Prime Capital & Credit Limited v Maundu & 2 others (Civil Appeal 483 of 2018) [2022] KEHC 3225 (KLR) (Civil) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 483 OF 2018

JK SERGON, J

MAY 31, 2022

BETWEEN

PRIME CAPITAL & CREDIT LIMITED ..... APPELLANT

AND

HENRY MUTISO MAUNDU ..... 1ST RESPONDENT

MOSES KAMAU NJUGUNA ..... 2ND RESPONDENT

JAMES NDWIGA MUCHUNGU ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable (Mr) D.O Mbeja (SRM) delivered on 14th September 2018)

JUDGMENT

1. At the onset, the 1st respondent herein instituted a suit before the Chief Magistrate's Court by way of the amended plaint dated August 18, 2017 pursuant to a road accident on November 19, 2005 along Jogoo road-Lusaka road round about and sought for reliefs against the appellant and the 2nd respondent in the nature of general and special damages plus costs of the suit and interest thereon.
2. The 1st respondent pleaded in his plainton or about November 19, 2005, he was a pedestrian walking along Jogoo Road-Lusaka Road roundabout when the 2nd respondent drove carelessly motor vehicle KAR 608 N and brutally knocked him down, causing serious injuries.
3. The 1st respondent further pleaded in his plaint that the accident occurred due to the sole negligence of the 2nd respondent and that the appellant is vicariously liable.

4. The appellant filed its statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the 1st respondent in the sum of Kshs.675,713/= plus costs.

5. The appellants being aggrieved preferred this appeal and put forward the following grounds:

   a) The learned trial magistrate erred in law and in fact in finding that the appellant was the owner of the motor vehicle registration number KAR 608N as at November 19, 2005 when the accident giving rise to the case occurred.

   b) The learned trial magistrate erred in law and in fact in holding that the evidence contained in the copy of records dated February 25, 2010 and produced by the 1st respondent showing that the appellant was the registered owner of the subject vehicle was not adequately controverted by the appellant.

   c) The learned trial magistrate erred in law and in fact in failing to take into account the copy of records dated May 25, 2012 and the log book of the subject vehicle which were produced by the appellant and which showed that the vehicle was jointly registered between the appellant and the 3rd respondent.

   d) The learned trial magistrate misconstrued the provisions of Section 8 of the *Traffic Act* by failing to find that despite being named as owner of the subject vehicle in the copy of records dated February 25, 2010 the appellant had proved to the contrary that indeed it was not the owner thereof.

   e) Having found that the accident was caused by the negligence of the 2nd respondent the learned trial magistrate erred in law and in fact in finding and holding that the appellant was vicariously liable for his negligence.

   f) The learned trial magistrate erred in law and in fact in finding and holding the appellant to be 100% liable for the accident.

   g) The learned trial magistrate erred in law and in fact in failing to consider the uncontroverted evidence adduced by the appellant that it was only a financier of the subject vehicle under a hire purchase arrangement and that the control and management of the same was with the 3rd defendant.

   h) The learned trial magistrate in concluding that the appellant was the owner of the subject vehicle erred in law and in fact in failing to consider the provisions of section 3 of the Insurance (Motor Vehicle Third Party Risks) Act which were drawn to his attention in the appellant's submissions and its effect on the relationship between the appellant and the 3rd respondent.

   i) The learned trial magistrate erred in law and in fact in failing to find that the appellant being the financier of the subject motor vehicle under a hiring agreement was not an owner of the same within the meaning of the Insurance Motor Vehicle Third Party Risks) Act.

   j) The learned Trial Magistrate having appreciated that the loan for the purchase of the vehicle had been fully paid byJuly 22, 2005and the logbook together with the transfer documents released to the 3rd respondent erred in law and in fact in failing to find that the appellant had no interest in the subject vehicle on 19.11.2005 when the accident occurred.

   k) The learned trial magistrate erred in law and in fact in entering judgment against the appellant against the weight of the evidence.

6. This court gave directions to the parties to file written submissions on the appeal. The appellant vide his submissions datedMarch 10, 2022gave brief facts of the matter and proposed to cluster the grounds into two groups depending on the common subject addressed under the grounds.

7. On grounds 1,2,3,4,7,8,9 and 10 the appellant submitted that the common issue raised under these grounds is that of ownership of the subject vehicle and whether the appellant had proved that he was the owner of the same .The appellant relied on the case of *Gichira Peter v Lucy Wambura Ngaku & Another* (2021) eKLR .The learned judge found that the appellant had produced evidence to prove that the case fell within the scope of the exception to the rule laid down under Section 8 of the *Traffic Act* .Consequently she held that the appellant was not the owner of the vehicle at the time of the accident and could therefore not be ordered to satisfy the claim. The judge inter alia as follows-

> "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:
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> > "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.
>
> 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:
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> > "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."

