



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.14 OF 2019

CANON MOTORS LIMITED.....APPELLANT

-VERSUS-

1. BIFATU HAYANI

2. JUMA ALI.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. F. Kyambia (SPM)

in the Senior Principal Magistrate's Court at Mombasa,

SPMCC No.466 of 2013, delivered on 23rd November 2018)

J U D G M E N T

1. Vide a **Plaint** dated **12th March, 2013**, the 1st Respondent sued the Appellant and 2nd Respondent in the lower court seeking general damages, special damages, costs of the suit and interest for injuries sustained in a road accident which occurred on **4th April, 2012** at **Ujamaa** area along Likoni-Ukunda Road.

2. The Appellant filed an undated statement of defence denying the claim and called for its strict proof. Further, the Appellant stated that on or about **6th July, 2008**, as a motor vehicle dealer it sold and delivered to **Anderson Chelugo Cherotich** and **Tobias Ogwela Onyange** the said **Motor Vehicle Registration No.KAY 961S**, hence at all material times, the subject vehicle was in the possession, and control of the said **Anderson Chelugo Cherotich** and **Tobias Ogwela Onyange**. The Appellant later on took out Third Party Notice against **Anderson Chelugo Cherotich** and **Tobias Ogwela Onyange**.

3. The matter proceeded to full hearing and Judgment was delivered which apportioned liability at 100% against the 1st and 2nd Respondents and assessed damages as follows;

General damages.....Kshs.600,000/=

Special damages..... Kshs.16,400 /=

Costs and Interest thereof from

the date of Judgment.

Total.....Kshs.616,400/=

4. Dissatisfied with the award, the Appellant filed this appeal and listed 4 grounds as follows:

a) The learned Magistrate erred in law and fact in his evaluation of the evidence presented before him.

b) The learned Magistrate erred in law and fact in failing to find that the Appellant had dislodged the presumption as to ownership in Section 8 of the Traffic Act.

c) The learned Magistrate erred in law and fact in failing to find that the 2nd respondent was not the Appellant's agent nor was he driving the motor vehicle for the Appellant's benefit as to render the Appellant vicariously liable for the 2nd Respondent's actions.

d) The learned Magistrate erred in law and fact in awarding general damages of Kshs.600,000.00 a figure that was inordinately and manifestly high in the circumstances of the case.

5. Directions were given that the Appeal be canvassed by way of written submissions. Accordingly, the Appellants and the 1st Respondent complied and filed their respective submissions.

SUBMISSIONS

6. **Mr. Kongere**, learned counsel for the Appellant submitted that the trial court erred when it held that the Appellant was deemed to be the owner of the vehicle at the time of the accident and punished the Appellant for not adhering to **Section 9(2)** of the **Traffic Act Cap 403**, even though the Police abstract showed that the owner of the subject motor vehicle was **Juma Ali**, and the fact that the subject motor vehicle was being used as a matatu on an occasion, which the Appellant was not concerned with. Therefore, that fact should have dissuaded the trial Magistrate from finding the Appellant to be the owner of the suit motor vehicle.

7. Counsel further submitted that the trial court erred when it assumed that liability attaches once ownership is proven. In this instance, the 1st Respondent did not prove a principal agency relationship between the driver and the Appellant. Counsel cited the case of **Securicor Kenya Ltd –vs- Kyumba Holdings Ltd [2005]eKLR**, where the court held that where there was no agency relationship the doctrine of vicarious liability was not applicable.

8. **Mrs. Umara**, learned counsel for the 1st Respondent submitted that the Appellant failed to rebut the evidence that it was the registered owner of the suit motor vehicle. No document was produced by the Appellant to show that the ownership of the suit motor vehicle had moved to the 3rd party. Therefore, the Appellant failed to dislodge the presumption of ownership as set out in **Section 8** of the **Traffic Act**.

