KAG Sacco Ltd v Mburugu (Civil Appeal E505 of 2021)
[2022] KEHC 11105 (KLR) (Civ) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11105 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E505 OF 2021

SJ CHITEMBWE, J

MAY 31, 2022

BETWEEN

KAG SACCO LTD ..... APPELLANT

AND

DENNIS MBURUGU ..... RESPONDENT

(Being an appeal from the judgement and decree of the court delivered on 19th July 2021 in the Small Claims Court Case No. 324 of 2021 by Hon. B. J. Ofisi Resident Magistrate)

JUDGMENT

1. The respondent filed the suit before the Small Claims Court at Nairobi seeking special damages together with costs. The trial court held the appellant 100% liable and awarded the respondent Ksh. 310,000 as special damages.

2. The appellant preferred this appeal on the following grounds:-

    1. The learned Magistrate erred in law in totally disregarding the evidence on record on the issue of negligence against the appellant.

    2. The learned Magistrate erred in law by failing to appreciate the evidence tendered with regard to the liability of the appellant

    3. The learned magistrate erred on law by failing to appreciate that the authenticity of the documents introduced into the evidence by consent of the parties was not open to her to deal with.

4. The learned magistrate erred in law when in the face of and despite the appellants documentary evidence, she failed to find and hold that the appellant was exonerated from any blame for that accident in that;

    i. That the appellant was duly a financier of the motor vehicle KCN 886H operated by the 2nd respondent in the lower court case

    ii. That the appellant was neither the employer nor the agent of Job Mbugua the 2nd respondent in the case.

    iii. That the mere registration of the appellant as the owner of the subject motor vehicle to secure a financial risk did not invite risk or liability, vicarious or otherwise or at all.

    iv. That at all times of the accident the subject motor vehicle was neither in the possession of nor under the control of the appellant.

    v. That at the material time of the accident the motor vehicle was being driven neither at the request of nor upon instruction of the appellant

5. The learned Magistrate erred in law by failing to consider and take into account the appellants submission on record.

6. The learned magistrate erred in law and as a result arrived at a wrong decision and in all circumstances failed to do justice to the appellant.

7. The judgement of the honorable court has occasioned a failure of justice and or resulted in a gross miscarriage of justice.

3. Counsel for the appellant submitted that before the trial court the parties agreed to utilize the provisions of section 30 of the *Small Claims Act* No. 2 of 2016 and adopted the documents in the court record as their evidence. In her judgment the learned magistrate doubted the authenticity of the documents submitted by the appellant as she indicated that there was no proof that the said motor vehicle was in the process of being transferred to another party hence the appellant was held 100% liable. It was therefore the appellant's argument that the appellants' documents should not have been questioned and should have been treated the same way as the respondent's documents.

4. It was also argued that section 8 of the *Traffic Act* 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". That the appellant was neither its agent nor its employer at the material time of the accident and neither was it in possession of the vehicle. The driver was not acting on instruction of the appellant and neither was he acting as its agent. The registration of the appellant as the owner of the motor vehicle was a security measure and its interest remained that of a financier which could not invite any risk.

5. In support counsel for the appellant cited the case of *Equity Bank Limited v Naftal Anyumba Onyango & 2 others* [2014] eKLR where it was stated

> "From the law, I do not agree with the arguments made by the 1st respondent that the appellant herein was vicariously liable for the acts of negligence of the 3rd respondent. It is clear from the record that the role the appellant played in the operation regarding the motor vehicle was purely that of financier.
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> ...

