IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CIVIL APPEAL NO. 373 OF 2014

(CORAM: M'INOTI, SICHALE & KANTAI, JJ.A.)

BETWEEN

JARED MAGWARO BUNDI.....APPELLANT

AND

PRIMAROSA FLOWERS LIMITED.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Mulwa, J.) dated 24th October, 2014

in

H.C.C.A No. 77 of 2011)

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As Consolidated With

CIVIL APPEAL NO. 375 OF 2014

SYLVANUS NYAMBANE NDEGE.....APPELLANT

AND

PRIMAROSA FLOWERS LIMITED.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Mulwa, J.) dated 24th October, 2014

in

H.C.C.A. No. 78 of 2011)

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JUDGMENT OF THE COURT

When this appeal came up for hearing before us, both counsel for the appellant and the respondent applied for and we allowed consolidation of this appeal with ***Civil Appeal No. 375 of 2014***, the facts in both cases being the same, the only difference being that the appellants are different. It is a second appeal and we must avoid the temptation to retry the case, which was done by the Magistrate's Court and retried in the first appeal. For the function of this Court on a second appeal like this one, see the many pronouncements of the court such as in the case of ***Maina v Mugiria [1983] KLR 78*** where it was held that on a second appeal, only matters of law may be taken. It was further stated in that case that if the High Court upholds a magistrate on a question whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law.

We shall revisit facts of the case to ascertain the same and establish whether the trial court carried out its task faithfully according to law and whether the first appellate court retried the case as required in law.

The appellant, ***Jared Magwaro Bundi***, in this appeal and the appellant, ***Sylvanus Nyambane Ndege,*** in ***Civil Appeal No. 375 of 2014*** were according to the pleadings and the evidence, employees of the respondent, ***Primarosa Flowers Limited,*** in its spraying department. The respondent would ferry its said employees by use of motor vehicles from designated places to farms where flowers were grown for the respondent.

On 1st May, 2010 the appellant boarded a motor vehicle registration mark KBK 385D with other employees to be transported to the respondent's flower farm along Oljoro-Orok road at a place called Kanguo. The motor vehicle was involved in a self involving accident where it overturned due to the manner of its driving and the appellant was injured. The appellant was treated in a hospital and medical evidence was led in evidence on the nature of injuries suffered. According to the plaint, the said motor vehicle was owned by a company called Zamora International Limited which was sued as 3rddefendant and was driven by one, ***Gideon Kabuga Karinga***, who was sued as 2nd defendant. The company called Zamora International Limited did not enter appearance to the summons and interlocutory judgment was entered against it in default. There is no material on record to show whether any further action was taken against that company after interlocutory judgment had been entered. That issue is not before us. The statement of defence filed in the suit was for the respondent and Gideon Kabuga Karinga.

It was the appellant's case before the trial court that the respondent was the beneficial owner of the said motor vehicle which was at the material time used to transport its employees to a flower farm owned by the respondent.

One of the issues that arose for determination by the trial court related to the ownership of the said motor vehicle at the time of accident as it was the appellants' case that the respondent was the beneficial owner of the motor vehicle while the respondent took the view that it was not the owner of the same. It was the respondent's case before the trial magistrate that in terms of the provisions of ***Section 8*** of the ***Traffic Act,*** liability could only be found against the person in whose name a motor vehicle was registered, in the case before the trial magistrate, Zamora International Limited which, as we have stated, was sued as the 3rd defendant. In his judgment, the learned magistrate found, in his own words on the said provisions of the ***Traffic Act***:

> ***"In my view the said section is fully cognizant if (sic) the fact that a different person or different other person may be de facto owners of the motor vehicle and so the section has an opening for any evidence in proof in such differing ownership to be given. There is no doubt that the certificate from the Registrar of Motor Vehicles shows the name of the registered owner. However, the indication shown if DW 1 (sic) is not final proof that the sole owner was the person whose name was shown".***

