



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL 129 OF 2007**

**LEONARD MUNGANIA ..... APPELLANT**

**VERSUS**

**JESSIKAY ENTERPRISES ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS MWONGERA ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from original judgment and decree of Senior Principal Magistrate's Court at Nanyuki in Civil Case No. 169 of 2006 dated 14<sup>th</sup> November 2007 by Ndungu H. N. (Miss) – Ag. S.P.M.)*

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

**Leonard Kirimi Mungania**, the appellant was once a casual labourer. On 20<sup>th</sup> April 2005 he left Meru headed for Nanyuki town in motor vehicle registration number KAS 477R, a matatu. He was a fare paying passenger. Upon reaching Baitere area, the motor vehicle aforesaid was involved in a road traffic accident when it overturned and rolled several times. As a result he was injured on the head, chest, hands and legs. According to **Dr. Waihenya Mwangi** who prepared and tendered in evidence his medical report, the appellant sustained painful swollen RT wrist joint, bruised LT arm posteriorly, Bruises on LT gluteal region, Tenderness of LT hip joint and superficial wound on LT chest interiority. He was attended to at Nanyuki District Hospital as an out patient. The only present complaint is occasional numbness of RT wrist joint and LT hip region. For his services, Dr. Waihenya charged him Kshs.2000/=. Once he recovered, he started inquiries as to who the owner of the motor vehicle was. Those inquiries took him to Timau police station where he reported the accident and was issued with a P3 form that was duly filled at Nanyuki District hospital. He was issued with a police abstract as well for which he paid Kshs.200/=. Through his advocates, **Messrs Bwonwonga & Co. Advocates**, he got information from the Registrar of Motor vehicles that as at the time of the accident the motor vehicle was registered in the name of **Jessikay enterprises Ltd**, the first respondent herein. He also established that as at the time of the accident, it was being driven by **Julius Mwangera**, the 2<sup>nd</sup> respondent. It would appear that the said information was not readily available from the police records for on the police abstract tendered in evidence the only information given was that of the insurance company for the motor vehicle. There was no mention of its owner or the driver.

Be that as it may, armed with the information aforesaid, the appellant sued the respondents jointly and severally seeking damages for the injuries he sustained as a result of the accident aforesaid. He blamed the accident wholly on the 2<sup>nd</sup> respondent whom he claimed that he was drove the motor vehicle as an

authorised driver, servant, agent and or employee of the 1<sup>st</sup> respondent hence vicarious liability. According the appellant, the 2<sup>nd</sup> respondent drove the motor vehicle too first in the circumstances, without due care and attention, failed to keep a proper look out, failed to properly manage the same, had no regard for the safety of the appellant and other passengers aboard the same, permitting or causing the motor vehicle to skid and finally allowing a defective and unroad worthy motor vehicle to ferry passengers.

The 1<sup>st</sup> respondent entered appearance and filed a defence to the appellant's claim. Its defence in the main was that it had sold and delivered the motor vehicle to one **Henry Kathiori Murathe** on 16<sup>th</sup> July 2008 and accordingly it could not be held vicariously liable for the alleged acts of negligence of the 2<sup>nd</sup> respondent as he was not its agent, servant, employee or driver. In support of these contentions, one **Francis Mbiti**, an assistant General Manager of the 1<sup>st</sup> respondent testified thus; that the 1<sup>st</sup> respondent sells used ex-japanese vehicles. The subject motor vehicle was sold by them to **Henry Kathiori Murathe** on 16<sup>th</sup> July 2004 by way of hire purchase agreement for Kshs.980,000/=. The purchaser immediately took delivery of the motor vehicle and thereafter they ceased to have control over the same. He went on to state that once they sold the motor vehicle they wrote to the registrar of motor vehicles on 26<sup>th</sup> August, 2005 to alert him of the transaction. The purchaser too was given a log book and duly signed transfer forms. It was his evidence that they could not have forced the purchaser to go to the registrar of motor vehicles to effect the necessary transfer to himself once they gave out all the aforesaid documents. As far as they were concerned the motor vehicle was no longer theirs. Neither had they employed the 2<sup>nd</sup> respondent to drive the motor vehicle.