> I further find that the said motor vehicle was never in the control of the appellant as at the time of the accident but the same was totally under the control of the 3rd respondent. The appellants did not manage the said motor vehicle for the reason that their only interest was that of a financial nature to ensure that the monthly installments as per the loan agreement were being monitored. On this ground I find that the appeal herein had merit.
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> Secondly on the issue of liability of the appellant as the financier I do find that the same cannot lie as against them. My reasoning is that the appellant did not have control over the borrower on how to manage the motor vehicle. His interest was only on the repayment of the loan by the 3rd respondent. He never benefited from the business by the 3rd respondent neither did he manage the same. As earlier stated the only persons liable for the said accident were the 3rd respondent and the 2nd respondent. No evidence was placed before the trial court by the 1st respondent that the appellant herein managed the suit motor vehicle on a daily basis nor that the appellant received any benefit (other than the loan repayment) from the use of the said motor vehicle on a daily basis. The appellant's involvement regarding the motor vehicle herein was purely that of financier and the same was extinguishable upon the finances being recovered and the transfer and title effected to the borrower as per the terms of the loan agreement entered into between the appellant and the 3rd respondent."

6. It is therefore the appellant's argument that the appellant as a financier they are not liable for the negligence of the driver.

7. The appeal was opposed, Counsel for the respondent submitted that in the trial court the appellant admitted to be the registered owner of the motor vehicle registration number KCN 866H which was driven by Job Mbugua. The appellant stated that Job Mbugua took a loan from the appellant to purchase the vehicle and that he had not finished repaying the loan and it was this reason that the appellant was held vicariously liable. It was also submitted that an affidavit and a letter cannot detach liability against the appellant because it did not in any way provide the terms of the loan facility or prove that such a facility was ever entered into. It was submitted that liability would only detach from the appellant once the full amount of the alleged loan facility had been paid. There was no proof of full payment. In this matter there was no proof that showed the handover of the motor vehicle to Job Mbugua which could have been done by transfer to his name.

8. In support counsel for the respondent relied on the case of *Leonard Mungania v Jessikay Enterprises & Another* [2009] eKLR where it was held:-

> "That condition amply testifies to the fact that the purchaser could only have transferred the vehicle into his name once the full purchase price had been paid. As at the time of the accident and assuming that the purchaser had been regular in the payments of the monthly instalments of Kshs.48,000/= per month with effect from 1st September 2004, he still had 2 more instalments to go. I would imagine that that was the reason why the motor vehicle was still perhaps registered in the name of the 1st respondent. I have a ringing suspicion that all documents tendered in evidence showing that the 1st Respondent had surrendered the motor vehicle to the purchaser, were generated by the 1st respondent purposely to defeat the appellant's claim. In any event, being a hire purchase agreement, it is common knowledge that the property the subject of the Hire purchase agreement ordinarily remains in the names of the vendor until the hire-purchase instalments are fully paid. This would seem to be the case here. Accordingly as at the time of the accident the vehicle in law still belonged to the 1st respondent. In my view therefore the property in the vehicle had not passed on to the purported purchaser. In support of this conclusion I would revert to section 9 of the *Traffic*

Act again. In a nutshell it provides that if a vehicle is transferred from a registered owner, it shall not be used on the road for more than 14 days after the transfer unless the new owner is registered as the owner thereof. From the evidence on record and which the 1st respondent wishes this court to believe had the vehicle been sold on 16th July 2004 the same could have been on the road at the very latest 30th July 2004. Yet the vehicle was on the road as late as at the time of the accident clearly in breach of the law. "

9. Counsel for the respondent argued that in the apparent case it is the appellant's assumption that the letter laid down the terms of the engagement between themselves and Job Mbugua. The letter dated April 2, 2017 stated that the liability would only detach once the full amount of the alleged loan facility had been paid and there was no proof of such payment that was adduced in the trial court.

10. It was also the respondents argument that section 30 of the *Small Claims Act* provides that "subject to agreement of all parties to the proceedings, the court may determine any claim and give such orders as it considers fit and just on the basis of documents written submissions, statements or other submissions presented to the court". Therefore the use of the word "may" in this context means that the court has a choice to use documents agreed to be adopted by the parties or not. It is therefore the courts discretion to use the documents and question their authenticity as it considers what is fit and just in the circumstances.

Analysis and determination.

11. This is a first appeal. The court has to evaluate the evidence and record of the trial court afresh before drawing its own conclusion.In *Selle -vs- Associated Boat Co Ltd*. [1968] EA 123. The duty of the first appellate court was stated in the following terms:

> "An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> 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 –vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)."

