



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO. 28 OF 2014**

**PETROCITY ENTERPRISES LTD----- APPELLANT**

**VERSUS**

**FREDRICK OKELLO OPIYO -----1<sup>ST</sup> RESPONDENT**

**DFCU LEASING CO. LTD----- 2<sup>ND</sup> RESPONDENT**

**KAGIMU DALAWUSI----- 3<sup>RD</sup> RESPONDENT**

*(Appeal arising from Judgment of Busia Chief Magistrates CMCC No. 354 of 2012 dated 29<sup>th</sup> September 2014 by Hon. C.I. Agutu RM)*

**JUDGMENT**

1. On or about 20<sup>th</sup> September 2011, Motor Vehicle Registration UAD 904R together with Trailer No. UAB 791E caught fire near Suo River along Kisumu-Busia Road. The fire injured one Fredrick Okello Opiyo (hereinafter referred to as the 1<sup>st</sup> Respondent) and caused him bodily burns. Following the incident the 1<sup>st</sup> Respondent filed a Civil claim against Petrocity Company Ltd (the Appellant), DFCU Leasing Company Ltd (DFCU) and Kagimu Dalawusi (Kagimu).
2. The outcome of the civil suit is that the Trial Court found the Defendants liable and made an award of Kshs. 950,000 General Damages less 10% contributory negligence. That judgment, delivered on 29<sup>th</sup> September 2014, is the subject of this Appeal by the Appellant.
3. In paragraph 5 the Amended Plaintiff filed in the Lower Court the 1<sup>st</sup> Respondent averred that:-

**On or about the 20.9.2011 while the Plaintiff was a lawful pedestrian along KISUMU-BUSIA ROAD near SUO RIVER when the 2<sup>nd</sup> Defendant who under the control, management, instructions and employment of the 1<sup>st</sup> Defendant, packed the said motor vehicle UAD 904R with its trailer No. UAB 791E which contained hazardous, flammable and toxic material along/beside the road when the Plaintiff was passing and in breach of the Defendant's duty of care to the Plaintiff, the said motor vehicle together with its trailer caught fire and exploded thereby causing serious bodily burns on the Plaintiff.**

The Plaintiff then outlined the particular of negligence and alleged breach of duties of the Defendants.

4. Only the Appellant entered Appearance and filed Defence. In the Statement of Defence, the Appellant denied being the owner of the Motor vehicle. It denied the 2<sup>nd</sup> Defendant was its

employee. It denied any form of negligence or breach of duty.

5. At Trial, the 1<sup>st</sup> Respondent testified in support of his case while the evidence of one Tukhahira Margaret given in a related suit (Civil Suit No.333/2013) was adopted as Defence Evidence. The 1<sup>st</sup> Respondent is a casual worker. On 20<sup>th</sup> September 2012, he walked from Matayos and on reaching Suo River he saw a trailer that had overturned. The Trailer exploded into a ball of fire which caught the Plaintiff and injured him on the throat, face and both hands. He was taken for treatment at Matayos Health Centre and later to Busia District Hospital where he was hospitalized for one month. Although the search he had showed that motor vehicle UAD 904R was registered in the name of DFCU Leasing Company(the 2<sup>nd</sup> Defendant) and Trailer UAB 791 E in the name of Kagimu Dalawusi (the 3<sup>rd</sup> Defendant), he nevertheless sued the Appellant because the vehicle had writings of “Petrocity” on its body. On cross-examination he stated that “Patrocity is the Beneficial Owner”.
6. Tukhahira Margaret is the Legal Officer of the Appellant. She denied that neither the motor trailer UAB 791E nor lorry UAD 904R belonged to the 1<sup>st</sup> Defendant. Just like the Plaintiff, the search she obtained from Uganda Revenue Authority showed the owner of UAD 791E as Kagimu and UAD 904 R as DFCU. She denied that Petrocity was a beneficial owner or lessor of the vehicles. As to why the Vehicle would bear the words “Petrocity” she explained

