



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 46 OF 2020

YUMEN ALI SHAMIL.....APPELLANT

VERSUS

KAHUNDA NDUNE NDAGO

MARY MAKHOHA RAGIRA

NELSON NJOROGE KINYANJUE.....RESPONDENTS

(An Appeal from the Judgment and decree by Hon. F. Kyambia,

Senior Principal Magistrate, delivered on 30th April, 2020 in

Mombasa Chief Magistrate's Court Civil Cause No. 902 of 2017).

JUDGMENT

1. In the lower court case, the Trial Magistrate entered Judgment jointly and severally against the 2nd defendant (appellant) and 3rd defendant (3rd respondent), in favour of the plaintiff (1st respondent). The Trial Magistrate held that the 1st defendant (2nd respondent) was not liable for the accident which happened on 29th October, 2016 at 0530 hours along the Bamburi Road, near Haller Park area.

2. At the time of the accident, the 1st respondent was a fare paying passenger aboard a Nissan matatu registration No. KCG 032N. The Trial Magistrate found that motor vehicle registration No. KBE 666C (sic) Nissan Wingroad moved from its lane onto the lane of motor vehicle registration No. KCG 032N and caused a collision, which led to the 1st respondent herein sustaining injuries. This court notes from the copy of the motor vehicle records and the plaint filed on 31st May, 2017 that the correct registration number of the vehicle being referred to as KBE 666C in the Judgment is **KBZ 666C**. It will hereinafter be referred to by its correct registration number to avoid confusion.

3. The appellant was dissatisfied with the decision of the Trial Magistrate which found him and the 3rd respondent jointly and severally liable and filed this appeal to contest the said decision. His main contention was that as the initial owner of motor vehicle registration No. KBZ 666C, he had as at 20th October, 2016 sold the said motor vehicle to the 3rd respondent, Nelson Njoroge Kinyanjue. The law firm of Jengo & Associates filed a memorandum of appeal on 5th May, 2010. On 23rd July, 2020 the appellant's Counsel filed an amended memorandum of appeal, with leave of the Court. They raised the following grounds of appeal-

(i) That the learned Trial Magistrate erred in law and misapprehended the doctrine of vicarious liability viz a viz agency and or employee/ employer relationship;

(ii) That the learned Trial Magistrate erred in law and fact in holding that the appellant was vicariously liable for the negligence of the 3rd respondent when the relationship of master servant or agency did not exist;

(iii) That the learned Trial Magistrate erred in law and fact in holding that the issue of ownership *per se* created vicarious liability on the part of the appellant; and

(iv) The learned Trial Magistrate erred in law and fact in his application of Sections 8 and 9 of the Traffic Act Chapter 403 Laws of Kenya and in holding that ownership of motor vehicle KBZ 666C at the time of the accident had not passed from the appellant to the third respondent.

4. The appellant's prayer was for the Judgment against him to be set aside and be replaced with dismissal of the suit against him and for the 3rd respondent to be held solely liable for negligence for the accident. The appellant also prayed for costs of this appeal and of the case in the subordinate court.

5. On 1st September, 2020 the appellant's Counsel filed written submissions. He stated that the Trial Magistrate misapprehended the evidence and misapplied the relevant law as the fact of the sale of motor vehicle registration No. KBZ 666C was corroborated by the sale agreement produced as an exhibit. He further stated that the fact of the sale and the 3rd respondent taking possession of the said motor vehicle were not challenged even in cross-examination, hence, it was presumed that facts not disputed were admitted. It was indicated that the police abstract did not show that the appellant was the owner of motor vehicle registration No. KBZ 666C. Further, that the police officer who testified indicated in cross-examination that there were doubts about ownership of the said motor vehicle.

6. Mr. Jengo for the appellant submitted that the Trial Magistrate misapplied the facts of the case herein on the provisions of Section 9 of the Traffic Act when he found that the appellant had not informed the Registrar of Motor vehicles about the sale within 7 days, as the accident occurred on the 3rd day after the sale. It was argued that the new owner could use the motor vehicle for up to 14 days after the sale, before a transfer could be done and thereafter, he would be in breach of the provisions of the Traffic Act. It was contended that the law does not indicate that failure to notify the Registrar of motor vehicles within 7 days or on the use of a vehicle on the road within 14 days of the sale, would nullify the sale or transfer. It was asserted that the foregoing did not apply in this case.

7. Mr. Jengo pointed out that the other aspect that the Trial Magistrate used to confer ownership and/or liability was that the motor vehicle was insured in the name of the appellant. It was argued that it was up to the court to apply evidence of the case and decide whether the insurance was still valid after an insured ceased have an insurable interest in a chattel. It was submitted that it is trite law that one can only have a policy of insurance in an asset if he has an insurable interest in it. It was also stated that the sale of motor vehicle registration No. KBZ 666C on 27th October, 2016 took away the insurable interest that the appellant had in the said motor vehicle, hence the policy automatically became extinct.

8. With a view of demonstrating that it is the fact of the sale that changes ownership in a motor vehicle and not the fact of registration, Mr. Jengo relied on the case of **Osumo Apima Nyaundi v Charles Isaboke Onyancha Kibondori & 3 Others** [1996] eKLR, where 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.

9. Counsel for the appellant also relied on the decision in **Joel Muthuri v Julius Gichuru Guantai** [1996] eKLR, where 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.

10. He also relied on the decisions in **Ignatius Makau Mutisya v Reuben Musyoki Muli** and **Joel Muga Opinja v East Africa Sea Food Ltd** [2013] eKLR, where 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.

11. It was thus submitted for the appellant that on 27th October, 2016 he ceased to be the owner of motor vehicle registration No. KBZ 666C after the sale agreement was done under the Sale of Goods Act and that the 3rd respondent became the new owner of the motor vehicle when he took physical possession and custody of the same. It was submitted that the appellant proved that the presumption that he was the owner of the vehicle under Section 8 of the Traffic Act, was erroneous.

12. On the issue of vicarious liability, it was submitted that the appellant had no relationship with the 3rd respondent, as in an agency or master/servant relationship or by the 3rd respondent being an employee of the appellant, at the time of the accident. Mr. Jengo relied on the case of **P.N.M & another** (The legal personal representative of the estate of **L.M.M v Telkom Kenya Ltd & 2 others** [2015] eKLR, where the court cited with approval the decision in **Tabitha Nduhi Kinyua v Francis Mutua Mhuri & another** [2014] eKLR, in which the parameters of vicarious liability were set out.

13. Counsel for the appellant also relied on the case of **Teresia Nduta v Patrick Mungai Njoroge & Another** HCCC No. 3689 of 1993, to assert that the appellant was not vicariously liable for the accident that occurred on 30th April, 2020. He also cited the case of **Anyanzwa v Gasperis** [1981] eKLR, on what comprises vicarious liability.

14. In winding up his submissions, Mr. Jengo stated that the Trial Court should have followed the doctrine of *stare decisis* and should not have held the appellant vicariously liable for the negligence of the 3rd respondent.

15. On 13th November, 2020 the law firm of Wanjugu – Waweru & Associates filed written submissions for the 1st respondent. They submitted that in the lower court, Judgment was entered in favour of the 1st respondent as against the appellant and the 3rd respondent. Further, that the Trial Magistrate also found that the appellant and the 3rd respondent were the joint owners of motor vehicle KBZ 666C Nissan Wingroad.

16. On the issue of the ownership of the said motor vehicle, it was submitted that if indeed the appellant sold the vehicle to the 3rd respondent, he was under duty to ensure that the Registrar of motor vehicles was notified and that the appellant took the step to transfer it to the new owner of the said vehicle.

17. It was pointed out that the appellant in his evidence admitted that he never signed any transfer documents and that at the time of the accident, the insurance cover was in his name. He also said that he had taken out an insurance cover for the vehicle which extended beyond

the time when the accident occurred and that the insurance (sic) was aware. The respondent's Counsel relied on the provisions of Sections 8 and 9 (4) of the Traffic Act and stated that the onus of notifying the Registrar of motor vehicles of the change of ownership vested on the outgoing owner of the motor vehicle. It was asserted that the issue of the ownership of the motor vehicle was proved on a balance of probability.

