



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 420 of 2002**

**JOSEPH WANGO KAMAU.....APPELLANT**

**VERSUS**

**GERMAN AGRO ACTION.....RESPONDENT**

*(Appeal from the judgment of Hon. Mrs. J. Ondiek in Kiambu SPMCC No.550 of 1999, delivered on 12<sup>th</sup> July, 2002)*

**J U D G M E N T**

1. This is an appeal arising from a suit which was filed in the Magistrate's Court at Kiambu by Joseph Wango Kamau, (hereinafter referred to as the appellant). The appellant had sued German Agro Action, a Non-Governmental Organization (hereinafter referred to as the respondent). The appellant claimed that the respondent was the owner of the motor vehicle registration No.KAE 883T which knocked down the deceased, Phyllis Kamau causing her fatal injuries.
2. The appellant contended that the accident was caused by the negligence of the respondent's servant, agent or driver. At the time of her death, the deceased was a 68 year old businesswoman cum farmer earning a net income of about Kshs.5,000/= per month. The appellant therefore claimed special and general damages on his own behalf and on behalf of the Estate of the deceased.
3. The respondent filed a defence in which he denied ownership of motor vehicle KAE 883T. In the alternative the respondent claimed it had sold motor vehicle KAE 883T to a 3<sup>rd</sup> party on 7<sup>th</sup> October, 1997. The respondent further denied all the particulars of negligence attributed to it or its agents and the appellant's claim for damages.
4. The respondent initiated 3<sup>rd</sup> party proceedings against Meshack Binge Nyauke, to whom it claimed to have transferred motor vehicle KAE 883T. Although duly served with a 3<sup>rd</sup> party notice, Meshack Binge Nyauke did not enter appearance or file any defence. Subsequently, it was agreed by consent between the appellant's counsel and the respondent's counsel, that the question of the liability of the 3<sup>rd</sup> party to indemnify the respondent be tried at the same time as the appellant's claim against the respondent.
5. During the hearing of the suit in the lower court, the appellant and one Haron Githinji Chege testified whilst the respondent called Grace Amungula, its assistant Regional Representative. The appellant testified that the deceased Phyllis Wangari was his mother. On 17<sup>th</sup> July, 1999, at about 7.00 p.m., he was in his house which is near the Nairobi/Nakuru Road. At about 7.30 p.m. he heard people screaming. He went out and found that an accident had occurred and there were many people around. On checking the scene, he found that it was his mother who had been hit by a vehicle. She was already dead and the body was lying half on the road, half out of

the road. A Mercedes Benz lorry registration No.KAE 883T had stopped just slightly ahead of the deceased.