The 2<sup>nd</sup> respondent neither entered appearance nor filed a defence. Accordingly and on the application of the appellant, an interlocutory judgment was entered against him.

The learned magistrate having carefully weighed and evaluated the evidence tendered, written submissions filed together with cited authorities and the law found favour with the 1<sup>st</sup> respondent's case and proceeded to dismiss the appellant's claim with costs. In dismissing the claim, the learned magistrate held, **"The 1<sup>st</sup> Defendant has in my view successfully shown the 1<sup>st</sup> Defendant company herein deals in sales of Japanese motor vehicles and that the accident vehicle herein KAS 477R was one of such vehicles that they sold to Henry Gathiori Maratha on 6<sup>th</sup> July 2004. There is before court documentary proof of these allegations. The 1<sup>st</sup> defendant's witnesses told the court they no longer have control of the vehicle since it was sold and did not have such control at the time of the accident and in the circumstances the 1<sup>st</sup> Defendant could not have employed the 2<sup>nd</sup> Defendant and is not therefore vicariously liable. In the light of this glaring evidence from the defence the Plaintiff has not established his case on a balance of probabilities against the 1<sup>st</sup> Defendant and the suit against the 1<sup>st</sup> Defendant must therefore fail and I dismiss the same with costs. Interlocutory judgment however remains on record against the 2<sup>nd</sup> Defendant."**

That dismissal provoked this appeal. In a 12 point memorandum of appeal filed through **Messrs Bwonwonga & Co. Advocates**, the appellant faults the decision of the learned magistrate on the grounds:

**"1. The learned magistrate erred in law and in fact**

**in dismissing the appellant's suit against the Respondent without any credible and/or sufficient reasons.**

**2. The learned magistrate erred in law and in fact by failing to appreciate that the Respondent was the Registered owner of Motor vehicle Registration No. KAS 477R and therefore liable.**

**3. The learned magistrate erred in law and in fact by holding that the respondent was not vicariously liable and yet the Respondent was the registered owner of Motor vehicle Registration No. KAS 477R.**

4. **The learned magistrate erred in law and in fact in failing to consider the Appellant's oral and documentary evidence as a whole.**
5. **The learned magistrate erred in law and in fact in refusing to make a finding that the accident occurred when motor vehicle registration No. KAS 477R was still under the names of the Respondent.**
6. **The learned magistrate erred in law and fact in failing to appreciate the fact that the Respondent admitted being the owner of motor vehicle registration No. KAS 477R.**
7. **The learned magistrate erred in law and in fact in delivering a judgment which was contrary to law and against the weight of the pleadings, submissions and binding authorities.**
8. **The learned magistrate erred in law and fact in failing to quantify the general damages payable to the Appellant by the 2<sup>nd</sup> Respondent.**
9. **The learned magistrate in law and in fact in refusing to make a finding that the 1<sup>st</sup> Respondent should have joined Henry Kathiori Muratha as a third party.**
10. **The learned magistrate erred in law and in fact in delivering a judgment not supported by the evidence adduced and was occasioned by extraneous considerations which were irrelevant.**
11. **The learned magistrate ought to have found that the 1<sup>st</sup> Respondent who was the registered owner of motor vehicle registration KAS 477R was jointly and severally liable to the Appellant claim(sic).**
12. **The learned magistrate ought to have found that on the evidence on record and submissions advanced titled in favour of the Appellant.**

When the appeal came up for hearing on 17<sup>th</sup> March 2009, **Mr. Bwonwonga & Kathungu**, learned advocates for the appellant and 1<sup>st</sup> respondent respectively agreed to argue the same by way of written submissions. Subsequent thereto they filed their written submissions which I have carefully read and considered.

This is a first appeal and so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions on such evidence, but always remembering that it neither saw nor heard the witnesses and make due allowance for it. See generally, **Peters v/s Sunday Post Ltd (1958) E.A. 424, Selle & Another v/s Associated Motor Boat Co. Ltd & Others (1968) E.A. 123** and **Ephantus Mwangi & Another v/s Duncan Mwangi Wambugu (1982-88) 1 KAR 278**.

