



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 129 OF 2017

MAKINDU MOTORS LTD.....APPELLANT

VERSUS

S N S (suing as the next friend of M N J).....RESPONDENT

AND

ANN WAITHERA.....INTERESTED PARTY

[Being an appeal from the Judgment of Hon Senior Principal Magistrate S. Atambo in Kiambu CMCC No 328 of 2015 delivered on 10th April 2017]

JUDGMENT

INTRODUCTION

1. In her judgment delivered on 10th April 2017, Hon S. Atambo, Senior Principal Magistrate at Kiambu Law Courts awarded the Respondent herein a sum of Kshs 500,000/= being general damages, Kshs 3,700/= being special damages together with interest thereon and costs.
2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, on 18th August 2017, the Appellant filed its Memorandum of Appeal of even date. It relied on five (5) Grounds of Appeal. Its Record of Appeal was dated 6th October 2017 and filed on 9th October 2017. Its Written Submissions were dated 17th March 2018 and filed on 19th March 2018 while those of the Respondent were dated 15th February 2018 and filed on 23rd February 2018.
3. When the parties appeared before the court on 19th March 2018, they requested for a Judgment date herein having relied entirely on their respective Written Submissions.

LEGAL ANALYSIS

4. 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.
5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [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...”

6. Having the aforesaid holding in mind and having looked at the Appellant’s Memorandum of Appeal and the parties’ respective Written Submissions, it appeared to this court that the following questions are what had been placed before it for determination:-
 - a. **Who was liable for having caused the accident,**
 - b. **Whether the quantum that was awarded by the Learned Trial Magistrate was severe, harsh and manifestly excessive**

warranting interference by this court.

7. The said issues were therefore dealt with under the distinct heads shown herein below.

I. LIABILITY

8. The Appellant and the Interested Party did not enter appearance as a result of which interlocutory judgment was entered against them. However, on 15th April 2016, by consent of the Respondent and the Appellant, interlocutory judgment was set aside against the Appellant herein and matter proceeded for trial. The Interested Party never participated in the proceedings herein.

9. In her judgment, the Learned Trial Magistrate found the Appellant and Interested Party to have been jointly and severally liable for injuries M N J (hereinafter referred “the minor”) sustained after she was hit by Motor Cycle Registration Number KMDK 729A (hereinafter referred to as “the subject Motor Cycle”) that was being driven by the Interested Party and allegedly owned by the Appellant herein on 13th June 2015 along Kiambu- Tinganga Road near Don Bosco Junction.

10. The Appellant submitted that the Learned Trial Magistrate erred when she found that it was jointly and severally liable for the injuries caused to the minor because the subject Motor Cycle was still registered in its name. It explained that it was an assembler of motor cycles and sold the same to third parties. It stated that it sold the subject Motor Cycle to one Johnson Jeremiah. It adduced in evidence a delivery evidencing sale of the subject Motor Cycle.

11. It submitted that it was not liable for the accident as the driver of the Motor Cycle at the material time was not under its control and as a result, it could not be held to have been vicariously liable for his actions.

12. It referred this court to Section 8 of the Traffic Act Cap 403 (Laws of Kenya) and argued that the presumption that it was still registered as the registered owner of the Motor Cycle was rebuttable by other evidence, which in this case, it said it was the Police Abstract Report that indicated the Interested Party herein as the beneficial owner of the Motor Cycle. It relied on two (2) cases but did not elaborate which point of law they were supporting – See **Ignatius Makau Mutisya vs Reuben Musyoki Muli [2015] eKLR and Securicor (K) Ltd vs Kyumba Holdings [2005] eKLR.**

13. On its part, the Respondent submitted that the Appellant had not met the threshold that was set by Section 8 of the Traffic Act. It referred this court to the case of **Charles Nyabuto Mageto vs Peter Njuguna Njathi [2013] eKLR** where it was held as follows:-

“From the interpretation of Section 8 of the Traffic Act, a person claiming or asserting ownership need to (sic) necessarily produce a log book or a certificate of registration. The courts recognise that there are various forms of ownership, that is to say, actual, possessory and beneficial all of which may be proved in other ways including by oral or documentary evidence such as the police abstract report.”

14. She was categorical that the documents that the Defendant adduced in evidence did not show that the subject Motor Cycle had been sold to a third party and that in any event, it did not call the said Johnson Jeremiah to support its case or enjoin him as a co-defendant herein. She pointed that the burden of proof lay with it to prove that it was not the owner of the Motor Cycle as is stipulated in Section 107 and 108 of the Evidence Act Cap 80 (Laws of Kenya).

