



**Car and General (Trading) Limited v See & another (Civil Appeal
E078 of 2023) [2024] KEHC 16946 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E078 OF 2023
F WANGARI, J
NOVEMBER 28, 2024**

BETWEEN

CAR AND GENERAL (TRADING) LIMITED APPELLANT

AND

BENARD OCHIENG SEE 1ST RESPONDENT

SILVESTER OTIENO NGESA 2ND RESPONDENT

*(Being an appeal from the decision of Honourable D.W Mburu, Senior Principal
Magistrate delivered on 3rd March, 2023 in Mombasa CMCC No. E578 of 2019)*

JUDGMENT

1. Having been dissatisfied with the above mentioned decision, the Appellant filed this Appeal and preferred the following grounds (in summary) in the Memorandum of Appeal dated 29/03/2023. That Learned Magistrate erred in law in;
 - a. Failing to appreciate that the accident was caused by the 2nd Respondent
 - b. Failing to apply section 8 and 9 of the [Traffic Act](#) in failing to establish that motor vehicle registration no. KTWA 601W (hereinafter referred to as the suit motor vehicle) had been sold to the 2nd Respondent.
 - c. Holding the Appellant 100% liable yet it was not in ownership or possession of the motor vehicle.
 - d. Failing to find that the Appellant had sold the motor cycle to the 2nd Respondent at the time of the accident.
 - e. Failing to consider the evidence and submissions thus arriving at unjust decision.



2. It thus prayed that that the judgment dated 03/03/2023 be set aside in its entirety, and that this Honourable Court do dismiss the case against the Appellant with costs.
3. Directions were taken to have the appeal disposed of by way of written submissions. Both parties duly complied with the court's directions. The Appellant's submissions are dated 12/04/2024 while those of the 1st Respondent are dated 17/06/2024. The 2nd Respondents did not file any submissions and neither did they participate before the Trial Court nor before this court.
4. The Appellant submitted that the owner of the motor cycle involved in the subject accident was the 2nd Respondent. Even though the copy of records show that the Appellant was the registered owner of the suit motor vehicle, the same had been sold to the 2nd Respondent and the sales invoice produced as exhibit was proof considering it had the chassis number of the vehicle.
5. The Appellant acknowledges that the sale invoice is not proof of ownership, but under the circumstances, it was the fault of the 2nd Respondent by failing to transfer the motor vehicle to his name, and the trial court ought to have taken judicial notice of the same.
6. The Appellant further submitted that being engaged in the business of selling motor cycles and as such, it had no control of a motor cycle once it has been sold. The Appellant prayed that judgment on liability against it be set aside, and the appeal be allowed in its favour.
7. On the other hand, the 1st Respondent, who was the Plaintiff in the lower court suit, submitted that the Appellant was the registered owner of the offending motor cycle. It was submitted that the alleged sale of the motor vehicle was in year 2014 and the accident occurred in year 2016. Transfer ought to have taken place within 14 days, hence section 9(1) of the Traffic Act had been offended
8. It was further submitted that the Appellant ought to have within 7 days from the date of transfer, informed the Registrar of Motor Vehicles particulars of the new owner and deliver the registration book of the motor vehicle. That was not done hence offending Section 9 (2) of the Traffic Act.
9. The Respondent submitted on quantum praying for enhancement of the award of General Damages. however, that was not an issue for consideration in the appeal. If the 1st Respondent was dissatisfied with the award of the General Damages, nothing stopped him from fling a cross-appeal against the said decision. This court shall not make a decision on the same.

Analysis

10. This Court has carefully considered the Record of Appeal, the parties' rival submissions, the authorities cited as well as the law and the only issue that falls for this Court's determination is whether the Appellant is liable for the accident caused. Corollary to this is the issue of costs.
11. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence and consider arguments by parties and apply the law thereto, and, make its own determination of the issue or issues in controversy. Except however, that it should give due allowance to the fact that it neither saw nor heard the witnesses' testimonies.
12. This was aptly stated by the Court of Appeal in the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123 as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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."

13. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred in its findings.
14. It is not in dispute that there was an accident involving the 1st Respondent herein and the suit motor cycle registration number KTWA 601W. It is also not in dispute that the said motor cycle is registered in the name of the Appellant, who is in the business of selling motor cycles.
15. There is evidence on record that the Appellant sold the motor cycle to the 3rd Respondent, who then sold it to the 2nd Respondent.
16. The trial court in finding the Appellant an owner of the motor cycle relied on Section 8 of the [Traffic Act](#), Cap 403 of the Laws of Kenya provides 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".
17. Further, section 8 of the [Traffic Act](#) was summarized in the case of [Benard Muia Kilovoo v Kenya Fresh Produce Exporters](#) [2020] eKLR as follows;

"41. The Court of Appeal in these binding decisions is clearly stating: -(i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.

(ii) Where there exists other compelling evidence to prove otherwise then the court can make a finding of ownership that is different from that contained in the logbook.

(iii) Each case must however be considered in its own peculiar facts."
18. In view of the above, I find that the Appellant ought to have discharged the presumption that it was the owner of the motor cycle by presenting compelling proof that ownership had passed. I have perused through the sales invoice produced as exhibit by the Appellant (pg. 61 & 62 of the Record of Appeal).
19. As admitted by the Appellant in its submissions on the 'insufficiency of the appellant's invoice', the contents in the said invoice is not proof of sale. Nothing stopped the Appellant from producing the sales agreement between the Appellant and the 2nd Respondent, as that would have been compelling proof that ownership had passed from the Appellant to the 2nd Respondent.
20. This court is in agreement with the submissions by the 1st Respondent that an invoice is not proof of sale hence this appeal fails. (See [Total Kenya Ltd v Janevams Limited](#) [2015] eKLR and [Great Lakes Transport Co. \(U\) Ltd v Kenya Revenue Authority](#) [2009] eKLR 720).

Determination

21. The upshot of the foregoing is that the court renders itself as hereunder: -



- a. The lower court judgment dated 03/03/2023 is upheld
- b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF NOVEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Lumatete Advocate for the Appellant

Aroka Advocate for the 1st Respondents;

Brian, Court Assistant

