



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 105 OF 2016

SAMUEL M. NG'ANG'A.....APPELLANT

VERSUS

JACQUES NGUUMBAO MUSYOKA.....1ST RESPONDENT

ALEX GACHERU JODE.....2ND RESPONDENT

NICHOLAS MUNYUA.....3RD RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Thika (Hon. J. W. Onchuru) Delivered on 18/3/2015 in Thika CMCC No. 826 of 2012)

JUDGMENT

1. By a Plaint dated 12/09/2012, the 1st Respondent herein sued the Appellant and the 2nd Respondent claiming compensation for injuries allegedly sustained on 21st November, 2010 when he was travelling along Thika Road in motor vehicle registration number KAM 404P as a lawful passenger when the said motor vehicle was negligently driven by the 2nd Respondent and as a result he sustained personal injuries. The Appellant was said to be vicariously liable for the negligence of the 2nd Respondent who was said to be his driver, servant and/or agent.

2. The Appellant filed his Defence denying any liability for the accident. In particular, the Appellant averred that he was not the actual owner of motor vehicle registration number KAM 404P when the accident occurred as the same had been sold to Nicholas Munyua.

3. In the circumstances the Appellant sought leave to serve Nicholas Munyua with 3rd Party Proceedings and upon default to enter appearance the Appellant prayed for interlocutory judgment which was entered.

4. The matter proceeded to a full hearing for the suit between the Appellant and the 1st Respondent. At the conclusion of the trial, the Honourable Trial Magistrate found the 2nd Respondent and the Appellant jointly and severally liable for the injuries sustained by the 1st Respondent. On quantum, the Honourable Trial Magistrate entered judgment as follows:

| | | |
|--------------------|-------|-----------|
| a. General damages | Kshs. | 500,000/= |
| b. Special damages | Kshs. | 4,000/= |
| Total | Kshs. | 504,000/= |

5. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present Appeal. In his Memorandum of Appeal, he has listed seven grounds of appeal as follows:

a) THAT the Learned Magistrate erred in fact and in law by failing to consider the interpretation of Section 8 of the Traffic Act Cap 403 Laws of Kenya.

b) THAT the Learned Magistrate erred in fact and in law in finding that a copy of records from the Registrar of motor vehicles was conclusive evidence of ownership.

c) THAT the Learned Magistrate erred in fact and in law in failing to find that the Sale Agreement was conclusive proof that motor vehicle KAM 404 P was not in the control of the 2nd defendant on the day of the accident.

d) THAT the Learned Magistrate erred in fact and in law in finding that the liability of the Defendants was jointly and severally in absence of proof of any such joinder.

e) THAT the Learned Magistrate erred in fact and in law in failing to consider the imputation of default judgment against the 3rd Party.

f) THAT the Learned Magistrate erred in fact and in law in finding that the 2nd defendant was the registered owner of motor vehicle KAM 404P as at 21st November, 2010.

g) THAT the Learned Magistrate erred in fact and in law in awarding the Plaintiff general damages of Kshs. 500,000/=.

6. The court directed the parties to canvass the appeal by way of written submissions and neither party found it necessary to orally highlight.

7. In his advocate's written submissions, the Appellant clustered the grounds into five: Ground 1; Grounds 2, 3 and 6, Ground 4, Ground 5 and Ground 7.

8. The 1st Respondent has opposed the Appeal and urges the Court that the Appellant has not shown that the appeal ought to be allowed and prayed that the decision and judgment of the trial court be upheld.

9. I have read and considered the respective arguments in those submissions.

10. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

11. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

*It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in **Watt –vs- Thomas (1), [1947] A.C. 484**.*

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

12. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

13. These three principles are well settled and are derived from various binding and persuasive authorities including *Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA)*; *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); *Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* (Kisumu High Court CC No. 88 of 2002).

14. With the above principles in mind, I will now proceed to deal with the appeal.

15. The 1st Respondent’s case was founded on the alleged negligence of the 2nd Respondent. As such, he was by law required to establish on a balance of probabilities that:

- a. The 2nd Respondent owed him a duty of care;
- b. The 2nd Respondent breached that duty, and;
- c. That he suffered injury as a result of that breach.

