REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 727 OF 2017

ABSON MOTORS LIMITED.....APPELLANT

VERSUS

TABITHA SYOMBUA MUTUA & ISAAC MUENDO MUTUA

(Suing as the administrator of the Estate of

STEPHEN MUIA MUTUA (DECEASED).....RESPONDENTS

(Being an Appeal against the judgment of the Hon. D. O. Mbeja (Mr) Senior Resident Magistrate,

delivered on the 13th day of December 2017 in Milimani CMCC No. 351 of 2011)

JUDGEMENT

1. The Respondents filed suit vide plaint dated 22/8/2011 seeking reliefs for general damages Kshs.1,578,560/=, special damages of Kshs.12,000/=, interests and costs.

2. The claim was based on facts that the appellant was owner of motorcycle **KMCF 1845** and especially on 14/4/2010 when **Stephen Muia Mutua** (deceased) being a passenger of same motorcycle along Enterprise road was involved in an accident due to ridder's negligence. That he sustained injuries which caused his death thus above reliefs.

3. The appellant filed defence dated 26/9/2012 denying the claim and especially denied ownership of the above motorcycle and also occurrence of the accident.

4. It averred that at the time of the accident, the motorcycle had been sold to Bake N Bite Nairobi Ltd who are beneficial owners of the same.

5. The matter was heard and in trial court judgment, the appellant was held vicariously liable and ordered to pay damages assessed.

6. Being aggrieved by the aforesaid verdict it lodged appeal and set out 6 grounds namely:-

(1) Case was not proved on balance of probabilities.

(2) The appellant was not beneficial owner of motorcycle at the date of the accident. Thus trial court erred in not finding so.

(3) Trial court erred in not finding that appellant was not owner of motorcycle.

(4) Trial court misapplied section 8 of Traffic Act.

(5) Trial court failed to find vicarious liability was not proved.

(6) The award under Traffic Act was excessive.

7. Parties agreed to canvas appeal via submissions which they filed and exchanged.

APPELLANT'S SUBMISSIONS:

8. The appellant argued Ground No. 1 separately, Grounds Nos. 2, 3 and 4 together as they are related and Grounds Nos. 5 and 6 separately.

9. In regard to Ground No. 1 the appellant submitted that the respondent did not prove its case against the appellant on a balance of probabilities before the subordinate court. The respondent proved that an accident occurred on 14th April 2010 and following the accident the deceased was fatally injured. The respondent however failed to prove that the appellant was to blame for that accident. The respondent totally failed to answer his own listed issue No. 3 *"who was the rider?"*

10. There is no way the court could have found the appellant liable without having an answer to that question. The particulars of negligence set out on the plaint are those of the appellant's rider therefore the appellant was being blamed for that rider's negligence. The court in tis judgment proceeded to assume that since the logbook was in the appellant's name, then the appellant obviously had a relationship with the named rider. The appellant had no control of the same and did not have any financial or beneficial interest thereof. The court ignored all that and mislead itself to reach at an erroneous conclusion.

11. The burden of proof in civil cases on the balance of probability was defined in the case of ***Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR*** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. Even if a certain issue is not challenged by the defendant, the burden of prove on the plaintiff on the balance of probabilities is not lessened. This was found to be the case by the Court of Appeal in ***Kirugi & Another vs Kabiya & 3 Others [1987] eKLR 347.***

12. The respondent failed to prove that the appellant could not be held vicariously liable for the negligence of the rider who was blamed for the accident. The learned court also failed to determine the said issue and only hold that the appellant was 100% liable for the accident.

13. The appellant adduced evidence that it is in the business of selling motorcycles which it sells in large numbers. Evidence was adduced that it sold the accident motorcycle in July 2009 while the accident occurred in 2010. Although the logbook was still in the appellant's name, it was clear that it had no control over the motorcycle at the time of the accident as it was owned by another party that actually controlled who rode it. It had no beneficial or financial interest on the said motorcycle. The court failed to address itself to this probability that had outweighed the respondent's claim.