18. On the issue of vicarious liability, it was submitted that the appellant was not sued because of any relationship between himself and the 3rd respondent but he was joined in the proceedings as the registered owner of the motor vehicle in issue.

19. Counsel for the respondent relied on the case of **Vyas Industries v Diocese of Meru** [1976] eKLR, where the Court of Appeal cited the case of **Hewitt v Bonvin** [1940] IKB 188, where it was held that if a plaintiff proves that a car was negligently driven and that the defendant was its owner and the court is left with no other information, the negligent driver is presumed to be either the owner thereof or some servant or agent of his.

20. It was stated that the 3rd respondent was joined in the suit in the lower court due to the documents availed by the appellant and that it can only be construed that the said act is aimed at hoodwinking this court by a fictitious person being brought in, to delay the suit and obstruct justice. This court was urged to uphold the Judgment delivered by Hon. F. Kyambia, SPM, by dismissing the appeal herein.

ANALYSIS AND DETERMINATION

21. The issues for determination are-

(i) If ownership of the motor vehicle registration No. KBZ 666C was properly determined; and

(ii) If the appellant was vicariously liable for the accident.

22. The duty of the 1st appellate court is to analyze and re-evaluate the lower court proceedings and come to an independent decision while bearing in mind that it neither saw nor heard witnesses testifying. While expounding on the duty of the 1st appellate court, in **Peters v Sunday Post** 1958 (EA) 424, the court held as follows-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

If ownership of the motor vehicle registration No. KBZ 666C was properly determined.

23. PW2 was No. 70875 Corporal Abdulah Adat of Bamburi Police Station. In his evidence before the lower court, he stated that an accident happened on 29th October, 2016 at 0530 hours along the Mombasa – Malindi Road near Alaba area, in Bamburi. He further stated that the accident involved motor vehicle Registration No. KBZ 666C, Nissan Wingroad and motor vehicle registration No. KCG 032N. His evidence was that the Investigating Officer PC Muriithi, who had since been transferred blamed the accident on motor vehicle registration No. KBZ 666C. PW2 produced the police abstract and the 1st respondent's P3 form

24. PW3, Katunda Ndone is the 1st respondent herein. Her evidence was that on the date of the accident she was aboard a matatu from Kilifi. She stated that a small car being driven from Mombasa direction went to the lane of the matatu and an accident happened. She sustained injuries for which she was treated at Coast Province General Hospital (CPGH) as her leg was injured. She reported the accident to the police. She produced search certificates for the two cars and receipts for payment of the same.

25. Dr. Ajoni Adede testified as PW1. He examined the 1st respondent on 14th February, 2017 after a road accident which happened on 29th October, 2016. He indicated that the 1st respondent sustained cuts on both legs and that at the time of being examined, which was 6 months after the accident, he (sic) had fully recovered. PW1 produced the medical report for the 1st respondent and receipts for his charges.

26. The appellant herein testified in the lower court as DW1. His evidence was that as at 30th October, 2016 he was not the owner of motor vehicle KBZ 666C as he had sold the car to Nelson Njoroge Kinyanjui (3rd respondent) who took possession of it on 29th October, 2016. He stated that he was not liable for the accident. He produced a sale agreement.

27. DW2, Tsuma Mwasaba the driver of a matatu registration No. KCG 032N testified of how on 29th October, 2016 as he was driving to Mombasa from Kilifi, a saloon car which was being driven from the opposite direction went to his lane. He stated that he swerved off the road but the said vehicle rammed into the vehicle he was driving. He blamed the driver of the saloon car for speeding and for being drunk.

28. The 3rd respondent did not enter appearance and an interlocutory Judgment was entered against him.

29. The appellant denied being the owner of the motor vehicle registration No. KBZ 666C as he had sold it to the 3rd respondent at the time of the accident. He relied on a sale agreement dated 27th October, 2016. A search done with the National Transport and Safety Authority on 9th March, 2017 revealed that motor vehicle Registration No. KBZ 666C was registered in the name of the appellant.

