



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 351 OF 2018

DANIEL MAWEUAPPELLANT

VERSUS

ALI ABDIKARIM HAJI1ST RESPONDENT

NOOR HASSAN ISSA.....2ND RESPONDENT

ELMI HASSAN ODHONA.....3RD RESPONDENT

(Being an appeal from the judgment and decree of Honourable G.A. Mmasi (Mrs) Senior Principal Magistrate delivered in Milimani CMCC No 502 of 2016 on the 20th July 2018)

JUDGMENT

INTRODUCTION

1. In a decision delivered on 20th July 2018, the Learned Trial Magistrate, Hon G.A. Mmasi (Mrs), Senior Principal Magistrate dismissed the Appellant's case with costs to the Respondents herein on the ground that he did not prove ownership of Motor Vehicle Registration Number KAY 379A (hereinafter referred to as "the subject Motor Vehicle") at the material time of the accident. He also faulted the said Learned Trial Magistrate for having found that other parties ought to have been enjoined in the suit and for failing to apportion liability and assessing damages had the suit been successful.
2. Being dissatisfied with the said decision, on 31st July 2018, the Appellant filed a Memorandum of Appeal dated 30th July 2018. He relied on eight (8) grounds of appeal. On 7th May 2020, this court allowed his Notice of Motion application dated 15th October 2019 and filed on 16th October 2019 seeking to amend his Memorandum of Appeal. He filed his Amended Memorandum of Appeal dated 8th May 2020 on 18th May 2020.
3. His Written Submissions were dated and filed on 26th July 2019 while those of the Respondents were dated 6th August 2019 and filed on 16th August 2019.
4. The Judgment herein is based on the said Written Submissions which were relied upon by both parties in their entirety.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. It appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in having dismissed the Appellant's suit. It therefore dealt with all grounds of appeal together as they were all related.

8. The Appellant submitted that Section 8 of the Traffic Act Cap 403 (Laws of Kenya) provides that the person in whose name a vehicle was registered was unless the contrary was proved, be deemed to have been the owner of the motor vehicle. He pointed out that he had placed before the Trial Court a Sale Agreement showing that he was the bonafide owner of the subject Motor Vehicle. He added that David Limo Komen (hereinafter referred to as “PW 1”) who was the driver of the subject Motor Vehicle and Samuel Njuguna, a Motor Vehicle Assessor (hereinafter referred to as “PW 4”) adduced sufficient evidence to prove that he was indeed the owner of the said subject Motor Vehicle.

9. It was therefore his submission that the Learned Trial Magistrate ought not to have made a finding that Sospeter Ndere Njoroge who sold him the said subject Motor Vehicle was a necessary party in the proceedings in the lower court.

10. He placed reliance on the cases of Superform Ltd & Another vs Gladys Nchororo Mbero [2014] eKLR and Ignatius Makau Mutisya vs Reuben Musyoki Muli [2015] eKLR where the common thread was where there was compelling evidence to prove that another person other than the one who had been registered as the owner of a vehicle was the actual owner, then the court could make a finding that the owner of the vehicle was different than the one who had been registered as an owner.

11. On their part, the Respondents argued that the Appellant did not state that he had purchased the subject Motor Vehicle and that he was yet to transfer the same. They pointed out that the Sale Agreement the Appellant was relying upon was not adduced during trial and had only been annexed in the Record of Appeal. They asserted that no leave was obtained to introduce new evidence on appeal. It was their submission that the Learned Trial Magistrate was therefore right in having found that the Appellant had not established ownership of the subject Motor Vehicle.

12. A perusal of the evidence that was adduced in the lower court showed that PW 1 testified that on 4th February 2013, he was the Appellant’s driver and was driving the subject Motor Vehicle when Truck Registration Number KBR 369Z (Mercedes Prime Mover) Trailer Registration Number ZD 9655 (hereinafter referred to as “the Trailer”) hit it.

13. On his part, the Appellant adduced in evidence the logbook and the Sale Agreement as proof of ownership of the subject Motor Vehicle. He stated that he had not transferred the said subject Motor Vehicle in his name. PW 2 said that he inspected the subject Motor Vehicle from the documents he was given by the Appellant herein.

14. Contrary to the Respondents’ assertions, this court noted that the Appellant adduced in evidence the Sale Agreement dated 29th September 2011 between him and Sospeter Ndere Njoroge. In the mind of this court, supported with the evidence of Francis G. Kuria, who was a witness to the said Sale Agreement, this was sufficient evidence to prove that the Appellant was the owner of the subject Motor Vehicle.