9. It was further submitted that an agency relationship between the Appellant and the driver was proved through the ownership documents and the appellant was unable to dislodge the issue of ownership since the Appellant only produced copies of documents without producing the original documents. Counsel cited the finding in the case of **Kenneth**

Nyaga Mwige –vs- Austin Kiguta & 2 Others [2015]eKLR, where the Court of Appeal held that if a document is not formally produced and proved then the document would only be hearsay, untested and an unauthenticated account.

DETERMINATION

10. Having considered the grounds of appeal, the rival submissions, and entire record of the trial court, it is clear that this appeal is on both liability and quantum. Accordingly, the issues for determination are:

a) Whether the liability was proved on a balance of probabilities;

b) Whether the quantum of damages should be disturbed.

11. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013]eKLR**, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

12. A finding and apportionment of liability by a trial court call calls for exercise of judicial discretion based evaluation of the evidence adduced and an appellate court can only interfere if the finding is not supported by the evidence on record. In the cases of **Isabella Wanjiru Karangu –vs- Washington Malele, Civil Appeal No.50 of 1981 [1983]KLR 142** and **Mahendra M Malde –vs- George M Angira Civil Appeal No.12 of 1981**, it was held that apportionment of blame is an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

13. In this case, the learned trial Magistrate found and concluded that the Appellant was the registered owner since no evidence was adduced to the contrary. Further, the learned trial magistrate found that the Appellant under **Section 9(2)** of the **Traffic Act** was enjoined to notify the Registrar of Motor vehicle within 7 days upon thereafter of the ownership of the vehicle in purchased form.

14. In order to determine ownership of a motor vehicle, a copy of records from the Registrar of Motor Vehicles is the only evidence of title. See the case of **Osumo Apima Nyaundi –vs- Charles Isaboke Onyancha Kibondori & 3 Others [1996]eKLR**, where the Court of Appeal held as follows:

“Traffic Act is an Act of Parliament to consolidate the law relating to traffic on the roads. It is not an Act, which decides the de

facto or de jure ownership of vehicles. Ownership of a vehicle passes by sale and delivery. The registration book of the vehicle is only evidence of title. Section 8 of the said Act reads:

“8. A person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

This section signifies that a registered owner will be

deemed prima facie, the owner. It is open for the real owner (should he be not the registered owner) to prove to the contrary.”

15. The Court of Appeal in the case of **Joel Mugo Apila –vs- East African Sea Food Limited, CA 309/2010[2013]eKLR**, observed that:

“We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

16. From the foregoing, I find and hold that the 1st Respondent proved that the Appellant was the registered owner of the suit motor vehicle on a balance of probability by producing a copy of records from the Registrar of Motor vehicles. Therefore, it was incumbent upon the Appellant to displace that inference by furnishing the court with evidence to the contrary. From the record, an attempt was made to displace the inference made by the 1st Respondent on ownership, but unfortunately, the document relied on by the Appellant had no probative value and an application by counsel for the Appellant to recall his witness to produce further document was declined by the trial court. Consequently, this court will not disturb the finding of the learned Magistrate on ownership of the suit motor vehicle.

17. On the finding of vicarious liability, counsel for the Appellant’s argued that the 1st Respondent failed to prove any agency relationship between the driver of the suit motor vehicle and the Appellant. Further, that the learned Magistrate assumed that once ownership was proven, liability attaches automatically. On the other hand, **Mrs Umara** submitted that the 1st Respondent proved ownership and went ahead to prove that the driver was charged with reckless driving. Therefore, the issue of agency falls by the wayside considering the presumption that the motor vehicle was driven by a person for whose negligence the owner is responsible.

