



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 154 OF 2012
CONSOLIDATED WITH
CIVIL APPEAL NO. 155 & 156 OF 2012

BETWEEN

AGRO-CHEMICAL FOOD COMPANY LIMITED APPELLANT

AND

JOEL ANGANA 1ST RESPONDENT

JOSEPH OMULAMA 2ND RESPONDENT

SAMMY AMULEYO ANGANA 3RD RESPONDENT

(Being an appeals from the Original Judgment and Decree of Hon. C. Owiye, PM dated

4th October 2012 at Senior Principal Magistrates Court at Nyando in

Civil Case No. 133 of 2005,

*Original Judgment and Decree of Hon. C. Owiye, PM dated 20th December 2012 at the Senior
Principal Magistrates Court at Nyando &*

*Original Judgment and Decree of Hon. C. Owiye, PM dated 20th December 2012 at the Senior
Principal Magistrates Court at Nyando respectively)*

JUDGMENT

1. These appeals were consolidated because they arise out of the same cause of action. For purposes of this judgment, the parties, where necessary, shall be referred to in their respective capacities in the original suit.
2. On 7th November 2004, the plaintiffs were passengers travelling along Nandi Hills-Chemelil road in motor vehicle registration number KYB 721 (“the motor vehicle”) allegedly owned by the appellant. Along the way the vehicle lost control and rolled. The plaintiffs sustained injuries and as a result they sued the driver and owner of the motor vehicle for general and special damages for pain and suffering and loss of amenities.

3. Apart from denying that the accident took place or that the plaintiffs were injured, the defendant denied that it owned the motor vehicle by registration either directly or beneficially. It averred that if indeed the accident took place, then ***Tridev Construction Company Limited*** ("***Tridev***") was to blame for the accident.
4. After full hearing, the trial court found the defendant liable and awarded the plaintiffs general and special damages. Aggrieved by the judgment and decree, the defendant lodged an appeal contesting the judgment and decree principally on the ground that, "*The learned trial magistrate totally misdirected herself in the evaluation of the evidence produced before him, especially with regard to the question of vicarious liability (over a motor vehicle long sold be(sic) the appellant, and not under their control) arriving at a wrong decision thereby occasioning a miscarriage of justice.*" The defendant also assailed the quantum of damages awarded to the plaintiff.
5. As this is a first appeal, I am cognisant of my role. It is to re-evaluate and re-assess the evidence adduced before the trial Court keeping in mind that the trial Court saw and heard the parties and giving allowance for that and applying the law to those facts and the conclusions reached by the learned trial magistrate and then determining whether the conclusions are to stand or not (see ***Selle v Associated Motor Boat Co. [1968] EA 123***).
6. The facts relating to the accident are not in dispute and I have alluded to the same in paragraph 2 of this judgment. The contested issue was whether the defendant was the owner of the motor vehicle. In order to establish the ownership, the plaintiffs testified that they were travelling in motor vehicle registration number KYB 721. They relied on a certificate of official search issued by the Registrar of Motor vehicles which showed that it was registered in the name of the defendant. It is noteworthy that the plaintiffs also produced a police abstract which showed that ***Tridev*** was the owner of the motor vehicle and it was insured by Kenindia Insurance Company Limited. This fact was confirmed by PC Peter Kihubwa (PW 4) who visited the scene and noted that the owner of the vehicle as per the certificate of insurance was ***Tridev***.
7. The defence called one witness, Dickson Muli William (DW 1) who was employed by the defendant as an Assistant Manager Human Resources. He testified that at the time the accident took place, the motor vehicle did not belong to the defendant as it had been sold to ***Tridev*** in October 1996. He further testified that the defendant put up the motor vehicle for sale through an advert in the Nation and Standard Newspapers on 26th April 1996. He told the court that the vehicle was sold but he did not have the sale agreement. As a result, when the defendant was sued, it issued a third party notice to ***Tridev***. In cross-examination, DW 1 stated that the vehicle was transferred from the defendant to ***Tridev*** on 21st September 2006.
8. In the judgment, the learned magistrate took the position that the defendant was liable because at the time of the accident the vehicle was still registered in its name and it was not until 21st September 2006 that the vehicle was transferred to the third party.
9. At the hearing of the appeal, counsel for the appellant faulted the trial court for holding that registration was conclusive evidence of motor vehicle notwithstanding evidence that pointed to the ownership and possession having changed. Counsel submitted that although the motor vehicle was at the time of the accident still registered in the name of the appellant, it had sold the motor vehicle to ***Tridev*** in 1996. He therefore submitted that since ***Tridev*** was the owner of the vehicle, the appellant was not in control of the motor vehicle and could not be held vicariously liable for the accident.
10. Counsel for the respondents supported the decision of the subordinate court and countered that the issue of vicarious liability arose from the fact that the driver was acting on behalf of the registered owner and were it not so, the appellant should have called the driver in question to testify on whose behalf he was acting. She submitted that the search results were very clear on who was registered owner of the motor vehicle and the appellant had failed to produce evidence indicating that it had actually transferred the motor vehicle to ***Tridev***.

