REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.247 OF 2009

MWANGI KAGUTHA……APPELLANT

VERSUS

JANE WAIRIMU KUNGU……...RESPONDENT

JUDGMENT

FACTS

This appeal arises out of the judgment of Hon. Njagi Senior Principal Magistrate, Naivasha delivered on the 21st October,2009 in Naivasha SPMCC No.437 of 2004.

The respondent herein brought a suit against the appellant related to injuries she sustained arising from a road traffic accident involving motor vehicles registration numbers KAP 335Y and KVM 247.

The Honourable magistrate found that the respondent had proved her case against the appellant and passed judgment in the following terms:

- Liability – 85:15
- General damages – Kshs.300,000/=
- Special damages – Kshs.1,600/=

The appellant being dissatisfied with the Honourable magistrate's judgment lodged this appeal and listed nine (9) grounds of the appeal as set out in the Memorandum of Appeal dated the 23rd November, 2009 which are *inter alia;*

1. **THAT the Judgment was never pronounced.**
2. **THAT the judgment was contrary to the provisions of Order XX Rules 3 and 4 of the Civil Procedure (1998 Revised) Rules.**
3. **THAT the Learned Magistrate erred in law and in fact in finding that the Defendant (Appellant) was liable without first making a finding whether or not the driver of motor vehicle registration number KVM 247 was the Defendant's (Appellant's) driver, servant and/or agent.**
4. **THAT the Learned Magistrate erred in law and in fact in finding that the Defendant (Appellant) liable despite there being no evidence adduced showing that the Defendant (Appellant) was negligent on 1/1/2003.**
5. **THAT the Learned Trial Magistrate erred in law and in fact in not taking into consideration**

the evidence of the Plaintiff (Respondent) in cross-examination especially on the evidence that the driver of KVM 247 was the agent of one MERCY MUTHONI thereby arriving at a wrong conclusion.

6. **THAT the Learned Trail Magistrate erred in law and in not taking into consideration the evidence by the Defendant (Appellant) his witness and the written submissions, If the Learned Magistrate did consider the same, he misapprehended the evidence and the issues raised.**
7. **THAT the Learned Trial Magistrate erred in law in imposing a burden on the Defendant (Appellant) to prove that the motor vehicle was not his.**
8. **THAT the decision was arrived at on consideration, to the extent that this was done, of wrong Principle of Law.**
9. **THAT the decision was against the the weight of evidence.**

ISSUES FOR DETERMINATION:

The appellant abandoned grounds 1 and 2 of the said Memorandum of Appeal and it is this court's considered view that the main grounds of appeal relate to ownership and liability and the issues framed for determination are as follows:-

1. **Whether the appellant was the owner of the offending motor vehicle registration number KVM 247?**
2. **Whether the appellant is vicariously liable for the acts of the driver of the aforesaid lorry?**

ANALYSIS:

This being the first appellate court it behoves this court to reconsider the evidence on record, re-evaluate it and to arrive at its own independent findings and conclusions always bearing in mind that this court neither saw nor heard the witnesses. Refer to the case of **Selle and Anor** V. **Associated Motor Boat Company Ltd and Others,** (1968) EA 123.

Issue (i) Whether the appellant was the owner of the offending motor vehicle registration number KVM 247?

At the trial hereof, the respondent gave evidence that she conducted a motor vehicle search on KVM 247 and the results indicated that the appellant was the registered owner of the said motor vehicle. It is on this basis that the respondent sued the appellant. Further the respondent's Advocates have submitted that they wrote to a Mercy Muthoni Njoroge who did not respond resulting in the suit against the appellant.

The appellant herein on the other hand gave evidence that he had sold the said motor vehicle to Mercy Muthoni Njoroge. He confirmed that he was paid in full and that he signed transfer documents which he handed over to Mercy.

The appellant called a witness – James Kahora – DW2 who testified that he was the MD (sic) of Nacom Insurance Agencies Limited. He confirmed that Mercy Muthoni Njoroge was the insured owner of KVM 247. He produced defence exhibit 1 **(DExh.1)** which was a letter he wrote to United Insurance Company Limited. The letter indicates that the insured owner of the motor vehicle at the time when the accident occurred was one Mercy Muthoni.

Based on the evidence as summarized above, the trial magistrate found that the appellant was the owner of motor vehicle registration number KVM 247 and made a finding that since the search certificate still read the appellant's name he was therefore still the owner.

Section 8 of the Traffic Act provides:

"The person in whose name a vehicle is registered shall, *unless the contrary is proved (*emphasis mine) be deemed to be the owner of the vehicle."

A Certificate of Motor Vehicle Search only shows who the ***prima facie*** owner of a motor vehicle is unless the contrary is proved. There was sufficient evidence adduced by the appellant that controverted the respondent's evidence on the certificate and as such it was not conclusive evidence of ownership.