8. The appellant submits that this case fell within the scope of the exception to the rule in Section 8 and produced evidence that it had financed the purchase of the subject motor vehicle by way of a hire purchase facility availed to the 3rd respondent and that DW1 had told the trial court that the name of the appellant appeared in the records kept by the registrar of Motor vehicle together with that of the 3rd respondent as owners of the vehicle and that they were jointly registered as such pursuant to the Hire purchase arrangement between them and so as to protect its interest as a financer .

9. The appellant contends that the DW1 had testified that the 3rd respondent had fully paid loan as at July 22, 2005 so that the appellant's interest in the motor vehicle came to an end and in the circumstances, the appellant released the logbook to the 3rd respondent with a signed transfer form so that the he could effect the transfer.

10. The appellant points out that as at November 19, 2015when the accident occurred the appellant had no interest in the vehicle as the facility secured by the joint registration had been repaid and a transfer

executed in favour of the 3rd respondent. On this the appellant relied on a similar situation in the case of *David Ogol Alwar v Mary Atieno Adwera & Another* (2021) eKLR where the court stated as follows:

> "Proof of ownership of a motor vehicle is not just by way of a registration of such ownership in the logbook. Other forms of ownership of motor vehicles are recognized in law. Section 8 of the *Traffic Act* (Chapter 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. That section which is couched in terms of a rebuttable presumption does not restrict a party from proving ownership of the motor vehicle by means other than by the copy of records or log book. "

11. The appellant relied on several authorities with similar reasoning were adopted including the case of *Ramesh V Hiran v Justus Murianki & Another* (2017) eKLR where Gikonyo J in the High Court at Meru held that the trial magistrate did not appreciate the fact that the presumption of ownership in Section 8 of the *Traffic Act* was rebuttable and that the appellant had rebutted it through credible evidence which he presented to the court and sated as follows;-

> "The evidence presented in this case was that the Appellant sold motor vehicle registration number KAE 270E on February 19, 2005to the 2nd Respondent for a consideration of Kshs. 230,000 which was paid in full albeit in installments- the last one having been paid on February 22, 2005. He produced the agreement as D Exhibit 2. He said that the 2nd Respondent took possession of the vehicle on the date of the agreement. He also stated that, upon payment of the last instalment on February 22, 2005, he handed over all the transfer documents to the 2nd Respondent as had been stipulated in the agreement. According to the Appellant, he did not know whether the vehicle remained in his name. My critical evaluation of the record is that that Appellant adduced evidence on balance of probabilities that he sold motor vehicle registration number KAE 270E to the 2nd Respondent on February 19, 2005. Further, he showed that the 2nd Respondent took possession of the said vehicle on February 19, 2005. In addition, he showed that he handed over duly signed transfer forms to the 2nd Respondent. There is nothing on record by way of evidence or in cross-examination that controverted the evidence by the Appellant that he sold motor vehicle registration number KAE 270E to the 2nd Respondent. Accordingly, the Appellant adduced cogent evidence which rebutted the presumption that as the person whose name the vehicle was registered he is the owner of motor vehicle registration number KAE 270E. He proved that motor vehicle registration number KAE 270E was sold to the 2nd Respondent who for all purposes was the owner of the said motor vehicle from February 19, 2005. The trial magistrate did not appreciate the fact that the presumption of ownership in section 8 of the *Traffic Act* was rebuttable and that the Appellant had rebutted it through credible evidence which he presented to the court."

12. The appellant went further and relied on the Court of Appeal which is Nyeri Civil Appeal No.243 of 1998 *Mohamed Hassn Musa & Another v Peter M Malianyi & Another* (unreported). In that case the plaintiff had executed against a financier after obtaining judgment in a case where the vehicle causing the accident had also been financed. The Court Of Appeal stated inter alia as follows:-

> " There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd,

which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached."

13. On grounds 5,6 and 11, the appellant submitted The learned magistrate held in the impugned judgment that the accident was caused by the 2nd respondent's negligence and that the appellant was vicariously liable for the 2nd respondent's negligence; however, the appellant was only a financier and not the owner of the subject motor vehicle, and as such, the 2nd respondent was not its employee or agent, and the appellant could not be held vicariously liable for his negligence.