**“I am not surprised that these vehicles bore the names of Petrocity. It is just for advertisement purposes only. We have no issues with vehicles bearing our names. They are advertising for us.”**

7. That in a nutshell were the pleadings and evidence that was before the Trial magistrate and upon which it found favour in the 1<sup>st</sup> Respondent. In this Appeal, the Appellant (the 1<sup>st</sup> Defendant) raises the following grounds:-
  1. **The Learned trial Magistrate erred in law and in fact in finding the Appellant liable for the incident when the evidence adduced pointed out the fact that the fire incident was as a result of people who were siphoning fuel from the tanker which had rolled without the permission and or consent and or participation of the Appellant.**
  2. **The Learned trial Magistrate erred in law and in fact in finding the Appellant liable for the incident when the 1<sup>st</sup> Respondent had failed to establish the relationship if any between the Appellant on one hand and the vehicles giving rise to the fire incident.**
  3. **The Learned trial Magistrate erred in law and in fact in holding the Appellant liable only because the name Petrocity Company limited appeared on the body of the tanker.**
  4. **The Learned trial magistrate erred in law in failing to fully appreciate the evidence adduced and in particular by the police officer and a representative of the Appellant herein hence the judgment was against the weight of evidence.**
  5. **The Learned trial Magistrate erred in law and in fact in holding the Appellant liable to the 1<sup>st</sup> respondent when judgment on liability had been entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent who had failed to enter appearance and or file defence**
  6. **The Learned trial Magistrate erred in law and in fact in fully relying on the evidence of the 1<sup>st</sup> Respondent which evidence was contradictory and totally unreliable.**
  7. **The Learned trial Magistrate erred in law and in fact in awarding excessive damages that were inordinately high and inconsistent with settled principles in award of damages.**
8. Supporting those grounds, Counsel for the Appellant filed written submission on 4<sup>th</sup> November 2015. In respect to negligence, it was argued that the 1<sup>st</sup> Respondent sustained the injuries as a result of joining members of the public in illegally siphoning fuel from the Accident Truck. That the 1<sup>st</sup> Respondent being well aware of the danger nevertheless put himself on harms way and his conduct was within the Doctrine of “volenti non fit injuria”. Because of this, it was submitted, the Trial Magistrate erred in finding that the Appellant was negligent.
9. On ownership of the vehicles, it was argued that without proof of ownership, there was no basis upon which the Appellant could be held to be liable either vicariously or otherwise. The Appellant

urged that it had not only denied ownership but in fact proved that both the lorry and trailer belonged to persons other than itself.

10. The Learned Trial Magistrate was criticized for relying on the Decision in **Nancy Njambi Chege vs Muljibhai Veheria - HCCC No. 2506/89 Nairobi** in reaching an estimate of damages. The Appellant submitted that the injuries in the High Court case were severe and not comparable to those suffered by the 1<sup>st</sup> Respondent here. This Court was asked to find that the amount awarded was inordinately high.
11. The 1<sup>st</sup> Respondent's response was in written submissions filed by his Counsel on 24<sup>th</sup> November 2015. In respect to ownership of the motor vehicles, it was argued that the Appellant was sued in its capacity as the Beneficial Owner of both the lorry and the trailer. It was further argued that the contents of the flammable substance (the fuel) belonged to the Appellant. I was also urged to find that the content of a Police Abstract is sufficient proof of ownership.
12. Turning to the issue of negligence, Counsel argued that the only route that the 1<sup>st</sup> Respondent could take to reach his destination was by crossing the bridge. This put him on the path of the danger posed by the lorry. It was denied that the Plaintiff participated in siphoning of fuel from the accident lorry and Trailer. On quantum this Court was asked to find that the Decision of **Nancy Njambi Chege** (supra) provided a good comparable as the injuries were in the two matter were similar.
13. This Court is a first Appeal Court in this matter. It has a duty to re-evaluate the facts afresh, assess and make its own independent conclusion but bearing in mind that it has neither seen nor heard the witnesses and must make due allowance in that respect. **(Selle & Another V Associated Motor Boat Company Ltd and Others [1968] 1 EA 123).**
14. Emerging from the Memorandum of Appeal and the arguments of the parties this Court, is broadly, asked to determine four issues;
  - i. Whether or not the Learned Trial Magistrate's finding on ownership of the vehicle and trailer was correct in law.
  - ii. If so, whether the 1<sup>st</sup> Respondent had proved that the Appellant were liable to him in negligence
  - iii. Whether or not the Court could still find the Appellant liable even after having entered interlocutory judgment against the DFCU and Kagimu.
  - iv. Whether or not the award of Damages made by the Learned Trial Magistrate was inordinately high as to amount to a wrong estimate of damages.

