Car & General (Trading) Limited v Mashiko & another (Civil Appeal E124 of 2022) [2024] KEHC 148 (KLR) (12 January 2024) (Judgment)

Neutral citation: [2024] KEHC 148 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E124 OF 2022

M THANDE, J

JANUARY 12, 2024

BETWEEN

CAR & GENERAL (TRADING) LIMITED ..... APPELLANT

AND

FATUMA JUMA MASHIKO ..... 1ST RESPONDENT

WILFRED MOENGA ..... 2ND RESPONDENT

(An Appeal from the Judgment of Hon. E. Muchoki Senior Principle Magistrate delivered on 21.7.22 in Mombasa SPMCC NO. 2225 of 2018)

JUDGMENT

1. The Appeal herein arises from Judgment of Hon. E. Muchoki Senior Principle Magistrate delivered on 21.7.22 in Mombasa SPMCC NO. 2225 of 2018. The 1st Respondent instituted the suit in the trial court against the Appellant by way of a plaint dated 26.10.18, seeking the following prayers:

    a) General damages for pain and suffering.

    b) Special damages of Kshs. 12,050.00.

    c) Costs of the suit.

    d) Interest on (a) and (c) above at court rates.

2. The 2nd Respondent did not enter appearance or file defence and interlocutory judgment was entered against him. The matter then proceeded to hearing and the trial court entered judgment in favour of the 1st Respondent and against the Appellant and the 2nd Respondent jointly and severally in the sum of Kshs. 208,525/= made up as follows:

    a. General damages Kshs. 400,000/=

b. Special damages Kshs. 12,050/=

c. Witness costs Doctor Kshs. 5,000/=

Total Kshs. 417,050/=

Less 50% contribution.

3. The Appellant being aggrieved by the said judgment preferred the appeal herein and the summarized grounds of appeal are that the trial Magistrate erred in law and in fact in:

1. Holding the Appellant 25% liable in light of the evidence placed before him.

2. Failing to appreciate the finding that the accident was wholly caused by an unknown motorcycle and that the Appellant was not to blame.

3. Failing to apply the provisions of Section 8 and 9 of the *Traffic Act* and holding that the Appellant had failed to establish that it had sold motorcycle KTWA 479E to the 2nd Respondent at the time of the accident.

4. Failed to appreciate that the Appellant had proved its case on a balance of probability.

5. Arriving at an unlawful and unjust decision.

4. The Appellant prayed that the Appeal be allowed with costs and that the judgment in question be set aside.

5. Parties filed their written submissions which I have duly considered. The submissions were on the following 2 issues which the Court has adopted:

i. Whether the Appellant was the owner of the Tuktuk registration no. KTWA 479E.

ii. Whether the Appellant was vicariously liable for the acts of the driver of the Tuktuk.

6. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However, the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

Whether the Appellant was the owner of the Tuktuk registration no. KTWA 479E

7. It is the Appellant's contention that the trial court erred in finding that the Appellant had failed to prove that it had at the time of the accident, already sold the Tuktuk to the 2nd Respondent, yet it had provided sufficient proof. Although the police abstract indicated that the insured was the 2nd Respondent and the motor vehicle search showed the Appellant as the registered owner, the court

fell in error in failing to take cognisance of the fact that the abstract is prima facie evidence of the true owner. Further, that the finding of the trial court was contrary to the provisions of Section 8 of the *Traffic Act*. It was contended that the Appellant had rebutted that presumption of ownership in Section 8 of the Act by means of the tax invoice it exhibited. As such, on a balance of probabilities, the beneficial and insured owner of the Tuktuk was the 2nd Respondent. Reliance was placed in the cases of Joel Muga Opija v East African Sea Food Limited [2013] eKLR, Securicor where the Court of Appeal stated as follows:

> 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.

8. Also cited was the case of Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR where the Court of Appeal stated:

> 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 to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.

9. Relying on the cited cases, the Appellant thus submitted that it had proved on a balance of probabilities that it was not the owner of the Tuktuk.

10. This was opposed by the 1st Respondent who submitted that she produced a certificate of search indicating that the Appellant was the registered owner of the Tuktuk. The sales tax invoice produced by the Appellant as proof of sale of the Tuktuk is not proof of the sale unless specifically endorsed that the goods in question were paid for. The 1st Respondent thus asserted that the Appellant did not discharge the burden of proof placed upon it under Sections 107 and 109 of the *Evidence Act*, and did not rebut the presumption of ownership under Section 8 of the *Traffic Act*.

11. In his judgment, the learned Magistrate applied his mind to the issue of ownership of the Tuktuk and was not persuaded that the Appellant had sold the Tuktuk to the 2nd Respondent. He noted that the certificate of search indicated the Appellant as the owner and the police abstract indicated the 2nd Respondent as the registered or beneficial owner thereof. He stated:

> The second defendant called the one defence witness who testified in court. According to his evidence Tuktuk Registration Number KTWA 479E had been sold to the first defendant during the material time of the incident. The first defendant was in actual possession of the said Tuktuk at the time of the accident though the transfer of the logbook had not been effected. The second defendant produced a tax sales invoice although the second defendant could not establish the relationship between him and the first defendant as the first defendant's name did not appear anywhere in the tax sales invoice.

12. I have looked at the record. The invoice produced by the Appellant as evidence of sale of the Tuktuk gives the customer name as Panij Automobiles (K) Ltd. No nexus was demonstrated between the 2nd Respondent and the Appellant or indeed the said company. When the question was posed in cross examination, Benson Wambua Solomon, the Appellant's witness, stated, "I sold the vehicle to Wilfrd Moenga. I cannot establish the relationship between us and the 1st defendant in the tax invoice. An invoice is a billing. There is no possession in the tax invoice. In re-examination, he stated that,

> " The buyer had taken possession by the time of issuing invoice".

13. The Court of Appeal considered whether an invoice is proof of sale in the case of Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2009] eKLR cited by the 1st Respondent and stated:

> With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word "PAID" on the invoice and that would turn the status of the invoice into a receipt.

14. Flowing from the holding in the cited case, it can clearly be seen that an invoice can only be deemed to be a receipt if the same has a visible endorsement to the effect that the goods for which invoice was prepared, were paid for. The invoice produced by the Appellant has no such endorsement. Further it does not reflect the name of the 2nd Respondent. My finding therefore is that the said invoice is not proof of sale of the Tuktuk by the Appellant to the 2nd Respondent as alleged.

15. The Appellant further relied on the police abstract as proof of ownership of the Tuktuk by the 2nd Respondent and not by itself. That the police abstract indicates Wilfred Moenga, the 2nd Respondent as the owner of the Tuktuk is not disputed.

16. In the case of Joel Muga Opija (supra), the Court of Appeal, while agreeing that a document from the Registrar of Motor vehicles was the best way to prove ownership of a vehicle, noted that where a police abstract is not challenged and is produced in court without any objection, its contents cannot be later denied. And in (Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR, Okwengu, J. (as she then was) accepted the police abstract as proof of ownership of the vehicle in question noting that

> " 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."

17. In the case before me, the police abstract has been both challenged and objected to by the 1st Respondent. The cited cases are thus not helpful to the Appellant's case.

18. Section 8 of the *Traffic Act* provides:

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

19. A certificate of search or a logbook indicates prima facie, the owner of a vehicle. Anyone claiming the contrary must prove the same. The certificate of official search produced in the lower court indicated that the Tuktuk was registered to the Appellant. Its claim that the Tuktuk had been sold to the 2nd

Respondent is not supported by evidence. The invoice produced did not also prove that sale of the Tuktuk. The Appellant did not discharge the burden of proof placed upon it to demonstrate that it had sold the Tuktuk to the 2nd Respondent. Accordingly, the presumption of ownership under Section 8 of the *Traffic Act* was not rebutted. I therefore find and hold that the ownership of the Tuktuk vests in the Appellant.

Whether the Appellant was vicariously liable for the acts of the driver of the Tuktuk

20. The Appellant contends that it is not vicariously liable for the acts of the driver of the Tuktuk It was submitted that the learned Magistrate erred in pegging liability for the accident to ownership of the Tuktuk, thus holding the Appellant vicariously liable without establishing that the driver of the Tuktuk was its agent. The Appellant contended that there existed no relationship between it and the said driver who was neither its servant nor agent. He was not using the Tuktuk at the request of the Appellant nor performing any task or duty delegated to him by the Appellant. To buttress this contention, the Appellant cited the the case of John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR where the Court of Appeal held that:

> Vicarious liability is not pegged on legal ownership but on employer/employee or agent/ principal relationship with particular emphasis on who employed and controlled the tortfeasor.

21. For the Respondent, it was submitted that the issue of vicarious liability is not one of the grounds of appeal in the memorandum of appeal. It was also not specifically pleaded in the Appellants statement of defence in the lower court. This issue also never arose in cross examination. Relying on Order 42 Rule 4 of the Civil Procedure Rules, the 1st Respondent submitted that the Appellant has not sought the leave of the Court to raise the issue of vicarious liability as an additional ground of appeal.

22. Order 42 Rule 4 makes provision for grounds which may be taken in appeal as follows:

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

23. The above provision prohibits an appellant from relying on any ground of objection not set forth in the grounds of appeal. It follows that the court shall not hear an appellant on any such ground. Any new ground may only be raised and heard with the leave of court. The proviso to the Rule stipulates that even where such leave is granted, the Court is barred from basing its decision on a ground not raised in the memorandum of appeal unless the opposite party had been given sufficient opportunity to contest the appellant's case on that ground.

24. In the case of Frera Engineering Company Limited v Morris Mureithi Mutembei [2020] eKLR, Githua, J. considering a similar issue and the import of Order 42 Rule 4 stated:

> 16. The Court of Appeal when confronted with a similar scenario in Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto, [2018]

eKLR stated the following when interpreting Rule 104 of the Court of Appeal Rules which is equivalent to Order 42 Rule 4 of the Rules:

> " Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.
>
> It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance."

17. Given that the appellant did not seek leave of the court to raise the new ground of appeal and the respondent did not have an opportunity to contest the same, I find that it would be prejudicial to the respondent to have the ground entertained on appeal.

25. A careful reading of the memorandum of appeal filed by the Appellant shows that the same does not contain the issue of vicarious liability as one of the grounds for consideration by this Court. The Appellant did not seek court's leave to urge this new issue which has been raised for the first time in submissions. As stated by the Court of Appeal in the cited decision, submissions must be founded on the issues before the court and the evidence on record regarding an issue. The ground of vicarious liability was not set forth in the memorandum of appeal filed by the Appellant herein. The effect of raising the same, is to change the nature of its case surreptitiously at the submissions stage, to the prejudice of the 1st Respondent. In light of the foregoing, this Court declines jurisdiction to consider the issue of vicarious liability.

26. In the end and in view of the foregoing, I find that the Appellant has not laid any basis for the Court to interfere with the decision of the learned Magistrate. Accordingly, the Appeal herein is found to be without merit and is hereby dismissed with costs to the 1st Respondent.

DATED AND DELIVERED IN MOMBASA THIS 12TH DAY OF JANUARY 2024

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M. THANDE

JUDGE