18. The Court of Appeal in the case of **Pritoo –vs- West Nile District Administration [1968]EA 428** and **Karisa V Solank[1969] EA 318** that:-

“ Where it is proved that a car has caused damage by negligence, then in the absence of any evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lend to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”

19. I have gone through the Record of Appeal and it is noteworthy that probativeness of DW1’s (**Eliachim Ombogo**) evidence was reduced when he was unable to produce any document in support of his allegations that the suit motor vehicle had been sold to a third party. Therefore, the presumption that the suit motor vehicle was being driven by a person whose negligence the owner is responsible was made stronger when no evidence was led to dispel the agency relationship. Consequently, this court upholds the trial magistrate’s finding on the appellant being vicariously liable for the accident that was caused by the negligence of the driver.

b) Whether the quantum of damages should be disturbed.

20. An Appellate court can only interfere with the sum awarded where the Appellant demonstrates that the award is too high or so low to amount to an outright error in the assessment of damages, or that in coming to that assessment, the court took into account an irrelevant matter or that it failed to take into account a relevant matter. These principles have been reiterated innumerable times. The court cites the words of the Court of Appeal in the case of **Ken Odondi & 2 Others –vs- James Okoth Omburah T/A Okoth Omburah & Company Advocates** where it was held: -

“We agree that this court will not ordinarily interfere with the findings of a trial Judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial Judge. To so interfere this court must be persuaded that the trial Judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the Plaintiff is entitled... This principle was adopted with approval by this Court in Butt v Khan [1981] KLR 349 where it was held per Law, JA:

“... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”

21. In this appeal, the limbs of the award challenged is the sum of Kshs.600,000/= being damages for pain and suffering. In making the challenge, the trial court is accused of not taking into account relevant factors before settling on the sum of Kshs.600,000/=. The Appellant proposed an award of Kshs.300,000/= at most. Reliance was placed in the case of **Veronicah Mkanjala Mnyapara –vs- Patrick Nyasinga Amenya [2021]eKLR**, where the Court awarded Kshs.

300,000/= as general damages for contusion to the head , chest contusion, bruises on both hands, dislocation of the left hip and bruises on both legs.

22. The 1st Respondent sustained the following injuries, fracture on the right hip, friction burns on the forehead and 3% permanent partial disability.

23. In the case of **Lilian Wanja –vs- Cyprian Mugendi Igonga & 2 Others CKA HCCA No.24 of 2015 [2016]eKLR**, the Plaintiff sustained a fracture/dislocation of the hip and multiple soft tissue injuries and the court awarded Kshs.500,000/- in 2016.

24. In the case of **George Osewe Osawa –vs- Sukari Industries Limited[2015] eKLR**, the Plaintiff sustained a fracture of the pelvis and was awarded Kshs.400,000/= in general damages in 2015. In the case of **Jane Muthoni Nyaga –vs- Nicholas Wanjohi Thuo & Another [2010]eKLR**, the court awarded Kshs.300,000/ as general damages for a fracture of the right superior and inferior pubic rami of the pelvis; a cut on the right leg and central dislocation of the hip.

25. In the case of **Ali Malik Brothers Motor (K) Limited & Another –vs- Emmanuel Oduor Onyango NRB HCCA No.252 of 2016 [2018] eKLR**, the Plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs.700,000/= which was affirmed by the High Court.

26. In the case of **Jane Muthoni Nyaga –vs- Nicholas Wanjohi Thuo & Another [2010]eKLR**, the court awarded Kshs..300,000/= as general damages for a fracture of the right superior and inferior pubic rami of the pelvis; a cut on the right leg and central dislocation of the hip.

27. Taking into consideration the various authorities on similar injuries, I find that the Appellant has not demonstrated that the award of Kshs.600,000/= is too high to amount to an outright error in the assessment of damages. I am hesitant to disturb the learned magistrate's award of Kshs.600,000/= in general damages.

28. In the end, I find this appeal lacking in merit and dismiss it. The 1st Respondent shall have costs of the suit in the lower court and interest on the damages from date of Judgment in the lower court. The 1st Respondent will have the costs of this Appeal.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kongere counsel for the Appellant

No appearance for Respondent

Court Assistant - Gitonga