14. Grounds Nos. 2, 3 and 4 are closely related as they all touch on the ownership of the motorcycle thus argued together. The appellant submitted that although the appellant was the registered owner of the motorcycle, it had no beneficial interest in the same. The appellant's defence witness clearly stated that motorcycle registration number KMCF 1845 was sold to Bake N. Bite Nairobi Ltd on 17th July 2009 .The said sale to a third party is supported by an Indemnity Form and Tax Invoice. Having sold the motorcycle to a third party the appellant had no control of the same. It did not have any beneficial interest thereon and definitely was stranger to the person who rode it. It was not the insured owner either. Normally, after an accident the insured owner's name appears on the police abstract and in this case the appellant's name did not appear on that police abstract.

15. The subordinate court in tis judgement considered the issue of ownership of the motorcycle but gravely erred in its determination. The court agreed that the appellant sold the motorcycle to Bake N Bite in 2009 at Kshs.82,000/=. Although the court agrees that the said sale was proved, it faults the appellant because the transfer of the motorcycle should have been done but was not done. The court then considered section 8 of the Traffic Act which states:

> **"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."**

16. While the subordinate court was right in evoking the provisions of the above section of the Traffic Act, it misdirected itself in applying it. The court had already found that the appellant had sold the accident motorcycle to a third party at the time of the accident therefore should have found that 'unless the contrary is proved' was the fact that it had been sold to a named third party which had been proved. The appellant had already proved that a third party owned the motorcycle at the time of the accident, which was contrary to the details on the logbook. The court ought to have held so but it erred in not doing so.

17. It is trite law that the details on the logbook are not conclusive when proving ownership and that's why section 8 of the Traffic Act has a rider 'unless the contrary proved'. The subordinate court ignored that rider.

18. The subordinate court in its judgment held that, ***"the defendant herein did not challenge the evidence so far adduced by the plaintiff with regard to ownership and in the absence of any evidence to the contrary, I shall hold the defendant wholly liable for the accident at 100% liability."***

19. This is a clear contradiction of what the court had noted there-above that the motorcycle was sold to Bake N Bite in 2009 but no transfer had been done. The court on one hand agrees the appellant had proved sale to a third party but on the other hand states that there was no evidence that the same was owned by another party other than the appellant. The court could only hold one position on this, but it actually confused itself thus getting to an erroneous conclusion.

20. The logbook indicated that the appellant was the registered owner at the time of the accident, but on the other hand the appellant proved that it had sold the motorcycle to third party. The court ought to have keenly considered the provisions of section 8 of the Traffic Act and be specific in the determination. It is not clear why the court decided that ownership was not challenged. Legal ownership as on the logbook was clear but what about the actual, beneficial, insured ownership? Wasn't the court required to address itself on that considering the appellant had pleaded on it and proved that it had already sold the motorcycle? It is guided by the court in ***Isaboke David vs Inspector of Police & 2 Others [2017] eKLR*** where it was held that, ***"a logbook or certificate of search is not a conclusive proof of ownership."***

21. These are some of the questions on ownership that this honourable court need to ask itself as the subordinate court left the same undetermined. This was a clear case where the ownership could not be said to be proved by production of the logbook only. The court erred gravely in its determination and it urges this court to find so.

22. It is its submissions that this honourable court has jurisdiction to consider and re-evaluate the evidence tendered during the hearing in the subordinate court by all witnesses and come to an independent determination of the suit. It urges the court to invoke the said jurisdiction and come to a conclusion that the subordinate court erred in law and facts.

23. On liability, the respondent in the plaint indicated that the accident of 14th April 2010 occurred due to the negligence manner in which motorcycle registration number KMCF 1845 was being driven, controlled and or managed by the defendant's agent. The particulars of negligence of the appellant's rider are set out. The appellant was therefore being blamed for its agent's negligence. That would amount to vicarious liability as it is not the appellant to blame but is agent. This is however not pleaded in the plaint and the court dealt with the matter as if vicarious liability was not an issue.