16. The 1st Respondent’s case, as it emerged at the trial was that he was involved in a road accident and was taken to Gatundu Level 5 Hospital and later referred to the spinal injury hospital. He sued Alex Gacheru Jode, the driver of the Motor Vehicle, and Samuel Nganga, whom he described as the registered owner of the Motor Vehicle as per the KRA records. He blamed the driver for the injuries that he sustained. He sustained a blunt head injury, perineal tear, fracture of the neck, comminuted right fracture and dislocation of the right wrist as outlined in the plaint.

17. During the trial, the Appellant testified that he was the owner of motor vehicle registration number KAM 404P from December 2002 to 15/06/2009 when he sold the said vehicle to Nicholas Munyua of P.O. Box 105278-00101, Nairobi. He testified that at the time of the alleged accident, he was not the owner of the said motor vehicle. He produced a Sale Agreement for the sale. He informed the Court that that he had also executed the transfer document which the buyer went away with promising to effect the transfer.

18. In disposing off the issue of liability, the Learned Trial Magistrate found thus:-

The 2nd defendant will vicariously be held liable for the accident for being the registered owner of the motor vehicle KAM 404P. The record at 21.11.2011 clearly showed that the 2nd defendant was the registered owner. The 2nd defendant submitted a sale agreement that he had sold the vehicle to a 3rd party. The said sale had not been transferred to reflect that the vehicle had indeed changed hands.

19. The Appellant argues that the Learned Trial Magistrate erred in holding that he was the registered owner of motor vehicle KAM 404P. He contends that he sold the said motor vehicle to Nicholas Munyua and even exhibited a sale agreement to that effect. On the other hand, the 1st Respondent produced a copy of records that showed that the Appellant was the registered owner of the said motor vehicle at the time of the accident.

20. The learned Trial Magistrate went ahead and held further that the appellant was vicariously liable for the negligence of the 2nd defendant herein who was the driver at the time of the accident therefore, held both of them jointly and severally liable for the injuries suffered by the 1st respondent herein.

21. The Appellant argues that the trial court had entered judgment in default against the 3rd respondent but failed to consider the same in its final judgment.

22. The dispositive question in this appeal is whether the Appellant was vicariously liable for the negligence of the 2nd Respondent who, admittedly, had control and possession of the offending Motor Vehicle. The 1st Respondent who was the Plaintiff in the Trial Court insists that by virtue of the fact that the Copy of Records from the Registrar of Motor Vehicles showed that the Appellant was the owner of the Motor Vehicle KAM 404P at the time of the accident, that is conclusive proof that the Appellant was, indeed, the owner. The 1st Respondent further submits that the production of the Sale Agreement indicating sale of the Motor Vehicle to a third party did not discharge the burden of proof required of the Appellant to escape liability.

23. During the trial, the Appellant produced a Sale Agreement dated 15/06/2009. It is signed by the Appellant as a Seller of the Motor Vehicle and one, Nicholas Munyua as the Buyer. The Appellant testified that he handed over possession of the Motor Vehicle to the Buyer on the day the Sale Agreement was executed. He further testified that he executed a Transfer Form which the said Buyer went with. The Buyer had promised to effect the transfer to himself.

24. Section 8 of the Traffic Act provides 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.

25. Both in the Court below and here, the Appellant has insisted that section 8 of the Traffic Act merely creates a rebuttable presumption that the person in whose name a vehicle is registered is the owner of the vehicle. He further insists that by producing the Sale Agreement, he had sufficiently rebutted this presumption. Further, the Appellant argues that the evidence of surrounding circumstances and context provided further evidence that he was, indeed, not the owner of, or in possession of the Motor Vehicle at the time of the accident for purposes of triggering the doctrine of vicarious liability.

26. The 1st Respondent's response to these arguments, as I understand it, is two-fold. First, he argues that the Sale Agreement is not sufficient to displace the presumption created under section 8 of the Traffic Act. In this case, the 1st Respondent points out that there is no evidence of Transfer of the Motor Vehicle to the alleged buyer. Further, the 1st Respondent argues that there is no evidence that the consideration for the Motor Vehicle was actually paid.

27. Second, the 1st Respondent argues that the Appellant did not discharge his burden of proof to demonstrate that he was not the owner of the Motor Vehicle. The 1st Respondent relied on a number of cases where a defendant was unable to escape liability even where only a Police Abstract showed they were the owners of the Motor Vehicle involved in an accident. These cases include: *Charles Nyambuto Mageto v Peter Njuguna Njathi (Nakuru HCCA No. 4 of 2009 [2013] eKLR)*; *Jotham Mugalo v Telkom (K) Ltd (Kisumu HCCC No. 166 of 2001 [2013] eKLR)*; and *JRS Group Limited v Kennedy Odhiambo Andwak [2016] eKLR*.