14. The appellant relied on the case of *Anthony Kuria Wangari v Guardian Bank Limited* of which it agreed with this submissions when it stated that:-

> " Having re-examined the evidence produced before the trial court, I can see no error committed by the trial court. The Bank produced a copy of a logbook as proof of sale of the vehicle. Further, it produced a sale agreement evidencing the further sale by the person who purchased the vehicle to James Kamau Maina. That sale agreement points to James Kamau Maina being the beneficial owner of the motor vehicle as at the date of accident. If that is not enough, the Bank's production of the police abstract dated December 11, 2014shows the owner of the motor vehicle was James Kamau Maina and because his driver ran away from the scene of the accident James Kamau Maina was charged, convicted and fined for the offence of failing to keep records and address of the driver, as at 31st July, 2014, contrary to Section 111(1)(3) of the *Traffic Act*. The conviction is proof of guilt and as provided by Section 47A of the *Evidence Act* it is was conclusive evidence of his guilt."

15. It is the appellants submissions that the vehicle was to be kept by the 3rd respondent in the trial court Clause 2(e) of the hire purchase agreement between the appellant and the 3rd respondent, and that the DW2 testified that the 3rd respondent kept the vehicle and used it for his own business, and that possession control and management was always with the 3rd respondent, it follows that the 2nd respondent who was driving the vehicle was not an agent or servant of the appellant and cannot be held liable.

16. The appellant in its submissions during the trial relied on the case of *Jane Wairimu Turanta v Githae John Vickery* (2013) eKLR where Ougo J stated as follows:-

> " The Respondent raised the issue of vicariously liable since the logbook was jointly owned by the bank and Munene Don. The doctrine of vicarious liability was expounded in the case of Morgan –vs- Launchbury (1972)2 All ER 606 which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the logbook being in its name, Such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive it."

17. In retort, the respondent submitted that that it should be noted that the 1st respondent who was the plaintiff had no way of knowing the private dealings between the registered owner of the motor vehicle as per the copy of the records availed to her on February 25, 2010 showing that as at November 19, 2005 the said motor vehicle had only one owner and that id appellant but not as a financier to anybody.

18. The respondent contends that it remained a mere allegation for the appellant failed to bring to court the alleged hirer so that the hirer can accept or deny the said allegation for the dealings between the appellant and the alleged hirer were private and only known to both of them.

19. This being a first appellate court, and as required under section 78 of the *Civil Procedure Act*, this court must reassess and re-valuate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See *Sielle –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123).

20. Having considered the five grounds of Appeal reproduced above, the evidence and submissions presented by both parties before the trial court and the written submissions canvassing this appeal and supporting statutory and case law, in my humble view, the issues for determination in this are: -

    i. If ownership of the motor vehicle registration No. KAR 608N was properly determined;

    ii. If the appellant was vicariously liable for the accident

21. It was the 1st respondent's case at the trial that the appellant was the sole owner of the subject motor vehicle as at the time of the accident and the authority for this assertion was a copy of records dated February 25, 2010 issued by the registrar of motor vehicles which the 1st respondent produced with the appellant's name only as the registered owner of the vehicle at November 19, 2005 when the accident happened.

22. DW1 who testified for the appellant told the trial court that the name of the appellant appeared in the records kept by the registrar of motor vehicles together with that of the 3rd respondent as owners of the vehicle however the appellant was jointly registered as such with the 3rd respondent pursuant to the hire purchase arrangement between them and so as to protect its interest as a financier.

23. The appellant submitted that the relationship between the appellant and the 3rd respondent was contractual in that the appellant co-owned the vehicle until the 3rd respondent completed paying the loan borrowed to purchase it and that the records dated May 25, 2012 were issued by the registrar of Motor vehicle showing such joint registration as at November 19, 2005 when the accident occurred was produced by the appellant however, the 3rd respondent fully paid the loan on August 22, 2005 so that the appellant's interest in the motor vehicle came to an end.

24. 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.

25. The respondents on the other hand submitted that the 1st respondent had no way of knowing the private dealings between the registered owner of the motor vehicle as per the records showing that as at November 19, 2005 the said motor vehicle had only one owner and that is the appellant but not as a financier to anybody.

26. 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."

27. In the above case, the Court of Appeal went on to state as follows- "The provision 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."

28. 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 3rd 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 3rd 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 (3rd respondent) failing which, the said owner could have moved the Registrar of motor vehicles (Registrar) to have the motor vehicle registered in his name.

29. 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."

30. On the issue of vicarious liability, it is clear from the determination of the first issue that the appellant had sold the said motor vehicle to the 3rd respondent, thereby transferring ownership to him. In *Jared Magwaro Bundi & another v Primarosa Flowers Limited* (*supra*), the Court of Appeal stated thus-

> " .. 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 possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered".

31. 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. KAR 608N as he had divested himself of the ownership and title to it. It 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 3rd respondent and was wholly liable for the accident that occurred on November 19, 2005.

32. The appeal is allowed. Consequently, the judgment of the trial court is set aside and is substituted with an order dismissing the suit. The appellant to have costs of the appeal and the suit to be paid by the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

J.K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent