner was the dealer Adeen Investments.
14. The Plaintiff's case was then closed.
15. The Defendant called one witness. DW1, Bernard Muli testified that he worked for the Defendant as the finance manager. He had filed his witness statement dated 31/3/2022 which he invited the court to adopt as his evidence in chief. There was also a bundle of documents filed by the Defendant dated 31/3/2022 which were produced as exhibits including DEXH.1-sale agreement, DEXH.2- Second hand motor dealer license, DEXH.4- Copy of ID card of the purchaser of motor vehicle and DEXH.5- reply to demand letter dated 27/1/2022.
16. In cross-examination, he stated that the vehicle was sold on 10-2-2021. The date the vehicle was sold it was the date the agreement was entered to (referred to DEXH 1- the sale agreement. According to the agreement the purchase price was not fully paid. In the schedule it gives dates and amounts to be paid. The last instalment was to be made on 2-3-2021 of Kshs.38,100/=. As per the sale agreement, as of 2-3-2022 the motor vehicle had not been fully paid up. (Referred to DEXH 3). They delivered the motor vehicle to the purchaser without him having fully paid up for the motor vehicle in the circumstances the vehicle belongs to the buyer and he takes up all responsibilities, our core business is to sell motor vehicle. The owner is the purchaser. Where purchaser fails to pay up, they can reclaim the motor vehicle. They recover the debt as follows; they have not attached the transfer documents the purchaser was to pay for the fees for transport. They have not initiated the transfer but he had not paid.

The sale agreement is a contract between Defendant and Kenneth Nyonje. The Plaintiff cannot be bound by the contract between Defendant and 3rd party. The DEXH. I was not commissioned. From the copy of records, the Defendant is still registered owner. They cannot bear liability because there is a sale agreement. They were not in possession of the vehicle.
17. The 3rd Party did not adduce any evidence.
18. Upon hearing of the case on merits and consideration of the Parties' submissions, the trial court delivered a judgment on 18/5/2022 wherein it held that on the issue of liability, the Parties had consented to adopt liability in Machakos SCCC No. E031 OF 2022 in which the trial court found that the Claimant could only sue the Respondent as he was the one registered as the owner of the suit motor vehicle. The Third Party though served, did not enter appearance or file any response to the Claim. The sale agreement was entered into by the Respondent and Third Party and the Claimant not being privy to that contract, could not know who to sue apart from whoever the motor vehicle search showed as the owner. The trial court stated that it was guided by the authority cited by the Claimant and found that the Claimant was a passenger and was not in control of the suit motor vehicle and held that the Respondent and the Third Party jointly and severally 100% liable for the accident and subsequent injuries by the Claimant.
19. On quantum, the trial court observed that the Plaintiff submitted for an award of Ksh.500,000/-as commensurate and relied on the following cases:Christine Adhiambo v Falcon Coach Ltd & Another



- [2009] eKLR where plaintiff sustained deep cut wound on the head, cuts on the left upper arm and forearm and other soft tissue injuries and general damages was assessed at Ksh.400,000/-.Patrick Kiptoo & Another v John Ewoi Eldoret HCCA No.82 of 2008 where the plaintiff sustained bruised and swollen forehead, blunt injury to the chest, tender and swollen upper arm and swollen and tender left hip and left thigh, General damages awarded were assessed at Ksh.300,000/-.Samuel Muthama v Kenneth Maundu Muindi Machakos HCCA No.102 of 2008 where the appellant sustained blunt injury to the hand, back and chest. General damages awarded were assessed at Ksh.380,000/-.
20. On the other hand, the Defendant and Third Party did not submit on quantum.
 21. On the basis of the evidence on record the Plaintiff sustained soft tissue injuries as evidenced by the medical report by Dr. John Mutunga.
 22. The trial court being guided by FM (Minor suing through Mother and next friend MWM) v JNM & Another [2020] eKLR where the Plaintiff suffered blunt injuries to the head, thorax, neck abdomen and limb was awarded Ksh.100,000/-.
 23. This trial court took cue from the above decision and held that the Plaintiff could reasonably be compensated with an award of Ksh.100,000/- as general damages.
 24. The Plaintiff pleaded and proved specials damages of Ksh.2,100/= as evidenced by Exhibit 6 which were award,
 25. Judgment was entered for the Plaintiff jointly and severally against the Defendant and Third Party in the following terms:
 - a) Liability assessed at 100% for the Plaintiff jointly and severally against the Defendant and Third Party.
 - b) General damages Ksh.100,000.00
 - c) Special damages Ksh. 2,100.00Total Ksh. 102,100.00
Costs of the suit and interest thereto.
 26. Being aggrieved by the said judgment, the Appellant lodged this appeal vide a Memorandum of appeal dated 14/6/2022 raising 10 grounds which challenge both liability and quantum.
 27. Parties were directed to file written submissions to canvas the appeal. The Appellant's submissions are dated 24/10/2023 and filed in court on 25/10/2023 whereas the 1st Respondent's submissions are dated 27/8/2024 and filed in court on 30/8/2024. There are no submissions by the 2nd Respondent who did not participate in the appeal.
 28. I have perused the Record of Appeal, considered and weighed the evidence that was adduced and rival submissions on the appeal and I now proceed to determine the appeal herein.
 29. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) EA 123, (1958) EA page 424



30. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

31. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
32. The Appellant submits that the question the appeal seeks to answer is contingent upon the twin issues of ownership and liability in respect of motor vehicle KDB 671S. That the Appellant is merely a Company that deals with the importation and sell of second-hand Japanese motor vehicles within the Republic of Kenya and produced evidence of sale agreement dated 1/2/12021 being DEXT.1 and that at the time of the accident, on 4/1/2022 the Appellant was not in possession and/or control of the said motor vehicle.
33. It is not in dispute that the Appellant had sold the subject motor vehicle to the 2nd Respondent who was the insured owner as per the sale agreement, under clause 6 and 7, the 2nd Respondent had complied with those terms by taking out an insurance cover with an insurance of his choice who accepted liability in the event the subject vehicle was to be involved in an accident. There is also evidence of the delivery note dated 10/2/2021 confirming the vehicle was received by the 2nd Respondent. The 1st Respondent's witness PW2-the police officer confirmed that the vehicle was in possession and control of the 2nd Respondent and the insured and beneficial and possessory owner was the 2nd Respondent. This witness produced a police abstract PEXT.1 which showed the insured at the time of the accident was the 2nd Respondent.
34. The 1st Respondent on the other hand submits that, the Appellant was the registered owner of the subject motor vehicle at the time of the occurrence of the accident as seen from the copy of records produced as PXET.2 and confirmed by the police officer from details of the log book, None Produced. The 1st Respondent agrees that the 2nd Respondent was the beneficial owner of the subject as at the time of the accident but he was yet to complete payments on purchase of the same to the Appellant. That by virtue of both the Appellant and the 2nd Respondents being the registered and beneficial owner respectively, of the subject motor vehicle at the time of the occurrence of the accident, they were consequently both jointly and severally liable for the occurrence of the accident. The 1st Respondent further submitted that considering the fact that the 2nd Respondent had not yet completed payments for the said vehicle, the Appellant still had a registered ownership interest in it, thus it is partly liable for the accident as correctly held by the trial court.



35. PW2, the police officer testified and attributed liability for the accident on the 2nd Respondent's driver. The Appellant submits that this evidence was not controverted and that Munyao Mutiso was to blame for the accident.

Analysis and determination

36. The issues for determination are-

- (i) Whether ownership of the motor vehicle registration No. KDB 671S was properly determined; and
- (ii) Whether the Appellant was vicariously liable for the accident.

(i) Whether ownership of the motor vehicle registration No. KDB 671S was properly determined

37. I have thoroughly read through the judgment of the trial court and the authority of Jared Magwaro Bundi & Another v Primarosa Flowers Limited (2018) eKLR that was cited by the Claimant/1st Respondent that guided the trial court on the issue of ownership of the subject vehicle and liability where the court stated :-

“It was therefore held in Muhambi Koja (supra) that Section 8 of the *Traffic Act* recognizes registration book or the Registrar's extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.”

38. The trial court rightly acknowledged that the Third Party did not participate in the proceedings.

39. In citing Section 8 of the *Traffic Act* which provides:-

“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 trial Court observed that the Respondent did not provide any evidence to show that the suit motor vehicle had been transferred or was in the process of transfer or registered in the name of the 2nd Respondent as held in Jared Magwaro Bundi (Supra).

From the foregoing, Claimant could only sue the Respondent as he was the one registered as the owner of the suit motor vehicle. The third party though served, did not enter appearance or filed any response to the claim. The sale agreement was entered into by the Respondent and Third Party and the Claimant not being privy to that contract, could not know who to sue apart from whomever the motor vehicle showed as the owner.

40. I do not agree with the trial court's finding above that Claimant/1st Respondent could only sue the Appellant as he was the one registered as the owner of the suit motor vehicle and further that the sale agreement was entered into by the Respondent and Third Party and the Claimant not being privy to that contract, could not know who to sue apart from whomever the motor vehicle showed as the owner.