11. The main issue for determination in this appeal is whether the defendant discharged the burden of proving that it was not liable as it had sold the motor vehicle to a third party. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

12. The defendant also bears the evidential burden of proving any particular fact which he desires the court to believe in its existence as required by **sections 109 and 112** of the *Evidence Act* (See *Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016]eKLR* and *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR*). The defendant need only prove that it was not the owner of the motor vehicle on a balance of probabilities. In the case of *Miller v Minister of Pensions [1947]2 All ER 372*, Lord Denning said the following about the standard of proof in civil cases;

The ...[standard of proof]... is well settled. It must carry a reasonable degree of probability..... if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.

13. In coming to the conclusion it did, the subordinate court relied on the certificate of registration issued by the Registrar of Motor Vehicle and discredited the defendant's evidence. It is not necessary to produce a certificate of search from the Registrar of Motor Vehicles to prove ownership of a motor vehicle nor is such a certificate conclusive proof of ownership. Apart from a search certificate, any other evidence may be tendered that may prove ownership. The Court of Appeal had this to say in *Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR*; about the certificate of search and the evidence required to prove ownership;

*[I]t was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under Section 8 of the Traffic Act when he states that the true owner of the motor vehicle is the appellant. That Section reads as: "The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." We think that the appellant had, by evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time of the accident occurred since it had sold it. Our holding finds support in the decision in *Osanpil v 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 names the vehicle was registered was presumed to be the owner thereof unless proved otherwise.....*

14. As the plaintiffs established prima facie evidence that the defendant was the registered owner of the motor vehicle and it was then the duty of the defendant to rebut this presumption on the balance of probabilities. DW 1 produced copies of newspaper advertisements showing that the motor vehicle was advertised for sale through tender on 26th April 1996. The copies of the advertisements produced were certified copies produced without objection and there is no reason to believe that they were not what they purported to be as they appeared regular on the face. Although the defendant failed to produce a sale agreement of transfer of the motor vehicle in favour of *Tridev*, there is additional evidence to show that the vehicle had indeed transferred on the date of the accident. PW 4 confirmed that the insurance sticker showed that the vehicle was owned by *Tridev* and the police abstract confirmed as much. I am aware and take judicial notice of the fact that it is mandatory for every motor vehicle owner to take out third party insurance under the *Insurance (Motor Vehicle) Third Party Risks Act (Chapter 405 of the Laws of Kenya)*. Why would *Tridev* take out insurance if it was not the owner of the motor vehicle? This evidence just goes to show that it is more probable than not that defendant had sold the vehicle to *Tidev* and it was therefore not the owner on the date of the accident. Had the learned magistrate considered this

evidence, he would probably have come to a different conclusion. I therefore find and hold that the defendant had discharged its burden of proving that it was not the owner of the motor vehicle hence it could not be held liable for what befell the plaintiffs.

15. I allow this consolidated appeal with costs to the appellant. Consequently, the suits filed in the subordinate court are dismissed with costs to the appellant.

DATED and DELIVERED at KISUMU this 28th day of July 2016.

D.S. MAJANJA

JUDGE

Mr Onyango instructed by Olel, Onyango, Ingutiah & Company Advocates for the appellant.

Ms Oteyo instructed by Gekong'a & Company Advocates for the respondents.