15. She also referred to the case of **Securicor Kenya Ltd vs Kyumba Holdings** (Supra), where the Court of Appeal held as follows:-

“Our holding finds support in the decision in OSAPIL VS KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only *prima facie* evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

16. She also placed reliance in the case of **Joel Muga Opinja vs East Africa Sea Food Ltd [2013] eKLR** where it was held as follows:-

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

17. She also relied on several other authorities where the common thread was that whether the property had been sold was determined by the facts of each case. She therefore submitted that she had proved her case on a balance of probability as was enunciated in the case of **Miller vs Minister of Pensions [1947] 2 All ER**

18. A perusal of the evidence that was adduced in court showed that there was no dispute as to whether or not the accident herein occurred on the material date. They all agreed that the accident occurred on the material date. What was in contention was who the owner of the Motor Cycle was.

19. In her evidence, the minor’s mother, Sara Nekesa Sindani (hereinafter referred to as “PW 1”) testified that the Interested Party was to blame for the accident and that the Appellant herein was the owner of the Motor Cycle as per the Copy of Records from the Registrar of motor vehicles which she adduced in evidence. She also tendered in evidence a Police Abstract Report showing the Interested Party as the beneficial owner of the said Motor Cycle. That notwithstanding, John Wafula (herein after referred to as “PW 2”) testified that he came to know that the owner of the Motor Cycle was Ann Waithira as was evidenced in the Police Abstract Report. In view of the two (2) documents that she tendered in evidence, it was not clear from PW 1’s evidence who was the real owner of the Motor Cycle.

20. On his part, the Appellant's Operational Manager, Samuel Kimili (hereinafter referred to as "DW 1") testified that the Appellant sold several Motor Cycles to one Johnson Jeremiah Electronics which included the subject Motor Cycle and handed over the logbooks. He adduced in evidence copies of Delivery Notes, which the Respondent had dismissed because the same were not on the Appellant's letter head.

21. Notably, Section 8 of the Traffic Act stipulates as follows:-

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

22. As had been held in **Charles Nyabuto Mageto vs Peter Njuguna Njathi** (Supra), ownership could be proved by any document such as a Police Abstract Report or by way of oral evidence. In other words, the presumption of ownership can be rebutted either by oral and/or documentary evidence.

23. Whereas the documents DW 1 tendered in evidence were not on the Appellant's letter head, it was clear from his evidence and that of PW 1 and PW 2 that the subject Motor Cycle was owned by the Interested Party. This court was thus persuaded to agree with the Appellant that it had proved on a balance of probability that it was not the owner of the subject Motor Cycle at the material time.

24. In fact in the Statutory Notice dated 6th November 2015 to M/S Madison Insurance Co Ltd, it was clear that the Respondent was aware that the subject Motor Cycle had moved from the Appellant to the Interested Party's possession. In this regard, the Appellant could not have been found liable for the actions of the Interested Party, her agents, drivers and/or servants under the doctrine of vicarious liability.

25. Accordingly, having considered the parties' Written Submissions and the cases they relied upon, this court came to the firm conclusion that the Respondent did not prove on a balance of probability that the Appellant herein was liable for negligence of the injuries that were sustained by the minor herein as it rebutted the presumption that the subject Motor Cycle was still in its possession or that it was its owner at the material time. It was therefore the considered opinion of this court that the Learned Trial Magistrate erred when she found the Appellant wholly liable jointly and severally together with the Interested Party merely because the Appellant was still appearing as the registered owner of the Motor Cycle in the Copy of Records from the Registrar of Motor Vehicles.

QUANTUM

26. Although the Appellant had indicated in Ground of Appeal No 5 that the damages the Learned Trial Magistrate awarded to the minor were excessive, it abandoned the same because it averred that it had demonstrated that it was not the registered owner of the Motor Cycle. In view of its finding aforesaid, this court did not therefore find any value in analysing the said Ground of Appeal.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 18th August 2017 was successful.

28. In the premises foregoing, this court hereby sets aside and/or vacates the judgment of the Learned Trial Magistrate against the Appellant herein and replaces the same with an order that:-

a. Judgment be and is hereby entered against the Interested Party as follows:-

General damages Kshs 500,000/=

Special damages Kshs 3,700/=

Plus costs and interest at court rates from the date of judgment till payment in full.

b. The Respondent shall bear the Appellant's costs in the matter in the lower court and those of the Appeal herein.

29. It is so ordered.

DATED and DELIVERED at KIAMBU this 26th day of June 2018

J. KAMAU

JUDGE