41. In my view, it is the fact of the sale of the motor vehicle that changes ownership in a motor vehicle and not the fact of registration. On 10/02/2021 the Appellant ceased to be the owner of motor vehicle registration No. KDB 671S after the sale agreement was done under the *Sale of Goods Act* and that the 2nd Respondent became the new owner thereof when he took physical possession and custody of the same. There are numerous court decisions on this. In the case of *Osumo Apima Nyaundi v Charles Isaboke Onyancha Kibondori & 3 Others* [1996] eKLR, the Court of Appeal held that ownership of a vehicle passes on the sale and delivery and that the registration book of the vehicle is only evidence of title. The said court went on to hold that Sections 9(1) and 14 of the *Traffic Act* provide penal sanctions but do not decide the issue of ownership of a vehicle. That the Court of Appeal further held that ownership of a vehicle (which is a chattel), is upon sale governed by the *Sale of Goods Act*. In *Joel Muthuri v Julius Gichuru Guantai* [1996] eKLR, the Court of Appeal held that a log book is only evidence of title but property in a vehicle passes to the buyer at the time when the contract is made. In *Ignatius Makau Mutisya v Reuben Musyoki Muli and Joel Muga Opinja v East Africa Sea Food Ltd* [2013] eKLR, the Court of Appeal held that registration of a motor vehicle is not conclusive proof of ownership, but it can be rebutted where other compelling evidence exists to prove otherwise.
42. In the case of *Muhambi Koja Said v Mbwana Abdi* [2015] eKLR, the Court of Appeal when considering the implication of Section 9 of the *Traffic Act* stated the following-
- “Two provisions are presented under this provision. There are two steps to be satisfied within fourteen days before the vehicle can be registered in the name of the new owner. As this process is in motion the new owner, though not registered can use the vehicle on the road for a period of fourteen (14) days. If the vehicle was to be involved in an accident in this intervening period the registration book will be in the name of the seller yet the motor vehicle will have been transferred and ownership vested in the new owner only pending registration. That new owner will be liable if evidence of transfer is led. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms. The police abstract report which is usually completed after investigations are conducted by the police and which is admissible in evidence by virtue of Section 38 of the *Evidence Act* is one such proof.” (emphasis added).
43. In the above case, the Court of Appeal went on to state as follows:-
- “The proviso to Section 9(2) is the second scenario. Unlike the first scenario which is restricted to fourteen days within which the motor vehicle must be registered, the second scenario is where the previous owner has transferred the vehicle to a new owner but has either refused to comply with the requirements necessary to register it, or has died or left Kenya or cannot be traced. Only after the Registrar is satisfied as to any or more of these conditions and upon payment of fees will the new owner be registered. In the meantime, before the Registrar is satisfied, although not named in the log book, the new owner, will be for all intents and purposes be deemed to be the owner, and in case of an accident, will be held liable.” (emphasis added).
44. In the present case, the Appellant discharged the burden of proof when he adduced evidence to demonstrate that he had sold the vehicle to the 2nd Respondent. Although he did not sign a transfer form, the sale agreement he produced in court was sufficient proof that he had transferred ownership to the 2nd Respondent. The Appellant had a window of 14 days within which to officially approve the transfer of the motor vehicle in issue to the new owner (2nd Respondent) failing which, the said owner



could have moved the Registrar of motor vehicles (Registrar) to have the motor vehicle registered in his name.

45. Since the Appellant produced a sale agreement dated 10th February 2021, he had 7 days within which to notify the Registrar of the change of ownership. The police abstract report in this case did not disclose the name of the owner of motor vehicle registration No. KDB 671S. In as much as a police abstract is supposed to have all the details of ownership of the vehicle, the holder of the policy was not reflected on the police abstract produced in this case.
46. In the case of *Muhambi Koja said v Mbwana Abdi (supra)*, the Court of Appeal in concluding its decision stated thus:-

“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 it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of ownership to the person named in that other form of evidence.”

47. The above position was also held in the case of *Jared Magwaro Bundi & Another v Primarosa Flowers Limited [2018] eKLR*. Which supposedly guided the Trial Magistrate.
48. It is the finding of this court that the Trial Magistrate misdirected herself in the interpretation of the provisions of Section 9 of the *Traffic Act*. Since the vehicle in issue was sold on 10th February 2021 and there was a sale agreement to that effect and the 2nd Respondent had taken physical possession of the subject motor vehicle and had taken an insurance policy cover over it which policy was valid at the time of the occurrence of the accident

ii. Whether the Appellant was vicariously liable for the accident

49. On the issue of vicarious liability, it is clear from the determination of the first issue that the Appellant had sold motor vehicle registration No. KDB 671S to the 2nd Respondent, thereby transferring ownership to him.
50. The finding of this court is that the Appellant was not liable for the accident in issue. This court has said enough to demonstrate that the Appellant should not have been held to be a joint owner of motor vehicle registration No. KDB 671S as he had divested himself of the ownership and title to it. He discharged his burden of proof on a balance of probability. I therefore find that the appeal herein is well merited. I allow the appeal and find that the 2nd Respondent was wholly liable for the self involving accident that occurred on 24th January 2022 involving motor vehicle registration No. KDB 671S being driven by Munyao Mutiso, the 2nd Respondent’s driver, agent and or servant at the time.
51. The appeal is therefore allowed in its entirety. The Appellant is awarded the costs of the lower court case and of this appeal. Interest is also awarded to the Appellant at court rates.

It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 28TH NOVEMBER 2024

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 28TH NOVEMBER 2024