### **Liability of the Appellant?**

15. At the commencement of this Action, the 1<sup>st</sup> Respondent sued the Appellant and one Joseph Kamuregia as a 2<sup>nd</sup> Defendant. But pursuant to an Amended Plaintiff filed herein on 28<sup>th</sup> August 2013, Joseph Kamuregia was removed as a 1<sup>st</sup> Defendant and DFCU and Kagimu added as Defendants. That amendment appears to have been made before pleadings had closed, and, correctly, without Leave of Court. In paragraph 4 of that Amended Plaintiff, the 1<sup>st</sup> Respondent avers as follows:-

**At all material times relevant to this suit, the 1<sup>st</sup> Defendant has been sued in its capacity as the beneficial owner of both the motor vehicle registration numbers UAD 904R Mercedes Benz AND UAB 791E Mitsubishi Fuso while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been sued in the capacity as the registered owners of motor vehicles Reg. No. UAD 904R Mercedes Benz and UAB 791E Mitsubishi Fuso respectively.**

**Further at all times relevant to this suit, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were under a contractual obligations and/or agreement with the 1<sup>st</sup> Defendant to ferry and/or transport oil/liquor within and without the Republic of Kenya using the motor vehicles registration number UAD 904R Mercedes Benz and UAB 791E Mitsubishi Fuso.**

There was no amendment to the Appellant's Statement of Defence after the filing of the Amended Plaintiff. Yet again, there was no evidence that the Amended Plaintiff was in fact served on the Appellant. I have to take it that the Appellant relied on the already filed Statement of Defence as an answer to the Amended pleadings.

16. As earlier noted neither DFCU nor Kagimu entered Appearance or filed Defence. Then there was common evidence by the 1<sup>st</sup> Respondent and the Appellant's witness that as at 18<sup>th</sup> February 2013 Kagimu was the registered owner of Trailer UAD 719E while DFCU was the Registered owner of Truck Head UAD 904R. The Registered ownership of the Trailer and Truck Head was therefore not in contention.
17. What was not agreed between the 1<sup>st</sup> Respondent and the Appellant was whether the Appellant was the beneficial owner of the Trailer and Truck Head. The onus was on the 1<sup>st</sup> Respondent to provide proof of that ownership. At Trial and Appeal, it was argued by the 1<sup>st</sup> Respondent that the Police Abstract produced at trial was sufficient proof of that ownership.
18. During Trial, the 1<sup>st</sup> Respondent produced a Police Abstract in respect of the material incident from Busia Police Station. The Defence did not object to its production nor were any questions fielded in respect to its contents. In the Abstract the name and address of the owner of vehicles UAD 904 R and UAD 791E was given as Petrocity Company Limited P.O. Box 110121 Kampala. The Plaintiff further testified that –

**“The vehicle had writings of Petrocity”.**

19. While what is under consideration here in the question of beneficial ownership as opposed to Registered ownership, the Court of Appeal Decision in **Joel Muga Opija vs East African Sea Food Limited (2013) eKLR** would still provide a guide on how I should deal with this matter. The Court of Appeal stated,

**“In any case in our view an Exhibit is evidence and in this case, the Appellant's evidence that the Police recorded the Respondents as the owner of the Vehicle and Ouma's evidence that he saw the vehicle with the words to the effect that the owner was East African Sea Food was not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. 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.”**