Much as the 1<sup>st</sup> respondent denies the occurrence of the accident, there is overwhelming evidence on record that indeed such accident involving the appellant did in fact occur. The accident occurred when the said motor vehicle in which the appellant was a fare paying passenger suddenly overturned control and rolled three times. As a result, the appellant was injured. The injuries sustained have already been set elsewhere in this judgment. Much as the 1<sup>st</sup> Respondent denies that the appellant suffered injuries as a result of the accident., there is sufficient evidence on record that indeed he suffered such injuries. At the time of the accident the motor vehicle was being driven by the 2<sup>nd</sup> respondent. This fact has not been disputed by the 1<sup>st</sup> respondent. However it is its contention that the 2<sup>nd</sup> respondent was not their agent, servant, employee or driver.

The appellant takes the view that the accident could well have been avoided had the 2<sup>nd</sup> respondent not driven the motor vehicle very fast in the circumstances and if the 1<sup>st</sup> respondent had not allowed a defective motor vehicle on the road. These are some particulars of negligence put forth by the appellant in his statement of claim. The 1<sup>st</sup> respondent did not dispute those claims in his evidence. Neither did he

call any evidence to counter it. Accordingly the appellant's contention that the accident was as a result of speedy driving by the 2<sup>nd</sup> respondent and the defects in the motor vehicle remains unchallenged, un rebutted and uncontroverted. It must therefore be taken to be true. Thus the appellant has been able to establish the cause of the accident which was negligence on the part of both the respondents.

Why did the 1<sup>st</sup> respondent wish not to be held liable for the accident in which the appellant was injured? Its case was that the motor vehicle initially belonged to them having imported it from Japan for purpose of selling it. By a sales & Hire purchase agreement dated 16<sup>th</sup> July 2004, they sold the same vehicle to one, **Henry Kathiori Murathe** at Kshs.980,000/=. The purchaser according to the sale & hire purchase agreement paid on the spot Kshs.500,000/= leaving a balance of Kshs.480,000/= to be paid over a period of 10 months at Kshs.48,000/= per month between 1<sup>st</sup> September 2004 and 1<sup>st</sup> June 2005. I have gleaned this information from the exhibits tendered during the trial which unfortunately were not included in the record of appeal. **Mr. Kathungu** has urged me to dismiss this appeal on the grounds that the appellant failed and or neglected to include exhibits tendered in evidence during the hearing of the main suit since the said failure or neglect will in effect render this court incapable of fully understanding and or having all the facts of the suit at its disposal and accordingly the 1<sup>st</sup> respondent would be prejudiced.

When this appeal came up for directions on 29<sup>th</sup> September 2008, the appellant and respondent were represented by advocates. They all agreed that the record as prepared was in order and ought to be certified as such. The 1<sup>st</sup> respondent's advocate if he felt that certain crucial documents had been omitted from the record of appeal, ought to have raised the issue then. He did not. He cannot now turn around and fault the record of appeal. In any event there is the original record of the trial court accompanying this appeal. All the documents that were omitted from the record are available for scrutiny. Nothing bars me from referring to the said original record. In the premises, I would hold that the 1<sup>st</sup> respondent's submission on that score lacks merit.

Upon taking possession of the motor vehicle, the purchaser was also given a duly signed transfer form as well as the logbook to enable him transfer the ownership of the motor vehicle to himself. To the 1<sup>st</sup> respondent therefore, having sold the vehicle to the purchaser as aforesaid, it could not have been responsible for the accident which occurred some nine or so months later.