On first appeal, J.N. Mulwa, J. re-analyzed the evidence, considered the said ***Section 8*** of the ***Traffic Act*** and reached the conclusion that beneficial ownership was not ownership of a motor vehicle and that the respondent could not assume liability for the accident. That first appeal was therefore allowed. Those findings provoked this appeal which is predicated on 4 grounds set out in the Memorandum of Appeal drawn by the appellant's lawyers ***M/s Robert Ndubi & Company Advocates***. Those grounds generally revolve around an attack on the findings of the learned Judge who found that beneficial ownership of a motor vehicle could not confer ownership of a motor vehicle for purposes of finding liability against such beneficial owner in a case like here where the motor vehicle was involved in an accident leading to injury of a passenger in the said vehicle. That was also the substance of the submissions of Mr. Robert Ndubi, learned counsel for the appellant, when the appeal came up for hearing before us on 31st January, 2018. According to learned counsel the learned Judge of the High Court misdirected herself in finding that the only issue for determination was ownership of motor vehicle when according to counsel there was also the issue of vicarious liability which the learned Judge had to consider and make findings on. Learned counsel faulted the learned Judge for not finding that the said motor vehicle was at the material time in the management and control of the respondent and was driven by its authorized driver. Learned counsel relied on various authorities and urged us to allow the appeal.

Mr. V. G. Muriuki, learned counsel for the respondent submitted that it was right for the High Court to find that beneficial ownership did not confer ownership on the said motor vehicle on the respondent. Learned counsel urged a strict interpretation of ***Section 8*** of the ***Traffic Act*** and submitted that beneficial ownership was in any event not proved. According to learned counsel without a rental or lease agreement between the respondent and the said company called Zamora International Limited, liability could not be found against the respondent. Learned counsel relied on some case law and urged us to dismiss the appeal.

In a brief reply, Mr. Ndubi submitted that it was never the appellant's case that the appellant was a fare paying passenger in the motor vehicle but that he was being ferried as an employee of the respondent in a motor vehicle within the respondent's control.

We have considered the whole record, the Memoranda of Appeal filed in both appeals and the law and this is what we think of this appeal.

It was the appellant's testimony before the trial magistrate that as was the usual practice, he arrived at the designated place at 5 am on 1st May, 2010 where he was picked along other employees by a motor vehicle KBK 385D which was driven by Gideon (sued as 2nd defendant) who according to the appellant was an employee of the respondent. He stated:

> ***"I knew Gideon since I was employed. He was a driver and a mechanic in-charge. We used to be carried in the morning by the company vehicle at 5.am the vehicle came on the material date and carried us. I had seen the vehicle for about 2 months within the company's premises. In my view the vehicle belonged to the company. It used to carry the bosses".***

The respondent called as a witness, ***Peter Kamotho,*** its Maintenance Manager and it was agreed by counsel appearing for both parties that his evidence be incorporated in both matters. That witness denied ownership of the subject motor vehicle by his employer but confirmed that employees who worked in the spraying department were ferried at 5 am in a motor vehicle from Oljoro-Orok to the farm. He stated:

> ***"I know all Primarosa drivers. Gideon is an employee of Primarosa. I know it is wrong to say a lie. I heard he was the one driving the accident motor vehicle".***

It is therefore agreed that the appellant was an employee of the respondent and that employees of the respondent who worked in its spraying department would be ferried in motor vehicles from Oljoro-Orok to the flower farm belonging to the respondent. According to the appellant the subject motor vehicle was owned by the respondent and he boarded it on the material day to be ferried to work believing that the motor vehicle belonged to the respondent. It was his further evidence that he knew Gideon as a driver and a servant of the respondent and that he had seen that motor vehicle at the respondent's premises for about 2 months and had seen Gideon driving it while ferrying employees to the said farm. The respondent takes the view as it has in the lower court that it could not assume liability for the accident because the motor vehicle belonged to Zamora International Limited. Heavy weather was placed by the respondent on ***Section 8*** of the ***Traffic Act.*** That ***Section 8*** provides as follows:

> ***"8. The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle".*** (underlining supplied)

As we have stated there was direct evidence that the said motor vehicle KBK 385D was being used to ferry employees who worked in the respondent's flower farm. It was not seriously contested that the appellant was in that motor vehicle on 1st May, 2010 when it was involved in an accident and the appellant was injured.