15. It was not necessary for the said Sospeter Ndere Njoroge or Chase Bank (Kenya) Ltd to have been enjoined as co-plaintiff and defendant respectively. In any event, Chase Bank (Kenya) Ltd was a financier and would not have been vicariously liable for the negligence of the driver of the subject Motor Vehicle at the material time. In any event, as the Appellant correctly pointed out, no suit should be defeated by reason of non-joinder or misjoinder of parties as stipulated in Order 1 Rule 9 of the Civil Procedure Rules, 2010.

16. Having said so, this court noted that the said Sale Agreement was not stamped as required under Section 19 (1) of the Stamp Duty Act Cap 480 (Laws of Kenya). The same provides as follows:-

“Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

a. in criminal proceedings; and

b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”

17. In the absence of any proof of stamping of the said Sale Agreement, the same was not admissible in evidence and consequently, his claim against the Respondents had to fail.

18. In the event this court was to have made an error in the aforesaid determination, it would have made findings on liability and quantum as shown in the distinct and separate heads hereinbelow.

I. LIABILITY

19. Notably, the Appellant submitted that the 3rd Respondent was wholly liable for the accident herein because he hit the subject Motor Vehicle twice.

20. On their part, the Respondents submitted that the Appellant was solely to blame for the accident because he had in fact admitted that he blocked the path of the Trailer which was being driven by the 3rd Respondent herein.

21. According to PW 1, the subject Motor Vehicle was hit by the subject. He explained that he blocked the subject Trailer after it drove off so as to take its registration number. He admitted that he could have seen the registration number without alighting from the subject Motor Vehicle.

22. PW 3 blamed the subject Trailer for having caused the accident. He adduced in evidence the Police Abstract Report showing that the

matter was referred to insurance. He did not tender in evidence the sketch of the scene of the accident.

23. On his part, the 3rd Respondent testified that the subject Motor Vehicle was the one that hit the subject Trailer. He was emphatic that he was not charged with any traffic offence.

24. In his cross-examination, PW 1 stated as follows:-

“The 1st accident the trailer hit me. He hit me with right side of trailer. It hit my vehicle on the left side. There were two trailers racing. The 2nd trailer came from behind and hit me not with its front part.... After the 1st accident I followed the trailer to look at the registration number. I went ahead and blocked him...I alighted and checked the registration number... When I talked to him he engaged the gear and hit my vehicle on the right side...”

25. There was a disconnect in the way PW 1's evidence was recorded thus causing confusion to this court. The disconnect may have been caused by the way the questions were asked. It did, however, appear to this court that the subject Trailer hit the subject Motor Vehicle twice.

26. As this was a case of one party's word against the other, and bearing in mind that the details of how the accident really occurred were sketchy and not very clear, this court found and held that it would have apportioned liability at 50%:50% as against the drivers of the subject Motor Vehicle and the subject Trailer respectively.

II. QUANTUM

27. When he was cross-examined, PW 4 stated that he examined the subject Motor Vehicle and established that the total repairs were in the sum of Kshs 266,800/= inclusive of Value Added Tax (VAT). He stated that he viewed the photos and proceeded to view the said subject Motor Vehicle. He later stated that he assessed the said subject Motor Vehicle via photos from the owner. In the same breathe, he stated that he took photos that he used to prepare the Assessment Report which he adduced in evidence. Finally, he clarified that he did not inspect the said subject Motor Vehicle.

28. It was clear that his evidence was so contradictory that it was difficult to know what really was the correct scenario. Suffice it to state that he admitted that he relied on the photos he was given by the Appellant to prepare his Assessment Report. This was contrary to the practise of assessing motor vehicles as he could not with certainty ascertain that that was the actual vehicle that was involved in the material accident.

29. In view of the aforesaid uncertainty, this court was not persuaded by the Appellant's submissions that the Respondents did not demonstrate that PW 4 could not have made a proper assessment based on the photos.

30. In the absence of cogency of PW 4's evidence regarding which vehicle he assessed and certainty of whether the damage he saw was the actual damage that was caused to the subject Motor Vehicle at the material time of the accident due to passage of time, this court was not satisfied that it should accept the assessed value he had given to court. Indeed, the assessment was done almost seven (7) months after the accident.

31. The Learned Trial Magistrate could not therefore be faulted for having determined that the Appellant did not prove his case on a balance of probability as she could not rely on PW 4's evidence which was based on photos that were given to him by the Appellant herein.

CONCLUSION

32. The burden was on the Appellant to prove his assertions that it was the subject Trailer that caused the damage to the subject Motor Vehicle as is provided in Section 107 (1) of the Evidence Act that provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

33. This court was therefore not persuaded that it should interfere with the decision of the Learned Trial Magistrate that the case could not be sustained against the Respondents herein. Suffice it to state that it found and held that the Appellant had not proved his case on a balance of probability and thus came to a similar determination but based on a slightly different reasoning as aforesaid.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal was not successful and the same be and is hereby dismissed with costs to the Respondents herein.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of October 2020

J. KAMAU

JUDGE