The appellant's evidence was corroborated by that of **DW2** who confirmed that the insured owner of the said motor vehicle was Mercy. Further the police abstract shows that the owner was Mercy Muthoni and not the appellant. It can be inferred from the police abstract that the insured owner was Mercy Muthoni a fact that was confirmed by **DW2** – her insurance broker. Therefore on a balance of probabilities, the beneficial and insured owner of the motor vehicle was Mercy Muthoni and not the appellant.

It appears that the motor vehicle did change hands but the new owner did not take steps to have the records at the motor vehicle registry changed.

This court is guided by the following authorities;

The Court of Appeal in **Joel Muga Opija** V. **East African Sea Food Limited Civil Appeal** [2013] eKLR observed that:

"In any case in our view, an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. 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."

The same Court of Appeal in **Securicor Kenya Ltd** V. **Kyumba Holdings Ltd Civil**

[2005] eKLR stated that:

"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.."

This court is also persuaded by the case of **Samwel Mukunya Kamunge** V. **John Mwangi Kamuru** - Civil Application No.34 of 2002 Hon. H. M. Okwengu, J (as she then was) held that:-

"It is true that a Certificate of Search from the Registrar of Motor-vehicles would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of Motor Vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as Section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time's vehicles change hands but the records are not amended. I find that the trial magistrate was wrong in holding that only a Certificate of Search from the Registrar of Motor Vehicles could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent."

It has been argued by the respondent's Advocates and which argument was upheld by the trial magistrate

that if the appellant had sold the motor vehicle as alleged then he was under a duty to enjoin the third party.

I respectfully disagree with this notion. The case is the respondent's and therefore the burden of proof is upon her. A party put to its defence is under no obligation to enjoin another party unless perhaps this will help its defence and even then it is entirely upto the party. In this case, I find the appellant produced enough evidence to show he was not the owner of the said motor vehicle and therefore the suit against him should have been dismissed. I therefore respectfully disagree with the learned trial magistrate that since the appellant failed to enjoin Mercy, he is culpable. It was upon the respondent to enjoin the third party.

In this case after re-evaluating the evidence on record, this court is satisfied that the appellant proved on a balance of probabilities that he was not the beneficial/insured owner of the motor vehicle and that the trial court made an erroneous finding.

1. **Issue (ii) Whether the appellant is vicariously liable for the acts of the driver of the aforesaid lorry?**

The appellant's submission was that before holding the appellant vicariously liable the trial magistrate ought to have first made a finding as to whether or not the driver of the lorry registration number KVM 247 was the agent of the appellant.

After careful perusal and re-evaluation of the evidence on record, I have not sighted any evidence that makes any reference to the negligence of the appellant in the testimony of the respondent. I am guided by the case of **Kiema Muthuku vs Kenya Cargo Handling Services Ltd [1991]2 KAR 258** where the Court of Appeal held that;

"…..A plaintiff must prove some negligence against the defendant where the claim is based on negligence….."

In cross-examination, the court notes that the respondent stated that the said motor vehicle was owned by Mercy Muthoni. She further testified that the driver of the said motor vehicle was the worker and an agent of Mercy Muthoni.

It is this court's considered view that the respondent failed to establish the existence of an agency relationship between the driver and the appellant. Refer to the case of **Joseph Cosmas Khayuglia** V. **Gigi & Co Ltd & anor .**

It therefore follows that the respondent again did not adduce any evidence of negligence touching on the appellant's driver, servant and or agent as pleaded in the Plaint.

To that end, I am satisfied that the trial court made an erroneous finding on liability.

The above notwithstanding, it is the duty of this court to render an opinion on the quantum of damages for the injuries suffered by the respondent.

According to the said medical report of Dr. Ndakalu, which was produced during trial, the respondent suffered cut wounds to her orbital area and a compound fracture to her right tibia/fibula.

At trial, the respondent testified that she still suffered pain at her injury sites.

The trial magistrate gave an award of Kshs.300,000/= as he found that the respondent had healed from her injuries.

For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in various decisions. Reference is made to the case of

Josephine Angwenyi V. Samuel Ochillo Civil Appeal No. 125 of 2008 wherein Makhandia , J considered the principles as;

"…an appellate court in deciding whether it is justified in disturbing the quantum awarded by the trial court, it must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor, or left out of account a relevant factor or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages …."

Bearing the above principles in mind, I have considered the comparable authorities that were considered by the trial court and this court is satisfied that the award was neither too high nor too low to warrant interference. The amount awarded as general damages would therefore have been left to stand if the appeal had been unsuccessful.

FINDINGS

This court finds that the trial magistrate arrived at an erroneous finding and determination on the issues of ownership and liability.

DETERMINATION:

The appeal is found to be meritorious and is hereby allowed.

The judgment entered in SPMCC No. 437 of 2004 Naivasha is hereby set aside and is hereby substituted with a judgment dismissing the suit with no order as to costs.

Each party to bear his/her own costs on the appeal.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 26th day of August, 2015.

A. MSHILA

JUDGE