28. I have read these decisions. They are eminently distinguishable from the defining issue in this appeal. The central issue in those cases was whether a party who claimed they were not the owners of a motor vehicle which was involved in an accident had sufficiently discharged their burden of proof to prove that they were not such owners when a Police Abstract as corroborated with other contextual evidence tended to show they were such owners. With respect, that is not the issue here. The specific issue in this appeal is whether the Appellant had sufficiently rebutted the presumption created in section 8 of the Traffic Act when he tendered evidence of the Sale Agreement of the Motor Vehicle between himself and a third party, and then tendered oral evidence of the sale.

29. In my view, the Appellant succeeded in rebutting the presumption created by section 8 of the Traffic Act in this case. Although the Appellant candidly conceded that he did not effect the transfer of the Motor Vehicle (that he only executed the Transfer form and handed it over to the new Buyer of the Motor Vehicle), the Appellant produced a duly signed copy of the Sale Agreement. The authenticity of the Sale Agreement was not questioned by the 1st Respondent during trial. Indeed, it was accepted as genuine by the Trial Court. Similarly, when the Appellant testified, the 1st Respondent did not cross examine him on the question on the veracity of the Appellant's claim that he had handed over possession of the Motor Vehicle to the buyer on 15/06/2009. There is nothing on record to doubt this assertion under oath.

30. In the circumstances, then, the correct position of the law is that established by the Court of Appeal in *Securicor Kenya Limited - v - Kyumba Holdings Limited Civil Appeal No. 73 of 2002* which was also followed by the Court of Appeal in *Robert Njoka & Alice Wambura Njagi & 3 others [2013] eKLR*. This case is on all fours with the present case. The Defendant Company had claimed in the Trial Court that it had sold the Motor Vehicle which was involved in a road traffic accident. Like in the present case, the company produced a Sale Agreement to counter the presumption created by section 8 of the Traffic Act. Like here, the company had signed but not effected a Transfer Form. The Court of Appeal found that it was an error for the Trial Court to have concluded that the Defendant Company was the owner of the Motor Vehicle in the face of the evidence produced. The Court of Appeal held:

We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. 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. The appellant had, indeed, proved otherwise.

31. So it is in this case. There was ample, uncontroverted evidence before the Court to easily meet the threshold of balance of probabilities to dislodge the presumption that the Motor Vehicle Registration Number KAM 404P was owned by the Appellant at the time of the accident.

32. The Appellant also complained that the Trial Court erred because it did not take into consideration the effect of the Appellant's judgment in default against the 3rd Respondent. He submits that the Court should have made reference to the ex parte judgment entered against the third party in its judgment.

33. On this one, the Appellant has missed the point. A judgment against a third party is definitionally either an indemnification or a contribution against a judgment entered against a Defendant in favour of a Plaintiff. Procedurally, where a judgment in default against a third party is entered, the defendant is entitled, after satisfying the decree against himself, to seek indemnification from the third party. See Order 1, Rules 17 & 19. In this case, the decree has not been satisfied yet.

34. I will now turn to the quantum.

35. The Appellant contends that an award of Ksh. 500,000/= as awarded to the 1st respondent was inordinately high and urged the court to reduce the award to Ksh. 250,000/=. General damages awarded at the lower court can only be interfered with if it is "so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) 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." (See *Butt -vs- Khan, Nairobi Civil Appeal NO. 40 of 1977*).

36. In the circumstances I would not have found the award of Kshs. 500,000/= inordinately low or high as to warrant any interference. (See *Mwavita Jonathan v Silivia Onunga [2017] eKLR* where Majanja J awarded Ksh. 400,000/= for a blunt chest injury, fracture of the left hip, dislocated right knee joint, sprains at the neck and back and a deep wound on the left lower leg.)

37. In any event, I already found the verdict in favour of the 1st Respondent to be unsustainable. Consequently, I allow the appeal. The judgment of the Lower Court together with consequential orders are set aside. The Appellant shall have the costs of this appeal and the suit in the Lower Court.

38. Orders accordingly.

Dated and delivered at Kiambu this 26th day of October, 2018.

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JOEL NGUGI

JUDGE