20. The 1<sup>st</sup> Respondent was relying on the Police Abstract to prove that the Appellant was the beneficial owner of the Trailer and Truck Head. In the Police Abstract, the Police stated that from their records the owners both the Trailer and Truck Head was the Appellant. Whether the ownership was beneficial or Registered was not stated in the Police Abstract. The Defence did not challenge the production of that evidence nor did it raise any question in respect thereof. In addition, the 1<sup>st</sup> Respondent gave evidence that the lorry had writings of the 1<sup>st</sup> Appellant's name on it.
21. How did the Defence deal with this? The only Defence witness denied the existence of any lease agreement between DFCU and Kagimu on the one hand and the Appellant on the other. As to whether and why the vehicles bore the name Petrocity, the witness explained-

**“I am not surprised that these vehicles bore the names of Petrocity. It is just for advertisement purposes only. We have no issues with vehicles bearing our names. They are advertising for us.”**

22. Considering this evidence, the Trial Court held

**“The denial of the first Defendant of being the beneficial owner is a mere denial. The**

**1<sup>st</sup> defendant did not produce any criminal proceedings against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for unlawfully trading in its name which can only mean that the 1<sup>st</sup> defendant was aware of the agreement that existed between them”.**

The Appellant had, without raising objection or question, accepted the production of a Police Abstract indicating that it was the owner of the Trailer and Truck Head. There was also evidence, not seriously denied by the Defence witness, that the body of the Trailer and Truck Head bore the name of the Appellant. It is on the basis of this evidence that the Trial Magistrate held that the Appellant needed to do more to disassociate itself with the Trailer and truck Head than to raise a simple denial. I would have to agree with the Trial Court. The Appellant needed to place before Court sufficient evidence that could displace the evidence of the Police Abstract and the writings on the vehicles. This Court finds that the 1<sup>st</sup> Respondent successfully proved that the Appellant was the beneficial owner of both the Trailer and Truck Head.

### **Negligence**

23. Parties are bound by the pleadings they make. The allegation of negligence and breach of duties on the part of the defendants is made on paragraph 5 of the Amended Plaintiff. Paragraph 6 contains the particulars of the alleged negligence and breach. The relevant part is reproduced below:-

**The plaintiff avers that the accident as occasion due to the negligence and breach of duties bestowed upon the Defendants for which the Plaintiff holds the Defendants severally and wholly liable**

### **PARTICULARS OF NEGLIGENCE AND BREACH OF DUTIES OF THE DEFENDANTS' WHOLLY AND SEVERALLY**

- i. Failing to take adequate measure and precaution while transporting or being in possession of hazardous, flammable and toxic products.**
- ii. Failing to take adequate measures in safe guarding the Plaintiff's safety while in possession of flammable and hazardous products.**
- iii. Parking the said motor vehicle at a zone not meant for parking for no apparent reason**
- iv. Exposing the Plaintiff to hazardous, flammable and toxic products.**
- v. Allowing and failing to prevent the Plaintiff from sustaining such injuries of serious nature in form of burns.**
- vi. Failing to take adequate measures to safeguard the Plaintiff in habitat gainst the hazardous, flammable and toxic products.**
- vii. Parking the suit motor vehicle at a non-designated parking joint.**

24. The impression given in the Amended Plaintiff is that the Trailer and Truck Head were parked in a place that was not designated for parking and was unsafe for the public. That is the repeated narrative in the Amended Plaintiff. In addition, it was alleged that the Defendant failed to provide adequate safeguards or measures to protect the public from the hazards and danger caused by the flammable product that was been carried by the trailer. The evidence before Court was, however, not congruent with that narrative. The plaintiff testified as follows:-

**“I reached Suo at the Bridge. I found a trailer overturned. There was a traffic snarl up. The Trailer exploded in a fire.**