30. 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.

31. The appellant's Counsel relied on the provisions of Section 9(1) of the Traffic Act to demonstrate that the 3rd respondent by virtue of the said provisions had 14 days from the date of the sale to use motor vehicle registration No. KBZ 666C on the road, pending registration of the said vehicle in his name. It was also submitted that the appellant had a window of 7 days from the date of the sale of the motor vehicle to inform the Registrar of motor vehicles of the change of ownership of the said vehicle.

32. In cross-examination, the appellant admitted that he did not sign transfer forms for change of ownership. He indicated that at the time of the accident he was the registered owner of the vehicle and that the insurance was in his name.

33. In re-examination, he stated that the actual owner of the vehicle was Nelson Kinyanjui Njoroge. The appellant indicated that he had taken out cover (insurance cover) for the vehicle which extended beyond the period when the accident occurred. He also said that the insurance did not know that he had transferred the vehicle.

34. 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).

35. 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).

36. 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.

37. Since the appellant produced a sale agreement dated 27th October, 2016, he had 7 days within which to notify the Registrar of the change of ownership. The fact that the vehicle had an insurance cover under the appellant's name is not an issue for this court's determination. The police abstract report in this case did not disclose the name of the owner of motor vehicle registration No. KBZ 666E. When cross-examined about it by Mr. Asena Advocate, PW2 said that the said vehicle had a valid policy. Inasmuch 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.

38. While being cross-examined by Mr. Jengo for the appellant, on being shown a letter written by J.N. Matara & Co. Advocates, PW2 stated that as per the agreement, DMFI – 2, the owner of the motor vehicle at the time of accident was the 3rd respondent. He also stated that the abstract was issued after the letter DMFI-1 from Matara & Co. Advocates had been written.

39. On being re-examined, PW2 indicated that the reason why the name of the owner of the motor vehicle registration No. KBZ 666C was not on the police abstract was probably because he did not submit the duplicate of the insurance policy.

40. 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.”

41. The above position was also held in the case of **Jared Magwaro Bundi & Another v Primarosa Flowers Limited** [2018] eKLR.

42. It is the finding of this court that the Trial Magistrate misdirected himself in the interpretation of the provisions of Section 9 of the Traffic Act. Since the vehicle in issue was sold on 27th October, 2016, the appellant still had time to officially transfer the vehicle in issue to the 3rd respondent, within 14 days from the said date. This court however notes that there was a conflict of the contents of the letter by Matara & Co. Advocates to the effect that the appellant had on 29th October (sic) taken physical possession of the subject motor vehicle and was given the original logbook together with the transfer forms by the appellant for purposes of transfer and registration of the motor vehicle into his name. The foregoing conflicts with what DW1 said in his sworn evidence that he did not sign any transfer document.

43. The submissions made by the 1st respondent's Counsel that the 3rd respondent was introduced into this case as a fictitious person in order to hoodwink the court cannot be taken seriously as in the amended plaint, no allegation of fraud was made against the appellant and no particulars of fraud were set out in the said plaint. The claim made by the 1st respondent's Counsel from the bar, should have been proved on a balance of probability after being pleaded in the plaint or an amended plaint and evidence being called to support it. That was not done.

44. The authorities cited by Mr. Jengo in this appeal are applicable. Having considered the Court of Appeal decisions cited in this case, the judicial precedents relied on by Counsel for the respondent are not applicable to the circumstances of this case.

If the appellant was vicariously liable for the accident

45. 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. KBZ 666C to the 3rd respondent, thereby transferring ownership to him.

46. 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”.

47. 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. KBZ 666C 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 3rd respondent and was wholly liable for the accident that occurred on 29th October, 2016 between motor vehicle registration No. KCG 032N and KBZ 666C.

48. 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.

DELIVERED, DATED and SIGNED at MOMBASA on this 22nd day of January, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of-

No appearance for the appellant

Mrs Kariuki for the 1st respondent

Mr. Oliver Musundi - Court Assistant.