



REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL NO. 6 OF 2013

SCHENKER & CO. EAST AFRICA LTD. APPELLANT

VERSUS

JOSPHAT WAITHAKA MUMBURA RESPONDENT

(Being an appeal from the judgment and decree in Murang'a Senior Principal Magistrates Court Civil Case No. 87 of 2005 (Hon. J Gathuku)

BETWEEN

SCHENKER & CO. EAST AFRICA LTD.....PLAINTIFF

AND

JOSPHAT WAITHAKA MUMBURA.....DEFENDANT

JUDGMENT

This appeal arises from a judgment in which the appellant's suit in the subordinate court was dismissed principally because the appellant had not proved liability against the respondent.

The appellant's claim against the respondent in the subordinate court was a non-injury, material damage claim which arose out of a road traffic accident that occurred on or about 17th October 2003 involving the appellant's motor vehicle, registration number **KAQ 004 M (Mitsubishi Pick up)** and that of the respondent, registered as **KVQ 029 (Bedford Lorry)**; the accident occurred on North Airport in Nairobi.

According to the amended plaint filed in the subordinate court, the traffic accident occurred as a result of the negligence or recklessness of the respondent or his authorised driver in driving or managing motor vehicle registration number **KVQ 029** and because of this errant motoring the respondent's vehicle collided with the rear side of the appellant's vehicle thereby damaging it.

The appellant's insurance company, the Insurance Company of East Africa Limited, paid for the repair costs and the appurtenant losses arising out of the accident; accordingly, under the doctrine of subrogation which was expressly pleaded in paragraph 6 of the appellant's amended plaint, the insurance company sued, in the appellant's name, for special damages totaling the sum of **Kshs 155,254.00** together with costs of the suit and interest thereof.

It is clear from the pleadings that the respondent was not the original defendant in the suit in the subordinate court; for reasons that will become apparent later in this judgment and which, in my view, have a bearing on the determination of this appeal, he was substituted in place of the original defendant hence the need for amendment of the plaint.

In his defence, the respondent denied the appellant's contentions as stated in his amended plaint; in particular, he denied that the accident occurred as a result of the respondent's or his driver's negligence or recklessness and instead contended that the driver of the appellant's vehicle was solely to blame for the accident.

At the hearing, only the appellant's witnesses testified; there was no evidence on behalf of the defence except the admission by consent of a document described as "memorandum of understanding" purportedly executed between the previous defendant and the respondent in respect of ownership of motor-vehicle registration number **KVQ 029**.

As noted earlier, the learned magistrate dismissed the appellant's suit and in his judgment there were three issues that he found wanting in the appellant's case; the first of these issues, was the question of ownership of motor vehicle registration number **KVQ 029**. Secondly there was the issue of proof of negligence and the final issue was the question of the doctrine of subrogation.

As for the question of ownership of motor vehicle registration **KVQ 029**, it was the learned magistrate's view that, from the evidence presented before him, the vehicle belonged to one Alice Wangui Wangahu and the inclusion of the respondent in the suit as the defendant was without any basis.

On the issue of negligence, the learned magistrate concluded that there was a third vehicle involved in the accident and which the plaintiff's driver could not recall. He also said that no measurements were taken and sketch plans drawn of where and how the accident may have happened and therefore the appellant's driver's evidence was not corroborated with any independent evidence. Since the plaintiff's driver could not remember the third vehicle and there was no independent evidence to support his evidence, the learned magistrate concluded that negligence had not been established.

The learned magistrate's finding on the question of subrogation was a bit curious, to say the least; he held that since the plaintiff had paid the premium to the Insurance Company of East Africa Limited and since it was the insurance company's obligation to pay for any loss incurred by the appellant whenever an insured event occurred, reimbursing the insurance company through the appellant's claim would be tantamount to paying the insurance company twice. In the learned magistrate's words, it "*would amount to the ICEA Company having its cake and eating it.*" And with that the learned magistrate dismissed the appellant's suit with costs.

The appellant was not satisfied with the subordinate court's decision and therefore appealed to this Court on the following grounds:-

1. The learned trial magistrate erred and misdirected himself in law in totally ignoring all the issues of law before him by way of submissions and/or facts at the time of the trial.
2. The learned trial magistrate based his findings substantially on conjecture and speculation without anxiously weighing up the evidence before him.
3. The learned trial magistrate erred in failing to apply the provision of law that the plaintiff must prove his case on a balance of probabilities in laying the burden of proof on the Defendant right from the start.
4. The learned trial magistrate showed extreme bias against the appellant which bias caused him to negate fundamental principles of evidence.

This being a first appeal, this Court is duty bound to re-evaluate the evidence on record and come to its own findings noting, however, that it does not have the advantage of seeing and hearing the witnesses. In **Kiruga v Kiruga & Another [1988] KLR 348**, the Court of Appeal observed that:-

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

It has been held, however, that the advantage of seeing and hearing the witnesses is not sufficient in itself not to dislodge the trial court’s findings of fact. In **Selle & Another v Associated Motor Board Company Ltd and Others [1968] 1 EA 123** and **Hahn v Singh [1985] KLR 716** it was held:-

“On appeal of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantage enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion.”

That a road traffic accident involving motor vehicles registration numbers **KVQ 029** and **KAQ 004 M** occurred on 17th October, 2003 on North Airport Road in Nairobi was not in dispute. For avoidance of doubt, this is what the defendant stated in paragraphs 3 and 4 of his defence:-

“3. The defendant does vehemently deny the contents of paragraphs 3 and 4 of the plaint and while putting the plaintiff to strict proof thereof does aver that no accident did occur in the manner captioned at paragraph 4 of the plaint; and the particulars of negligence set thereunder are denied in toto.

5. Further to (3) above, the plaintiff avers that the accident that occurred on 17/10/2003 was solely caused by the negligence and/or recklessness of the driver of motor vehicle registration number KAQ 004M-Mitsubishi pick up.”

My understanding of defendant’s averments is that while he admits that a road traffic accident involving motor vehicle registration number **KAQ 004 M** did occur on 17th October, 2003, it was solely caused by the negligence of the driver of that particular motor vehicle.

This being the case, the only questions that this appeal should be concerned with are those issues raised by the learned magistrate and which, incidentally, were taken up by the learned counsel for the respective parties in their written submissions in this appeal; the ultimate goal in evaluating the evidence afresh, will be to answer those questions independent of the learned magistrate’s findings.

Ownership of Motor vehicle registration number KVQ 004 M:

George Macharia Mbugua (PW1), the driver of motor-vehicle **KAQ 004 M** and the appellant’s employee at the material time testified, in answer to questions put to him in cross-examination, that he was not aware that motor vehicle registration number **KVQ 029** belonged to one Alice Wangui Wangahu. He only thought that the vehicle belonged to her when he was shown by counsel for the respondent a copy of a certificate of official search from the Registrar of Motor Vehicles showing that indeed Alice Wangui Wangahu was the registered owner of the vehicle as at 17th October, 2003.

Irene Ruguru Ngatho (PW3) a legal assistant with the Insurance Company of East Africa Limited also testified that it was apparent from the copy of the certificate of official search that the Bedford lorry belonged to Alice Wangui Wangahu. Similarly, **Samuel Ntambo Kerongo (PW4)**, a private investigator acting under the instructions of Insurance Company of East Africa Limited testified that he established from the Kenya Revenue Authority that motor vehicle registration number **KVQ 029** was registered in the name of Alice Wangui Wangahu.

Despite the documentary evidence from the Registrar of Motor Vehicles showing that motor vehicle registration number **KVQ 029** was registered in the name of Alice Wangui Wangahu, the record shows that on 24th March, 2010, counsel for the respective parties consented to have an agreement of sale of that

motor-vehicle admitted in evidence; according to this agreement, on 27th May, 2003, Alice Wangui Wangahu sold the vehicle to Josephat Waithaka Mumbura, the respondent herein, at a consideration of Kshs. 70,000/=. Amongst the terms and conditions of that agreement were that the respondent was to take possession of the vehicle upon execution of the agreement and that he was responsible for any liability arising out of the use of that vehicle from the date of execution of the agreement.

In a bid to controvert this piece of evidence, the defence introduced a document described as a “memorandum of understanding” purportedly executed between, Alice Wangui Wangahu and Josephat Waithaka Mumbura on 8th June 2003. According to this “memorandum of understanding” the parties’ agreement of 27th May, 2003 was revoked and the vehicle was returned to Alice Wangui Wangahu who in turn refunded the purchase price to Josephat Waithaka Mumbura.

I note from the record that counsel for the respondent admitted and indeed it is apparent on the document itself that his firm drew the agreement of 27th May 2003 and therefore there is no dispute that Alice Wangui Wangahu sold motor vehicle registration number **KVQ 029** to the respondent on 27th May, 2003.

It is noted from the appellant’s pleadings that the said Alice Wangui Wangahu had initially been sued in her capacity as the owner of this vehicle; no doubt she was sued in that capacity because the official records reflected her as the registered owner of the vehicle.