He further testified,

**I blame the driver of the vehicle for careless driving.”**

In cross-examination he said,

**I stay in Suo. I stay in Mundika sub location. I was crossing the bridge. I alighted**

**form my bicycle. There was a vehicle snarl up. No vehicles got burnt. The vehicles were passing. There were three vehicles. Two were headed to the Kisumu route. No vehicle was burnt. The oil was spilt. There was no petrol on the road. I was 20 metres away from the vehicle. There were many people passing. I blame Petrocity because it entrusted petrol to a careless driver. Petrocity Product was written on vehicle. It was not yet dusk. UAD 904R belongs to Kagumu Delawusi. Petrocity is the Beneficial owner. (my emphasis)**

25. The evidence of the 1<sup>st</sup> Respondent was not entirely easy to follow. In his evidence in chief he stated that as he was walking from Matayos he found a vehicle that had overturned and which soon thereafter exploded into a ball of fire. But under cross-examination he stated that no vehicle got “burnt”. What is clear however is that on reaching the scene, the witness found a trailer that had overturned. The Trailer was not parked as pleaded and no question would arise as to whether or not the Appellant was negligent in the manner in which it parked the Trailer and Truck Head. If however the Plaintiff would have pleaded that the Trailer and/or Truck Head had overturned and thereafter caught fire, the Doctrine of Res Ipsa Loquitor may have required the Appellant to show that it had taken all necessary steps to either prevent the fire from breaking out from the overturned vehicles or of condoning off the vehicles or of warning the public of the danger posed by the overturned vehicles. But my finding is that the Plaintiff failed to prove that the trailer or the Truck Head was in the first place dangerously parked.

**Effect of interlocutory judgment against the other Defendants:**

26. Although, having found that the Learned Trial Magistrate erred in finding that the Appellant was liable, it would be moot for this Court to consider this third issue, I will make some short comments on it. While the Plaintiff sued three Defendants, only the Appellant entered Appearance and Defended the suit. Having failed to enter Appearance or file Defence, and at the behest of the 1<sup>st</sup> Respondent, interlocutory judgment was entered against the other two on 12<sup>th</sup> November 2013. Still, it fell to Plaintiff to formally prove its case against these two Defendants. The possible outcome of the trial would be-

- a. That all the three Defendants could be held jointly and severally liable.
- b. Any two could be held jointly and severally liable.
- c. One could be liable
- d. None could be liable.

I am unable to agree with the Appellant’s Counsel that upon interlocutory judgment being entered against the other 2 (two) Defendants, then his client was automatically exonerated. That said, the Learned Trial Magistrate failed to explicitly state who of the three Defendants she found liable.

**Quantum**

27. What are my views of quantum? In the Medical Report dated 26<sup>th</sup> October 2012 prepared by Dr. Manasseh Onyimbi, he observed that the 1<sup>st</sup> Respondent had sustained deep burn injuries on the head, face, neck, both upper limbs and both lower limbs. At the time of observation the 1<sup>st</sup> Respondent had not recovered and still had discomfort as follows

- i. **Experiences excruciating painful sensation from the sites of previous burns**
- ii. **Had developed ugly post-burn scars on both upper and lower limbs**
- iii. **Has developed some contractures of burned muscles at the point of articulation of the limbs – posing him a lot of difficulty in making any reasonable movements or engagement in physical activities.**
- iv. **Suffers from photophobia from affected eyes.**

The prognosis of the Doctor was that the Plaintiff required corrective Plastic and Cosmetic

surgeries that would cost more than Khs. 2.8 million. These no doubt are serious injuries. I am unable to agree with the Appellant's advocate that the award of damages of Kshs. 950,000/- made by the Trial Court was inordinately high or excessive.

28. Otherwise for reason stated, I allow the Appeal on liability and quash the Decision of the Lower Court. The Appellant shall have costs of this Appeal and of the Lower Court.

Dated, signed and delivered at Busia this 20<sup>th</sup> day of January 2016.

**F. TUIYOTT**

**J U D G E**

In the presence of :-

Oile C/Assistant

Okeyo - for Appellant

N/A - for Respondent