24. The agent who was riding the motorcycle at the time of the accident was not named in the plaint and his name was not given by the plaintiff's witness. The abstract however indicates that Emmanuel Mulinge Mweu was the owner/rider of KMCF 1845. PW3 in cross examination also stated that the owner of the accident motorcycle was Emmanuel Mulinge Mweu.

25. In ***John Nderi Wamugi vs Rubesh Okumu Otiagala & 2 Others Kisumu CA 24 of 2015*** the court held thus:

> ***"Vicarious liability is not pegged on legal ownership but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor."***

26. In the instance case, there is clear evidence that the appellant had sold the motorcycle to a third party at the time of the accident. The appellant's general manager's statement which was adopted in court during the hearing is clear that the appellant had no beneficial interest or control of the motorcycle at the time of the accident as it had sold the same in the course of its business.

27. The respondent ought to have proved that there existed an employer/employee or agent/principal relationship between the appellant and the rider of the motorcycle to have proved liability against the appellant. The court however dealt with the matter as if the appellant, a company, was the one riding the accident motorcycle.

28. Even if the court had not erred in holding that ownership had been proved, and it submit it gravely erred in doing so, the court could not peg liability on the said ownership. In absence of any proof that the appellant had employed the rider, then the respondents failed to prove their case against the appellant.

29. The court must have assumed that since appellant's name appeared on the logbook, then it was in control of the rider which is not the case. The name of the rider/owner of the motorcycle was given on the abstract as Emmanuel Mulinge but there is no evidence that he was in employment of the appellant. Once the motorcycle was sold, it was in possession and control of a third party and the appellant did not benefit in any way from the said motorcycle. It is therefore punitive to hold liability at 100% against the appellant.

30. On issue of the documents that the appellant produced in the subordinate court that was raised during directions. It is clear that the respondent's advocate had raised an objection that the documents were not served upon them. There is no determination by the court over the objection and the witness proceeded to testify and refer to the documents. There is no order expunging the documents from the record and the said documents are rightfully on the record of appeal.

RESPONDENTS' SUBMISSIONS:

31. On ownership, this was confirmed by the copy of records which was produced at the trial court. Section 8 of the Traffic Act states 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."***

32. They submit that the plaintiff proved to the required standards that the defendant was the registered owner of the subject motorcycle. No evidence to the contrary is on record and as submitted earlier. The same is being belatedly sneaked to this court through a back door.

33. The degree of probability on the issue of ownership has been discharged reasonably. There are no two equal possibilities on ownership as submitted by the appellant, since nothing has been brought forth to dispel/dislodge the plaintiff's version and evidence.

34. This view was held in ***HCCA No. 180 of 2010 JRS Group Ltd vs Kennedy Odhiambo Andirak.*** Other three decided cases maintained the same; ***HCCC No. 166 of 2001 [2005] eKLR – Jatham Mugalo vs Telcom (K) Ltd, HCCC No. 34 of 2002 [2005] eKLR – Samuel Mukunya Kamunge vs John Mwangi Kamura*** and ***HCCC No. 4 of 2009 [2013] eKLR – Charles Nyambuto Mageto vs Peter Njuguna Ngathi*** – Nakuru.

35. On liability rider, it has been raised as a ground of appeal in that he ought to have been enjoined in the proceedings. They submit that the ridder was a third party to the plaintiff. He is not the owner of the subject motorcycle. Failure to enjoin him does not exonerate the owner from blame.

36. The evidence has been adduced that he was negligent in ridding. The same is unchallenged.

37. They submit that it was the duty of the appellant under Order 1 rule 18 of the Civil Procedure Rules to enjoin any third parties it deems fit

to take responsibility in the cause.

38. The defendant failed to do so. It also failed to produce evidence to exonerate it from this cause, mere pleading of fact/denial is not enough to dislodge the finding the learned trial magistrate on the twin issues of ownership and liability.

