



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 186 OF 2011

HENKEL POLYMER T/A HENKEL

CHEMICALS EAST AFRICA.....APPELLANT

VERSUS

GEORGE WALUBENGO

PAUL MUTUKU THUO.....RESPONDENTS

(Appeal from the original judgment and decree of Hon. Mrs. L. M. Njora (SRM) in Kikuyu, SRMCC No. 107 of 2009 delivered on 1st April, 2011)

JUDGMENT

1. The 1st respondent sued the appellant and the 2nd respondent seeking compensation for the injuries he suffered following an accident which occurred on 6th January, 2009. The trial court heard the matter and found the appellant and the 2nd respondent 90% liable jointly and severally. Mrs. Njora, Learned Senior Resident Magistrate awarded the 1st respondent KShs. 80,000/- as general damages and KShs. 1,500/- as special damages. The award was then subjected to the 1st respondent's liability ratio.
2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:
 - a. *The Learned Magistrate in failing to find that the appellant was not the beneficial owner of motor vehicle registration number KAD 902R on 6th January, 2009;*
 - b. *The Learned Magistrate in failing to find that the appellant was not vicariously liable for the acts of the 2nd respondent; and*
 - c. *The Learned Magistrate in failing to find that the 1st respondent had not discharged the requisite burden of proof against the appellant.*
3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at pg. 429**).
4. The 1st respondent's case was that on the material day, he was cycling to Kawangware when motor vehicle registration number KAD 902R which he saw coming in a zigzag manner hit him occasioning him injury to his right leg from the knee to thigh. He was taken to Saint Teresa Kikuyu Maternity and Nursing Home for treatment. There, he was admitted for two (2) days. He reported the incident to Karen Police Station where he was issued with a P3 form and a police

- abstract form (P. Exhibit 2(a)). He stated that he learnt that the driver of the vehicle was the 2nd respondent and the vehicle was owned by the appellant. He then produced a copy of records from the registrar of motor vehicles (P. Exhibit 4(a)). He further stated that the injuries have healed but he still experiences pain on his teeth and when he walks. On cross-examination, the 1st respondent admitted that the complimentary slip (P. Exhibit 5) indicates that the appellant owned the suit motor vehicle until 30th August, 2001 when it was transferred to D.T. Dobie.
5. The medical report by Dr. Kiama and a receipt for the medical report for KShs. 1,500/- were produced by consent as P. Exhibit 3(a) and 3(b) respectively.
 6. DW1, Mr. Alvin Kipngeno who was the personnel and Administration Manager of the appellant testified that the vehicle was owned by the appellant until the year 2001. That the vehicle was sold to D.T. Dobie on 30th August, 2001. He produced a transfer form (D. Exhibit 1) to that effect. He denied that Paul Mutuku Thuo was an employee of the appellant.
 7. DW2, Mr. Isack Miano Ngethe who was a private investigator with Principal Enterprises confirmed that as at the time of the accident, the vehicle was not owned by the appellant rather it was owned by the 2nd respondent. He then produced an investigation report (D. Exhibit 2).
 8. The appeal was canvassed by way of written submissions. The appellant relied on section 8 of the Traffic Act and argued that the provision does not put strict liability on the registered owner of a vehicle. That it only gives such an owner the opportunity to show that it was not the actual owner at the material time. It was submitted that the appellant did show by way of documentary evidence that it was not the owner of the vehicle. It was contested that the 1st respondent failed to prove that the appellant was the beneficial owner of the vehicle. The appellant in this regard cited **Meto & Another v. Kihaguru & 3 Others (2002) 2 KLR 752** and **Morgans v. Launchbury & 3 Others (1972) ALLER 606 at pages 32-45** where vicarious liability of an owner of a chattel for the negligence of a user acting for the owner's purposes was recognised. The appellant submitted that DW2 in fact confirmed that the vehicle was owned by the 2nd respondent who took an insurance cover for the vehicle with Blue Shield Insurance Company Limited.
 9. The 1st respondent on the other hand contended that the effect of the provision of section 8 of the Traffic Act is to raise a rebuttable presumption that an assumption of ownership shall prevail until proved otherwise by sufficient evidence. Citing **Wellington Ng'ang'a Muthiora v. Akamba Public Road Scv Ltd & Another C.A. No. 260 of 2004** and **Jotham Mugalo v. Telkom (K) Ltd Kisumu HCCC No. 166 of 2001**, the 1st respondent submitted that the evidence by the appellant did not meet legal standards. He faulted the transfer form saying that it only bore the appellant's representative's signature. That no representative was called from D.T. Dobie to corroborate the appellant's evidence. He further submitted that the sale was through a tender process yet no such evidence was furnished.
 10. The 1st respondent submitted that in determining vicarious liability, a presumption is raised that the motor vehicle driven under the control or for the benefit of the owner. He cited **Kenya Bus Services Limited v. Humphrey (2003) KLR 665; (2003) 2 EA 519**. He finally stated that he proved his case on a balance of probabilities as required under section 107 of the Evidence Act considering that the fact that he suffered injuries as a result of the accident was not disputed and that he proved that the appellant was the owner of the vehicle.
 11. I have considered the submissions and authorities cited thereto. The issues left for my determination are whether the 1st respondent proved ownership of the vehicle and liability on a balance of probability, if so, what damages are available to him.
 12. On the issue of ownership, I agree with the 1st respondent's submissions. I have perused the transfer form and the investigation report (D. Exhibit 1 and 2) respectively. The transfer form only bears the signature of the appellant and the investigation report has no document annexed to it to establish that the 2nd respondent was a policy holder with Blue Shield Insurance Company Limited as alleged.
 13. On liability, it is noteworthy that the appellant did not controvert the 1st respondent's evidence on. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**, Ali-Aroni j, stated as follow:-

“In this matter, apart from filing its statement of defence the defendant did not adduce

any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

I am in agreement with the above holding. I adopt the same in this Appeal. I however agree with the trial court's decision on liability since the 1st respondent too needed to be watchful as he cycled. Liability as apportioned by the trial court is hereby upheld. The upshot is that this appeal is dismissed with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 23rd day of January, 2015.

J. K. SERGON

JUDGE

In the presence of:

Miss. Mathai for the Appellant

Miss. Kiyoi for the Respondents