What is the law as regards title to and ownership of motor vehicles? 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 vehicle.....**" The appellant proved by producing documents from the registrar of motor vehicles that as at 20<sup>th</sup> April 2005 when the accident occurred, the 1<sup>st</sup> respondent was still the registered owner of the subject motor vehicle. Accordingly and in terms of section 8 aforesaid, it was deemed to be the owner of the motor vehicle. The 1<sup>st</sup> respondent in a bid to disown the ownership of the vehicle produced in evidence sale and hire purchase agreement dated 16<sup>th</sup> July 2004 showing that the said motor vehicle was in fact sold to a third party who took immediate possession thereof as per the delivery note dated the same date. Further the 1<sup>st</sup> respondent through a letter dated 20<sup>th</sup> August 2005 informed the registrar of motor vehicles of the sale. To conclusively cement its case, the 1<sup>st</sup> respondent produced a copy of a duly signed transfer form thereby demonstrating categorically, that ownership of the said vehicle had changed hands by 20<sup>th</sup> April 2005. By production of those documents, it is the 1<sup>st</sup> respondent's contention that it had been able to prove to the contrary as envisaged by section 8 supra. However I am unable to agree with this contention. From the sale and hire purchase agreement, it is evident that there was a balance of the purchase price of Kshs.480,000/= to be repaid to the 1<sup>st</sup> respondent by the purchaser over a period of 10 months commencing 1<sup>st</sup> September 2004. 10 months from 1<sup>st</sup> September 2004 would effectively end on 1<sup>st</sup> June 2005. The accident occurred on 20<sup>th</sup> April 2005 before the purchaser had completed payment of the full purchase price. How could the purchaser have effected the transfer of the vehicle into his name when there was an outstanding balance of the purchase price payable to the 1<sup>st</sup> respondent? I doubt that that was possible. I am fortified in this holding by condition 3 of the sales and Hire Purchase Agreement which is to the effect that "**The vendor to hand over the registration Book (logbook) and transfer after payment in full of the purchase price, and**

**any interests costs applicable.**” (emphasis mine).

That condition amply testifies to the fact that the purchaser could only have transferred the vehicle into his name once the full purchase price had been. As at the time of the accident and assuming that the purchaser had been regular in the payments of the monthly instalments of Kshs.48,000/= per month with effect from 1<sup>st</sup> September 2004, he still had 2 more instalments to go. I would imagine that that was the reason why the motor vehicle was still perhaps registered in the name of the 1<sup>st</sup> respondent. I have a ringing suspicion that the all documents tendered in evidence showing that the 1<sup>st</sup> Respondent had surrendered the motor vehicle to the purchaser, were generated by the 1<sup>st</sup> respondent purposely to defeat the appellant’s claim. In any event, being a hire purchase agreement, it is common knowledge that the property the subject of the Hire purchase agreement ordinarily remains in the names of the vendor until the hire-purchase instalments are fully paid. This would seem to be the case here. Accordingly as at the time of the accident the vehicle in law still belonged to the 1<sup>st</sup> respondent. In my view therefore the property in the vehicle had not passed on to the purported purchaser. In support of this conclusion I would revert to section 9 of the Traffic Act again. In a nutshell it provides that if a vehicle is transferred from a registered owner, it shall not be used on the road for more than 14 days after the transfer unless the new owner is registered as the owner thereof. From the evidence on record and which the 1<sup>st</sup> respondent wishes this court to believe had the vehicle been sold on 16<sup>th</sup> July 2004 the same could have been on the road at the very latest 30<sup>th</sup> July 2004. Yet the vehicle was on the road as late as at the time of the accident clearly in breach of the law.

**Mr. Bwonwonga** in his submissions has also referred this court to the provisions of Section 9(2) of the Traffic Act which is to the effect that if a person is registered as an owner of a vehicle and he transfers that ownership, he must inform the Registrar of motor vehicles within 7 days of the change of ownership. The 1<sup>st</sup> respondent testified that by a letter dated 26<sup>th</sup> August 2005 he had informed the registrar of the transaction. This was a month or so after the transaction. That again was in breach of the law. It is also doubtful whether that letter is in the prescribed format contemplated by the law. In nutshell therefore I find that the 1<sup>st</sup> respondent had not legally transferred the motor vehicle to a third party. It still in law owned the vehicle and therefore liable to the appellant for the injuries sustained in the accident. If the 1<sup>st</sup> respondent really wanted the trial court to believe in its claims, what was easier than availing the alleged purchaser to testify in support of its case? If perhaps it found that course difficult to take, one would have hoped that once served with the suit papers it would initiate third party proceedings against the purchaser and bring him on board for either indemnity and or contribution. Condition 8 of the sales and Hire Purchase Agreement is categorical; “..... **Should motor vehicle be involved in a road or involved in any illegal offences, or stolen, burnt etc, it shall be the sole responsibility of the buyer, NOTWITHSTANDING the fact that the motor vehicle has not been formally transferred in his/her or business names.....**” So there it is. The 1<sup>st</sup> respondent had the details and particulars of the purchaser yet it opted not to enjoin him in the proceedings yet it had provided in the agreement disclaimer to liability. The appellant was not in a position to know that the vehicle had been sold to the purchaser. That information was only available to the 1<sup>st</sup> respondent. Small wonder that the appellant relied on the information provided by the registrar of motor vehicles.

Having found that the 1<sup>st</sup> respondent was still the registered owner of the vehicle at the time of the accident and therefore liable for the injuries sustained by the appellant, by necessary implication, the 2<sup>nd</sup> respondent was the 1<sup>st</sup> respondent’s driver or agent and hence vicariously liable. In other words he was an ostensible agent of the 1<sup>st</sup> respondent. There was no suggestion that the 2<sup>nd</sup> respondent was driving the vehicle without the instructions of the respondents. Nor in driving the vehicle he was on a frolic of his own. The record shows that at the time the accident occurred, the 2<sup>nd</sup> respondent was driving the vehicle with the express permission of the alleged purchaser and in the course of his duties as such driver. The 1<sup>st</sup> respondent having released the vehicle to the alleged purchaser without effecting the necessary transfer as required in law also surrendered to the alleged purchaser their authority to have the vehicle driven by either the alleged purchaser or any other driver of his own choice. The 2<sup>nd</sup> respondent was one such driver. It must be assumed that the 2<sup>nd</sup> respondent had the authority of the 1<sup>st</sup> respondent and the

alleged purchaser to drive the motor vehicle. In the premises both the 1<sup>st</sup> respondent and the alleged purchaser are vicariously liable for the 2<sup>nd</sup> respondent's activities. It should be noted though that there is already interlocutory judgment against the 2<sup>nd</sup> respondent which has to date not been set aside. With that judgment the issue of the 2<sup>nd</sup> respondent's liability to the appellant has been settled.

That being my view of this appeal, I must then agree with **Mr. Bwonwonga** for the appellant that this appeal must succeed. Accordingly I would allow the appeal, with costs to the appellant. I would set aside the order dismissing the suit and substitute therefore with the order entering judgment in favour of the appellant as against the respondents jointly and severally.

What then should be the damages payable to the appellant. I have looked at the authorities cited by the appellant in support of quantum of damages. Considering the injuries sustained by the appellant the awards appear to be on the higher side. Nonetheless I note that in the court below, he had asked for an award of Kshs.800,000/= for pain, suffering and loss of amenities and Kshs.4,600/= as special damages. It is however a matter of great regret that the learned magistrate having dismissed the appellant's claim did not proceed to assess damages she would otherwise have awarded the appellant had she found in his favour as required. That would have shade light on her thoughts on the issue. In his submission in the trial court, the 1<sup>st</sup> respondent had submitted that general damages in the sum of Kshs.50,000/= would be adequate compensation considering that the appellant suffered only soft tissue injuries for which he was treated as an outpatient.

I agree that the appellant suffered soft tissue injuries with no long term residual effect. However I think that a sum of Kshs.50,000/= on the authorities cited is much on the lower side. From all the foregoing and this court endeavouring to do its best in the circumstances will award the appellant Kshs.120,000/= as general damages for pain, suffering and loss of amenities. The special damages which were specifically pleaded and proved amount to Kshs.4,200/= which I hereby allow.

The end result of this appeal is that:

- (a) It is allowed with costs to the appellant**
- (b) The order dismissing the suit as against the 1<sup>st</sup> respondent is reversed. In substitution thereof I enter judgment in favour of the appellant as against the respondents jointly and severally.**
- (c) Damages payable to the appellant by the respondents jointly and severally is:**  
**General Damages – Kshs.120,000/=**  
**Special Damages – Kshs.4,200/=**
- (d) The appellant shall have the costs of the suit in the subordinate court.**
- (e) General damages shall attract interest at court rates from the date of judgment of the lower court, that is to say, 14<sup>th</sup> November, 2007 whereas interest on special damages at court rates shall accrue from the date of filing suit, to wit, 23<sup>rd</sup> October 2006.**

Those shall be the orders of this court in this appeal.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of May 2009*

**M. S. A. MAKHANDIA**

**JUDGE**