12. During the trial the documents in the court record were adopted as the parties' evidence according to Section 30 of the *Small Claims Court Act*. It was the respondent's case that he is the registered owner of a three wheeler motor cycle registration number KTWB 886H which on 21st September was involved in an accident. The accident was reported at Kikuyu Police Station where the blame was attributed to the driver of motor vehicle KCN 886H. After an assessment by Strategic Automobile Valuers and loss assessors it was determined that the cost of repairs was 54% of the value of the motor vehicle. Therefore the respondent sought special damages in the amount of Kshs 310,000. This was supported by the assessment report of Strategic Automobile Valuers and Loss Assessors LTD which estimated the cost of overall repairs at Kshs. 169,290 which amount is 54% of the vehicle value which is placed at Kshs

310,000 and therefore recommend that the case be treated as a total loss on the basis that economic repairs are not possible.

13. The appellant opposed the suit and admitted to being the registered owner of the motor vehicle registration number KCN 886H that was being driven by Job Mbugua. The appellant indicated however that Mr Mbugua took a loan from them to purchase the said vehicle.

14. Mr Mbugua failed to enter appearance and consequently default judgement was entered against him on 8th July 2021. In her judgement the learned magistrate found that there was no proof that the said vehicle was in the process of being transferred to another party and went on to find the appellant 100% liable for the accident and awarded the respondent Ksh 310,000.

15. In *Ali Lali Khalifa and 8 others Vs Pollman's Tours And Safaris Ltd, Diamond Trust Bank (K) Ltd, Salim Khalid Said*[2003] eKLR it was held;

> "The legal position is this: if it can be demonstrated that a registered owner of a motor vehicle hired it out to a third party or the said vehicle was used in the circumstances which do not allow for the doctrine of vicarious liability on the part of the registered owner, to apply, then the latter is not liable.
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> In Ormrod –vs- Crosville Motor Services Lted (1954) 1 AII E.R 763 at page 755 Lord Denning said:
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> > "The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."
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> In the circumstances of the present case the following facts have been proved to exist
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> (a) The second defendant was a mere financier of the first defendant of the purposes of the acquisition of motor vehicle Registration number KAE 520H by the first defendant, and the second defendant's interest in the aid vehicle was merely recorded in the Registration Book or in the records held by the registrar of motor vehicles for the purpose of securing its interests under the Hire Purchase Agreement.
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> That interest is the balance of the loan or advances to the first Defendant.
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> (b) .....;
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> (c) The second defendant had neither interest in the first defendant's business nor in the third defendant's matatu business.
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> (d) The accident the subject matter of this suit, arose at the time when the said vehicle was being driven wholly for the purpose of the business of the Third defendant."

16. Turning back to the case herein, a question arises as to whether the appellant proved that he was a financier to Job Mbugua. On examination of the record the appellant provided an affidavit dated 19th May 2021 from Job Mbugua who indicated that he was the owner of KCN 886H and that he took

a loan with KAG SACCO to purchase the said vehicle. A letter dated April 2, 2017 by Job Mbugua was also provided which reiterated the same.

17. The appellants however did not produce any loan agreement as proof and on further examination of the log book of KCN 886H, the appellant is the only registered owner. Job Mbugua was therefore not a joint owner of the vehicle at the time of the accident. It is the view of this court therefore that the evidence provided by the appellant to prove that they were financiers of the vehicle and not the owners was not sufficient to detach liability. The usual practice by financiers is that before the full purchase price for a financed motor vehicle is paid, the vehicle would be registered in the joint names of the financier and the purchaser. This was not the case. The vehicle is registered in the names of the appellant only. The appellant could not have financed the purchase of the vehicle without any documentation to that effect.

17. In light of the above conclusion this court finds that the learned magistrate in her judgement dated 19th July 2021 was correct in awarding 100% liability to the appellant. The respondent proved his case to the required standard. In the end this court finds the appeal herein to be without merit and is dismissed with costs to the respondents.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2022

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S. CHITEMBWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022

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J.K. SERGON

JUDGE