6. The matter was reported to the police who came and took the deceased's body to the mortuary. The appellant also produced a police abstract report of the accident which showed that the accident involved motor vehicle KAE 883T. He also produced a certificate from the Register of Motor Vehicle which showed that as at 17<sup>th</sup> July, 1999 the motor vehicle KAE 883T belonged to the respondent. The appellant produced receipts for funeral announcements, coffin, ribbons, police abstract report and certificate from the Registrar of Motor Vehicle. The appellant also produced a limited grant of letters of administration *ad colligenda bona* issued to him by the High Court in respect of the deceased's estate. He explained that the deceased was a peasant farmer and also had milk cows. She used to make a net profit of Kshs.5,000/-. He therefore urged the court to award him special and general damages.
7. Haron Githinji Chege testified that he was coming from a neighbor's house when he saw the deceased alight from a motor vehicle which moved ahead. A lorry then came, swerved off the road and hit the deceased who had already crossed the road. The lorry then swerved back to the road and drove off. The witness raised an alarm and people rushed to the scene. A vehicle which was behind the lorry overtook the lorry and stopped it. Chege identified the lorry as registration No. KAE 883T. Chege testified that the lorry which was travelling at a very high speed had four lady passengers on the front seat.
8. The respondent witness Grace Amungula, testified that the respondent sold motor vehicle KAE 883T to Meshack Nyauke. She produced a sale agreement dated 7<sup>th</sup> October, 1997. she also produced a copy of a cheque dated 9<sup>th</sup> September, 1997 issued to the respondent by Tibbet and Britten Kenya Ltd who was the employer of the buyer. She also produced a copy of the transfer of ownership which was duly signed by the respondent as well as a letter dated 8<sup>th</sup> October, 1997, informing the Registrar of the transfer of the motor vehicle KAE 883T.
9. The witness therefore maintained that by the time of the accident in the year 1999, the respondent did not own the motor vehicle subject of the accident. She maintained that whoever was driving the motor vehicle at the time of the accident was not doing so for the benefit of the respondent.
10. In her judgment, the trial magistrate noted that the only issue for determination was whether the motor vehicle belonged to the respondent. The trial magistrate found that the respondent had sufficient proof that it had sold the motor vehicle to Meshack Nyauke before the accident. The trial magistrate found that the respondent could not be held liable for the accident as the motor vehicle belonged to one Meshack Nyauke at the time of the accident. The trial magistrate therefore dismissed the appellant's suit.
11. Being aggrieved by that judgment, the appellant has lodged his appeal raising 4 grounds as follows:
  - (i) That the learned magistrate erred in law and fact by holding that the appellant had sued the wrong person notwithstanding that the defendant had filed third party proceedings claiming *inter-alia* indemnity from the said party and in spite of the fact that the defendant was the registered owner of the motor vehicle registration number KAE 883T as at the time of accident.
  - (ii) The learned magistrate erred in law and fact in dismissing the appellant's suit in spite of the fact that the plaintiff had proved its case as against the defendant.
  - (iii) The learned magistrate erred in both law and fact in not appreciating the nature relevance and substance of third party proceedings in relation to the plaintiff's case.
  - (iv) The learned magistrate erred in both law and fact in failing to give the probable awards on damages that she would have given had she found the defendant liable as by law required.
12. At the hearing of the appeal, Mr. Nyaga who appeared for the appellant abandoned ground 3. Mr. Nyaga maintained that the appellant had proved through production of a copy of records from the Registrar of Motor Vehicle, that the respondent was the registered owner of the motor vehicle KAE 883T at the time of the

accident. Mr. Nyaga maintained that the defence did not contain any averment or denial that the motor vehicle was being driven by the respondent's servant or agent.

13. Mr. Nyaga submitted that the respondent never established that motor vehicle KAE 883T was indeed sold to Meshack Nyauke by the respondent. Mr. Nyaga referred the court to Section 8 of the Traffic Act under which a motor vehicle is deemed to belong to the registered owner. Mr. Nyaga maintained that the respondent did not comply with Section 9(2) of the Traffic Act, which placed a duty upon the respondent to notify the Registrar of Motor Vehicles of any change of ownership of the motor vehicle.
14. Mr. Nyaga submitted that the alleged sale of the motor vehicle by the respondent, did not comply with the law as the Registrar of Motor Vehicles was only informed of the sale about a month after the sale. Mr. Nyaga pointed out that the appellant had filed an application in this court seeking to have additional evidence adduced in accordance with Order XLI Rule 22 of the Civil Procedure Rules. He contended that the additional evidence was not available until after the judgment. Finally Mr. Nyaga criticized the trial magistrate for failing to assess general damages notwithstanding her finding on liability.
15. Mr. Opini who appeared for the respondent submitted that the appellant's suit was properly dismissed as the appellant failed to prove his case on a balance of probabilities. He noted that the appellant did not prove that the subject motor vehicle was owned by the respondent. He pointed out that the appellant had in fact initially sued the right party but later amended the plaint.
16. With regard to Section 8 of the Traffic Act, Mr. Opini submitted that under that subsection, the person registered according to the records of the Registrar of Motor Vehicles, is deemed to be the owner of the motor vehicle unless the contrary is proved. Mr. Opini argued that the respondent had discharged this burden by availing documents showing that the motor vehicle was sold to Meshack Nyauke.
17. Further, Mr. Opini submitted that the appellant did not establish any vicarious liability as there was no evidence adduced to show that the person who was driving the motor vehicle was a driver or agent of the respondent. With regard to the sale transaction involving motor vehicle KAE 883T, it was maintained that the transaction was finalized on the 7<sup>th</sup> October, 1997 and the Registrar notified on the next day that is 8<sup>th</sup> October, 1997. The court was therefore urged to dismiss the appeal.
18. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower court. I have also considered the pleadings and the submissions which were made. It is evident from the pleadings that regarding liability, the main issue was whether motor vehicle KAE 883T was owned by the respondent, and if so, whether the accident that occurred on 17<sup>th</sup> July, 1999 was caused by the negligence of the respondent's servant, agent or driver. The appellant simply relied on the copy of record dated 31<sup>st</sup> March, 2000, issued by the Registrar of motor vehicle which gave the name of the respondent as the registered owner of the subject vehicle as at 17<sup>th</sup> July, 1999.
19. Section 8 of the Traffic Act provides that:

***“The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the motor vehicle.”***
20. This means that registration of a motor vehicle in a person's name only provides prima facie evidence of ownership, which can be dislodged by appropriate evidence. In this case, the respondent's evidence was that it sold motor vehicle KAE 883T to Meshack Nyauke on 7<sup>th</sup> October, 1997. This was evidenced by the sale agreement and the transfer of ownership of motor vehicle documents both of which were duly signed on 7<sup>th</sup> October, 1997. The sale was further evidenced by a copy of a cheque, a remittance advice and an internal memo which confirmed that the payment for the vehicle was made by the buyer's employer through a cheque dated 9<sup>th</sup>

September, 1997.

21. The respondent further produced a copy of a letter dated 8<sup>th</sup> October, 1997 addressed to the Registrar of Motor Vehicle informing the Registrar of Motor Vehicle of the sale of the vehicle. The letter which was dated 8<sup>th</sup> October, 1997 was stamped as received by the Registrar of Motor Vehicles. I find that in accordance with the sale agreement, and the transfer of ownership, the transaction was actually finalized on the 7<sup>th</sup> October, 1997. It is obvious that the cheque which was dated 9<sup>th</sup> September, 1997 was prepared about a month earlier but appears to have been delivered to the respondent on the 7<sup>th</sup> October, 1997 when the transaction was finalized.
22. The above evidence provides sufficient proof that the respondent did transfer the ownership of the motor vehicle to the 3<sup>rd</sup> party, signed the appropriate forms and reported the transfer to the Registrar of Motor Vehicles. The respondent was therefore not the owner of the motor vehicle at the time of the accident, nor was any evidence adduced to show that the motor vehicle was being driven by the respondent's servant or agent or for the respondent's benefit.
23. Order I Rule 7 of the Civil Procedure Rules provides as follows:

***“Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.”***
24. In this case, the police abstract report gave an indication that motor vehicle KAE 883T belonged to Meshack Nyauke. Although the certificate of the Registrar of Motor Vehicle indicated that the registered owner of motor vehicle KAE 883T was the respondent, the minute the respondent filed the defence claiming it had sold the vehicle to Meshack Nyauke, the appellant ought to have invoked Order I Rule 7 of the Civil Procedure Rules to enable the court determine the issue of the ownership of the accident vehicle. It is clear that the appellant's counsel goofed in failing to pursue Meshack Nyauke. I find that the trial magistrate was right in finding the respondent not liable. The feeble attempt by the appellant to call additional evidence in this court was unsuccessful as the appellant did not satisfy the requirements of Order XLI Rule 22 of the Civil Procedure Rules.
25. As regards the issue of quantum of damages, the trial magistrate was under an obligation to assess the quantum of damages notwithstanding her finding on liability. With regard to loss of dependency, although paragraph 5 states that the deceased had a family who were dependant on her, no particulars were given nor did the appellant testify of any dependant. The only relation of the deceased revealed in the evidence was the appellant who claimed to be her son. No evidence was however adduced regarding the age of the appellant, or what he was doing for a living and whether he was really dependant on the deceased. The evidence regarding loss of dependency was therefore wanting.
26. Be that as it may, a multiplier of 6 years a dependency ratio of  $\frac{1}{3}$  and the deceased's net income of Kshs.5,000/= would have been appropriate to arrive at an award of Kshs.120,000/= for loss of dependency. A further sum of Kshs.100,000/= in respect of loss of life expectancy and Kshs.21,600/= in respect of special damages would have been appropriate.
27. The upshot of the above is that the appellant having failed to establish liability on the part of the respondent, his appeal has not merit. It is accordingly dismissed. Each party should bear his own costs.

Dated and delivered this 11<sup>th</sup> day of March, 2010

**JUDGE**

In the presence of: -

Ms Matu H/B for Nyagah for the appellant

Opini for the respondent

Eric - Court clerk