39. They urge this honourable court to maintain the lower court finding on the twin issue of ownership and liability.

40. On award of damages, the appellant raised it as a ground of appeal on it memorandum issue No. 6 on damages awarded.

41. The appellant in its submissions has abandoned that issue altogether and nothing is submitted on the same which could require response from the respondent.

42. They maintain that the award was proper and within the law and ask this honourable court to dismiss the ground of appeal.

ISSUES ANALYSIS AND DETERMINATION:

43. After going through pleadings, evidence on record and parties submissions, I find the issues are; whether the appellant was beneficial owner of M/C KMCF 1845? If above is in affirmative, whether the appellant was vicariously liable for negligence of the rider? What is the order as to costs?

44. The burden of proof in civil cases on the balance of probability was defined in the case of ***Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR*** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. Even if a certain issue is not challenged by the defendant, the burden of prove on the plaintiff on the balance of probabilities is not lessened. This was found to be the case by the Court of Appeal in ***Kirugi & Another vs Kabiya & 3 Others [1987] eKLR 347.***

45. The appellant's defence witness stated that motorcycle registration number KMCF 1845 was sold to Bake N. Bite Nairobi Ltd on 17th July 2009 .The said sale to a third party is supported by an Indemnity Form and Tax Invoice. The same piece of evidence was not rebutted. Thus having sold same motorcycle to a third party it was not shown that the appellant had control of the same.

46. The trial court in tis judgement considered the issue of ownership of the motorcycle and agreed that the appellant sold the motorcycle to Bake N Bite in 2009 at Kshs.82,000/=. Although the court agreed that the said sale was proved, it faulted the appellant because the transfer of the motorcycle should have been done but was not done. The court then considered **section 8 of the Traffic Ac**t which states:

> ***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."***

47. The logbook indicated that the appellant was the registered owner at the time of the accident, but on the other hand the appellant proved that it had sold the motorcycle to third party. The court ought to have considered the provisions of **section 8 of the Traffic Act** to the extent that contrary was shown as to the sale of the M/C prior to the accident.

48. It is not clear why the court decided that ownership was not challenged. Legal ownership as on the logbook was clear but the actual, beneficial, insured ownership was proved via aforesaid sale to third party.

49. The trial court obligated to address itself on that considering the appellant had pleaded on it and proved that it had already sold the motorcycle. See the case of ***Isaboke David vs Inspector of Police & 2 Others [2017] eKLR*** where it was held that, ***"a logbook or certificate of search is not a conclusive proof of ownership."***

50. The appellant was not proved to have any beneficial interest thereon and definitely was stranger to the person who rode it. It was not proved to be the insured owner either. Normally, after an accident the insured owner's name appears on the police abstract and in this case the appellant's name did not appear on that police abstract produced in evidence.

51. On vicarious liability, the agent who was riding the motorcycle at the time of the accident was not named in the plaint and his name was not given by the plaintiff's witness. The abstract however indicates that Emmanuel Mulinge Mweu was the owner/rider of KMCF 1845. PW3 in cross examination also stated that the owner of the accident motorcycle was Emmanuel Mulinge Mweu.

52. In ***John Nderi Wamugi vs Rubesh Okumu Otiagala & 2 Others Kisumu Ca 24 Of 2015*** the court held thus:

> ***"Vicarious liability is not pegged on legal ownership but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor."***

53. In the instance case, there is clear evidence that the appellant had sold the motorcycle to a third party at the time of the accident. The appellant's general manager's statement which was adopted in court during the hearing is clear that the appellant had no beneficial interest or control of the motorcycle at the time of the accident as it had sold the same in the course of its business.

54. The respondent ought to have proved that there existed an employer/employee or agent/principal relationship between the appellant and the rider of the motorcycle to have proved liability against the appellant. The court however dealt with the matter as if the appellant, a company, was the one riding the accident motorcycle.

55. On those two grounds the appeal succeeds and thus court makes the following orders;

i. ***The appeal is allowed and thus the suit in lower court is dismissed.***

ii. ***Costs to the appellant for the appeal.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE