



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 109 of 200

AL-MALIK BROTHERS MOTORS LIMITED APPELLANTS

VERSUS

VICTORIA IMINZA)

PAUL KAINA) RESPONDENTS

JUDGMENT:

Victoria Iminza was the plaintiff in Kisii CMCC No. 1140 of 2002. She pleaded that on 24th April 2003 she was lawfully walking along Kisii/Migori road near Bosongo hospital when she was hit by motor vehicle registration No. KAQ 236 L that was said to be owned by the appellant herein, **Al-Malik Brothers Motors Limited**. The said motor vehicle was being driven by Paul Kaina. The respondent set out particulars of negligence on the part of the said motor vehicle's driver. She further alleged that as a result of accident she sustained soft tissue injuries on her right hand, fractured ribs, soft tissue injuries on the chest and lower abdomen and was traumatized as a result of death of her child. She prayed for general damages as well as special damages amounting to Kshs. 28, 100/=.

Following the said accident, the aforesaid driver was charged with causing death by dangerous driving and was convicted on his own plea of guilty and sentenced to eighteen months suspended sentence.

The defendants filed a statement of defence through S.M. Mogaka and Company Advocates. In the said defence the appellant allegedly admitted that it was the owner of the motor vehicle registration No. KAQ 236 L. The hearing proceeded and judgment was entered for the plaintiff in the sum of Kshs. 120,000/= (general damages) and Kshs. 17,100.00/= (special damages).

On 1st August 2005 the appellant through M/s Timamy & Company Advocates, applied to set aside the said judgment, saying that they were not aware of the suit and had not instructed M/s S.M. Mogaka & Company in the matter. The appellant also stated that it was not the owner of the aforesaid motor vehicle. The application was allowed with the result that the aforesaid judgment was set aside and the appellant was allowed to file its own statement of defence which it did.

During the hearing, the respondent, Victoria Iminza testified that on 26th April 2003, she was heading to Kisii town and was walking beside the road. She was carrying a child aged about one year. A motor vehicle that was overtaking another one hit her, causing her to sustain the injuries aforesaid. Her child died as a result of the said accident. The respondent was admitted in a hospital for fourteen days. She produced a receipt for Kshs. 12,000/= being the amount of money paid for her treatment. She also

produced a receipt for Kshs. 5,000/= on account of a medical report prepared by Dr. Ogando.

In cross-examination, the respondent stated that she did not see the registration number of the vehicle which hit her but got to know of it later on when she went to Kisii police station where she was issued with a police abstract report regarding the accident. She was further informed that the motor vehicle that hit her belonged to the appellant although she admitted that she never conducted a search at the office of the Registrar of motor vehicles to confirm details of such ownership.

Dr. Ezekiel Ogando Zoga, PW2, testified and produced the respondent's medical report. He confirmed that he charged Kshs. 5,000/= for both the medical report and court attendance. In his view, the respondent was expected to have fully healed after six months from 15th May 2003 when he examined her.

Edward Atumba, DW1, testified on behalf of the appellant. He was employed by the appellant as a Sales Manager. He had worked for the appellant for over ten years. He stated that the appellant was engaged in the business of importing new and used motor vehicles from Japan. He further stated that the motor vehicle registration No. KAQ 236 L was imported by the appellant and after its registration, it was sold to one **Akbar Mohamed Niwaz Khan** on 24th February 2003. He produced a copy of the sale agreement in respect of the said motor vehicle. Clause 5 of the said agreement stated that in the event that the motor vehicle was involved in an accident before transfer of ownership of the same having been formally effected the purchaser would be responsible. A photocopy of the purchaser's identity card was also produced by DW1. He added that the accident in question was never reported to the appellant. He further denied that Paul Kaina was an employee of the appellant.

In his judgment, the learned trial magistrate stated, *inter alia*:

“The driver of the subject motor vehicle was convicted for the offence of causing death by dangerous driving. The motor vehicle in question is registered in the name of the first defendant. No steps were taken by the first defendant to include the alleged purchaser as a third party. I hold the first defendant 100% liable.

In view of the injuries sustained I am minded to assess general damages at Kshs. 150,000/=.
The plaintiff exhibited receipts for Kshs. 17,000/= in support of specials. I will award this sum.”

The appellant was aggrieved by the said judgment and preferred an appeal to this court. The main argument that was raised by the appellant during the appeal was regarding the learned magistrate's finding on the appellant's liability for the said accident.

The appeal was set down to hearing on 16th March, 2009 and a hearing notice to that effect was served upon the respondent's advocates, M/s Bw'ondika and Company. However, the said advocates did not show up on the hearing date. Mr. Oguttu for the appellant submitted that there was unchallenged evidence that prior to the occurrence of the accident the motor vehicle in question had been sold to a third party, Akbar Mohamed Niwaz Khan. That fact had also been expressly stated in the statement of defence. The fact that the motor vehicle was still registered in the name of the appellant as at the date of the accident despite the aforesaid sale did not necessarily imply that the appellant was liable for the accident. He referred to **Section 8** of the **Traffic Act** which states that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. In this matter, it had been sufficiently proved that as at the date of the accident, the owner of motor vehicle registration No. KAQ 236 L was the said Akbar Mohamed Niwaz Khan and not the appellant. Paul Kaina, who was driving the motor vehicle at the material time, was not an employee of the appellant. In **SECURICOR KENYA LIMITED –VS- KYUMBA HOLDINGS LIMITED**, Civil Appeal No. 73 of 2002 (unreported) the Court of Appeal dealt with a similar matter and in its interpretation of **Section 8** of the **Traffic Act** stated as follows:

“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

holdings finds support 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 log book was only *prima facie* evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

The appellant had, indeed, proved otherwise.”

I am in full agreement with the aforesaid holding which is in all fours with the main issue for determination in this appeal.

I am satisfied that the finding on liability by the learned trial magistrate was erroneous. The above cited Court of Appeal decision was cited before the trial court and it is disturbing that the learned trial magistrate disregarded an authority that was binding upon him. Had he cared to apply the same he would have reached a different conclusion.

In the circumstances, I allow this appeal, set aside the lower court judgment and substitute therefor an order dismissing the respondent’s case with costs to the appellant. The respondents shall also bear the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

23/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the appellant

N/A for the Respondent

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.