By a chamber summons dated 13th October, 2005, the plaintiff sought to amend the plaint to replace the name of Alice Wangui Wangahu with that of the respondent. According to the affidavit sworn on the same date by one Pauline Waruihiu in support of that chamber summons, the need to amend the plaint in this respect was informed by the fact that when Alice Wangui Wangahu was served with the plaint she instructed her advocates to inform the appellant’s advocates that she had had sold the vehicle to respondent; her advocates not only gave out this information as instructed but they also sent a copy of the sale agreement to the appellant’s advocates. A copy of the agreement was exhibited on Pauline Waruihiu’s affidavit.

No doubt the appellant’s advocates could not have been aware of this information when they lodged the suit in court considering that the records at the Registrar of the Motor Vehicles had apparently not been up-dated to reflect the current ownership status of the vehicle in question. It is for this reason that it was necessary and legitimately so, to have the appellant’s plaint amended. The application for amendment was inevitably allowed by consent on 13th October, 2005.

With the application for amendment on record supported by sufficient evidence exhibiting the sale of the vehicle to the respondent and more so, considering that the application was allowed by the court itself upon the consent of parties, it is difficult to understand why the learned magistrate could not find, in his judgment, the reason for including the respondent as the defendant in the suit. It is equally baffling that the learned counsel for the respondent could be questioning the inclusion of the respondent in the suit when his firm drew the agreement that transferred the vehicle in question to the respondent.

I have considered the so-called “memorandum of understanding” purporting to return the motor vehicle to Alice Wangui Wangahu. In my view, this document was a mischievous attempt by the defence to avoid liability. This is because, this document was purportedly executed on 8th June, 2003, less than two weeks after vehicle was sold to the respondent yet when Alice was served with the plaint in 2005 she wrote to the appellant’s advocates telling them that the vehicle was indeed sold to the respondent. If the ownership of the vehicle had been restored to her as the respondent wanted the court to believe, she would not be writing and forwarding a copy of the sale agreement to appellant’s advocates showing when she sold the vehicle to the respondent without any reference to the “memorandum of understanding.”

Neither is this document mentioned anywhere in the respondent’s defence. I am minded that under **Order 2 Rule 3(1)** of the **Civil Procedure Rules** only material facts and not evidence by which those facts are to be proved ought to be pleaded; however, if the ownership of the vehicle was in issue, that fact ought to have been pleaded and then of course it would have been supported at the hearing with the production of

the evidence of the “memorandum of understanding”.

In any event, if the respondent’s case was that the vehicle was owned by Alice Wangui Wangahu, then he is understood to have been saying that a third party was to blame for the accident in which event therefore he ought to have sought for a third party notice to issue against Alice Wangui either for indemnity or, in view of her purported execution of the “memorandum of understanding,” for determination of the question of ownership of the vehicle as between himself and the said Alice Wangui Wangahu. For some reason the respondent did not take advantage of this option which is provided for under **Order 1 Rule 15(1)** of the **Civil Procedure Rules**.

My conclusion on this issue is that the purported “memorandum of understanding” was a belated yet a mischievous attempt to skirt around the sale agreement dated 27th May, 2003 transferring ownership of motor-vehicle registration number **KVQ 029** to the respondent; it is simply not credible evidence.

It has been demonstrated that the sale agreement dated 27th May, 2003 was not in dispute; having discounted the “memorandum of understanding” it is only this agreement that demonstrates who owner of the vehicle registration number **KVQ 029** was at the material time. The certificate of registration from the Registrar of Motor vehicles indicating that Alice Wangui Wangahu as the registered owner of the vehicle was overtaken by this agreement because the property in the lorry passed to the respondent the moment the sale agreement was executed and the fact of registration of the vehicle in her name could not be taken to be conclusive proof that she was indeed the owner of the vehicle. I understand this to be the meaning of **Section 8** of the **Traffic Act (Cap 403)** which says:-

“8. Owner of vehicle

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

According to this provision of the law, the registration of a motor-vehicle in a person’s name is only but a rebuttable presumption that the person is the owner of the motor vehicle and evidence may be led to show that in fact he or she is not the owner but someone else is; and evidence in this respect may include a sale agreement such as the one that was executed between the respondent and the vehicle’s previous owner or even a police abstract. In **Joel Muga Opija versus East African Sea Food Limited Civil Appeal No. 309 of 2010**, the Court of Appeal sitting in Kisumu cited with approval its decision in the unreported **Civil Appeal No. 333 of 2003, Ibrahim Wandera versus P.N. Mashru Ltd** where it stated:-

“The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J proceeded as though the appellant had not presented evidence of ownership of the accident bus. The learned judge, with respect to him, did not at all make any reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968 W with Mashru of P.O. Box 98728 Mombasa as the owner. This fact was not challenged. The appellant was not cross-examined on it. It means the appellant was satisfied with that evidence.”

The court went further to affirm that:-

“We agree that the best way to prove ownership would be to produce to 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.”

In the case against the respondent, it was not the police abstract that was not challenged but the sale agreement disposing of the vehicle to the respondent. In my view, it was a sufficient proof, and I so hold, that the respondent was the owner of motor vehicle registration number **KVQ 029** at the time material to the suit against him.

Negligence:

The only evidence as to how the traffic accident happened was led by the plaintiff's witnesses; as noted the respondent did not testify and neither did he call any witness.

According to the evidence of **George Macharia Mbugua (PW1)** he was driving on North Airport Road behind a trailer until such time that the trailer started turning to the right towards Transcom. It is not clear what Transcom could have been but what is clear is that at some point the trailer turned to the right. At that time the respondent's lorry, was coming from the opposite direction and when it approached the appellant's vehicle it swerved to its right, that is, towards the side of the road where the appellant's vehicle was. In order to avoid a head-on collision, this witness swerved to the far left but still the lorry hit his vehicle on the right side all the way from the front to the rear.

George Macharia Mbugua's (PW1's) testimony was corroborated by the evidence of **Albert Mureithi (PW2)** who described himself as an engineer and engaged as a loss assessor in his own company called Instep Loss Assessors. He testified that on 22nd October, 2003 he assessed the damage on the appellant's motor vehicle which was then at a garage called Haji Motors on instructions of the Insurance Company of East Africa Ltd. According to his testimony, the nature of the damage was as a result of an accident and that the vehicle had been hit on the right side more particularly from the front to the rear. He took photographs of the damaged vehicle and these photographs were part of assessment report which was produced and admitted in evidence.

According to the report, some of the parts of the vehicle that were damaged were the right hand side front corner light, the right hand side pick-up panel; the right hand side door glass, the right hand door shell, the right hand side tail light and the right hand side rear body window. The photographs taken show the pictorial details of the damages the assessor referred to in his report.

In the absence of any evidence from the defendant, the plaintiff's evidence on the manner the accident occurred and the extent of the damage and loss incurred was not controverted.

The learned magistrate's conclusion that negligence on the part of the respondent was not proved simply because the appellant's driver could not remember the trailer ahead of him was, in my view, a misdirection and an erroneous consideration of extraneous matters not relevant to the issue at hand. I say so because none of the parties alleged either in their pleadings or in evidence at the trial that the trailer ahead of the appellant's vehicle was involved in the accident or contributed to the accident in any way. There is no particular reason why the appellant's driver should have remembered it. It was an error on the part of the learned magistrate to insinuate that the trailer was to blame for the accident and that sketch maps ought to have been drawn ostensibly to determine the extent of this trailer's liability for the accident.

Counsel for the respondent made most of what he considered to be the appellant's witnesses' contradictory evidence on how the accident occurred. According to his understanding, the appellant claimed in the amended plaint that its motor vehicle was hit from the rear, an allegation that its witnesses are said to have denied.

The learned counsel, in my view, is confusing two different things; in my humble view, 'colliding with the rear' is one thing while being hit 'from the rear' is totally something different.

It is clear from the averments in paragraph 4 of the plaintiff's plaint that the defendant permitted his vehicle "*to violently collide with the rear of the plaintiff's motor vehicle thereby occasioning excessive damage thereto.*" The plaint does not state, as counsel has argued, that the appellant's vehicle was 'hit from the rear'. The driver himself testified that his vehicle was damaged '*from the driver's side to the back the impact was from the front. The vehicle which hit me came from the airport.*' This evidence was corroborated by the assessor (PW2) who testified that the vehicle was hit from the '*right hand side from front to the rear*'. Photographs of the damaged parts of the appellant's vehicle were exhibited and they showed that the rear part was damaged. There is therefore no doubt that much as the front right part of the

vehicle was damaged, the same side of the rear part of the vehicle was damaged meaning that the respondent's vehicle collided also with the rear part of the appellant's vehicle. I cannot see any inconsistency between the appellant's pleadings and the evidence that was proffered as alleged by the respondent's counsel.

It has been noted that the defendant did not testify and therefore the appellant's testimony was not controverted. In **Chao versus Dhanjal Brothers Ltd & 4 Others (1990) KLR at page 488** the court said of such situation:-

“Where circumstances of the case give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence.”

And in **Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another and Josephine Mumbi Ngugi (2008) eKLR the Court of Appeal held:-**

“without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or (sic) attempt to partly or wholly blame the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of Mitsubishi Canter without any evidence to counter the police abstract produced by the 1st respondent which shows it to be the owner of that motor-vehicle.”

Without hearing the respondent's side of the story on liability, I take cue from the foregoing decisions and hold the respondent or his driver to have been negligent and solely liable for the accident. From the evidence of the appellant's driver, he swerved to the left side of the road to avoid a head-on collision with the respondent's lorry and therefore the question of contributory negligence does not arise.

Subrogation:

The learned magistrate's appreciation of this doctrine was clearly skewed; he reasoned that since the insurance company had received its premium from the plaintiff, there was no basis for it to pursue reimbursements of costs and expenses incurred in repairing the appellant's vehicle for that would amount to double payment. The learned magistrate might not be aware but by reasoning the way he did, he was in essence challenging the very doctrine of subrogation itself; he was challenging the law as we understand it.

The extent of the right of the insurer under the doctrine of subrogation was stated in the case of **Castellain versus Preston (1883) 11QBD 380 at page 388 where Brett LJ** expressed it as thus:-

“The advantage of every right of the assured, whether such a right consists of in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable...”

More recently, more particularly on 7th February, 2002, the House of Lords expressed the doctrine in simpler and clearer terms in **Caledonia North Sea Ltd versus British Telecommunications Plc. (Scotland) & Others (2002) UKHL**. Lord Bingham of Cornhill expressed it in paragraph 11 of the judgment as follows:-

“The law has long been settled in England and Wales as (I understand) in Scotland, that an insurer who has fully indemnified and insured against a loss covered by contract of insurance between them may ordinarily enforce, in the insurer's own name, any right of recourse available to the insured.”

The learned judge made reference to Lord Cairns LC speech in **Simpson & Co versus Thompson (1877) 3App cases 279, 286** where after considering several decisions on the doctrine and the manner of pursuing the insurer's rights under it, he said:-

“My Lords, these authorities seem to me to be conclusive that the right of the underwriters is merely to make such claims for damages as the insured himself could have made, and it is for this reason that (according to English mode of procedure) they would have to make it in his name...”

Evidence was led to the effect that the Insurance Company of East Africa Limited had fully indemnified the plaintiff for the loss and damage that arose from the traffic accident. **Irene Ruguru Ngatho (PW3)** produced receipts for the payments of up to Kshs. 155,154/=. There was also payment of Kshs.100 for the police abstract bringing the total amount due to the insurance company to Kshs 155, 254/=.

As noted in the case of **Simpson & Co versus Thompson (ibid)**, the insurer has every right to bring a claim for reimbursement in the name of the insured; this, the Insurance Company for East Africa Limited did and specifically pleaded the doctrine in the amended plaint. It was erroneous on the part of the learned magistrate to insist that the company should have sued in its own name and that it was doubtful whether the decretal amount would have been paid to the insurance company had its suit succeeded, in any event. Whether the decretal sum was going to be paid to the insurance company should have been the least of the learned magistrate's concerns since the insurance contract between the plaintiff and the Insurance Company of East Africa Ltd was not a subject for interrogation in the suit before him.

Conclusion:

I am persuaded that the appellant's appeal is merited and it is hereby allowed. The learned magistrate's judgment and decree are set aside and substituted with the order allowing the suit in terms of the amended plaint amended on 30th April, 2007. Judgment is accordingly entered for the appellant for the sum of **Kshs. 155,254.00** plus costs and interest at court rates from 28th January, 2011 till payment in full. The appellant will also have the costs of this appeal.

I need mention here that this appeal was transferred from the High Court at Nyeri immediately after the High Court station in Murang'a was established in October 2012; after parties filed their written submissions and took a judgment date on 19th November, 2012 the file was mistakenly mixed up with the rest of the files that were being transferred and delivered from Nyeri. It is only in November, 2014 when it was retrieved and noted that it was pending for judgment which ought to have been delivered way back in January, 2014. I wish to take this opportunity to inform the parties that the apparent delay in delivery of the judgment was not deliberate; incidentally, however, none of the parties brought the matter to the attention of the court in the intervening period. Nevertheless, the court regrets any inconveniences that may have been caused as a result of the delay.

Signed and dated at Nyeri this _____ day of _____ 2015

Ngaah Jairus

JUDGE

Read and delivered in open court this 13th day of February, 2015

H.P. Waweru

JUDGE