Taking a historical perspective the courts took a technical interpretation of the said provision of the ***Traffic Act*** where courts interpreted the provision with strictness. For instance, in the often cited case of ***Thuranira Karauri vs Agnes Ncheche Civil Appeal No. 192 of 1996 (UR),*** although cited as obiter, it was held that since the plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant where the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a Certificate of Search signed by the Registrar of Motor Vehicles showing the registered owner of the same in the absence of which the defendant was not liable.

That position seems to have changed as it is seen in a more recent case decided by this Court sitting in Kisumu being ***Joel Muga Opija v East African Sea Food Limited Civil Appeal No. 309 of 2010 (ur)*** where the law was stated to be:

> ***"It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter in the Thuranira case … 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".***

The same issue came for consideration before this Court sitting in Mombasa in the case of ***Muhambi Koja v Said Mbwana Abdi [2015 eKLR***. It was recognized in that case that in the absence of evidence to the contrary the registration certificate or logbook of a motor vehicle or an abstract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle. It was further recognized in that case that in the normal cause of business and human interactions, situations may arise where the person named in those records may have passed the vehicle to some other person in whom the ownership presently vests. There was a discussion in that case of ***Section 9*** of the ***Traffic Act*** which section recognizes a situation like the one above. That section requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding 14 days after the date of such transfer unless the new owner is registered as the new owner thereof. The registered owner must within 7 days from the date of the transfer inform the Registrar in a prescribed form. It is the new owner who then takes over from that point and inserts necessary parts of change of ownership, forward registration book with prescribed fees to the Registrar whereupon the vehicle will be registered in the name of the new owner.

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

The position taken by this Court in ***Joel Muga Opija*** (supra) and ***Muhambi Koja*** (supra) appears to us to accord with modern thinking and jurispurdence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case. Where, as here, it was proved to the satisfaction of the trial court that the accident motor vehicle, though registered in the name of Zamora International Limited was in actual possession and use by the respondent, the trial magistrate was entitled to hold, in accord with ***Section 8*** of the ***Traffic Act***, that the contrary had been proved and that the respondent should be held liable for the accident that occurred on 1st May, 2010 where the appellant was injured.

As we have seen in the present appeal there was direct evidence that the relevant motor vehicle was used for ferrying employees of the respondent from a designated place to a farm in Oljoro-Orok. There was direct evidence that the motor vehicle was driven by one Gideon who was an employee of the respondent as confirmed by the respondents' witness. The learned trial magistrate analyzed the evidence and found that there was sufficient proof that the vehicle that was used to transport employees of the respondent was in actual possession of the respondent.

Upon our own consideration, we are satisfied that the appellant was able to show that there was a direct link between the respondent and the motor vehicle that was involved in the accident which led to the injuries to the respondent's employees including those to the appellant. The respondent availed the said motor vehicle to be used by its employees and the appellant could not possess evidence to show the relationship the respondent and the company called Zamora International in whose name the motor vehicle was registered. The appellant proved on a balance of probabilities that the respondent had beneficial ownership of the motor vehicle and that is why it availed the said motor vehicle to be used to ferry its employees. The learned magistrate's findings were sound and should have been upheld by the learned Judge on first

appeal. The learned Judge fell into error in placing a technical interpretation of the provisions of ***Section 8*** of the ***Traffic Act***. It was proved to the required standard that the motor vehicle which was registered in the name of the company Zamora International Limited was used by and to the benefit of the respondent. We are entitled to set aside the findings of the learned Judge which we hereby do.

The upshot of our findings is that we find merit in this appeal which we hereby allow and award costs here and below to the appellant. These findings and orders will apply *mutatis mutandis* to the related ***Civil Appeal No. 375 of 2014*** which was consolidated with this appeal.

Dated and delivered at Nyeri this 21st day of March, 2018.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR