



**CMC Motors Group Limited v Kingangi & 2 others (Civil Appeal
176 of 2023) [2024] KEHC 9098 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 176 OF 2023**

**AC BETT, J
JULY 19, 2024**

BETWEEN

CMC MOTORS GROUP LIMITED APPELLANT

AND

PATRICIA MWIKALI KINGANGI 1ST RESPONDENT

ZUKA GROUP LIMITED 2ND RESPONDENT

BRYAN MBUGUA KARIUKI 3RD RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. S. Atambo (CM)
in Thika CMC Civil Suit No. 506 of 2018 delivered on 11th July 2023)*

JUDGMENT

1. By way of a plaint dated 22nd June 2018, the 1st respondent moved the trial court for special damages in the sum of Kshs. 71,617, general damages, costs of the suit and interest.
2. The 1st respondent's case was that on 24th August 2017 she was lawfully travelling aboard motor vehicle registration number KCE 870J Scania Bus when on reaching Gatunyaga area along Thika Matuu Road, the appellant and 2nd respondent's motor vehicle registration number KCC 778J was negligently driven thus colliding with motor vehicle registration number KCE 870J as a result of which she sustained serious bodily injuries.
3. The appellant in a statement of defence dated 26th October 2018 denied the 1st respondent's averments and claimed that it was a stranger to the accident. They went ahead to state that they deal in the business of importation and sale of motor vehicles and that in the month of November, 2016, they sold motor vehicle registration number KCC 778J at the sum of Kshs. 400,000/ to the 3rd respondent.



4. The 3rd respondent joined the suit by way of a third-party notice and in his defence dated 20th November 2020, he averred that the accident was solely caused and/or contributed by the negligence of the driver and/or owner of motor vehicle registration number KCE 870J.
5. The 2nd respondent failed to enter appearance and did not file its statement of defence as a result of which interlocutory judgement was entered against them.
6. In a judgment of the trial court delivered on 11th July 2023, the trial court found the appellant and 2nd respondent 100% jointly and severally liable for having caused the accident and proceeded to award the 1st respondent general damages in the sum of Kshs. 680,000/, special damages in the sum of Kshs. 71, 617/, costs of the suit and interest.
7. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 9th August, 2023 seeking orders to have the decision of the trial court against the appellant set aside and that this court finds the 2nd and 3rd respondents liable for the accident. They also pray that they be awarded costs of this appeal.
8. The appeal is premised on the following grounds;
 - a. The learned magistrate erred in law and in fact in making a finding and holding that there was no proof of sale agreement of motor vehicle KCC 778J by the appellant to the 3rd respondent when the appellant had produced documentary evidence to wit a retail vehicle order dated 17th November, 2016, copies of the 3rd party's national identity card and KRA PIN certificate, a receipt dated 18th November, 2016 and a vehicle sales invoice dated 25th November, 2016 to prove the sale of the motor vehicle by the appellant to the 3rd respondent.
 - b. The learned magistrate erred in law and in fact in making a finding and holding that there was no proof of a sale agreement of motor vehicle registration number KCC 778J by the appellant to the 3rd respondent and no reasons furnished as to why the same was not produced when she had made a finding that the appellant's witness had produced several documents to prove the sale.
 - c. The learned magistrate erred in law and in fact in holding the appellant jointly and severally liable with the 2nd respondent when there was evidence on record to prove that the appellant is a motor vehicle dealer who in November 2016 had sold motor vehicle KCC 778J to the 3rd respondent.
 - d. The learned magistrate erred in law and in fact in finding the appellant was the registered owner of motor vehicle KCC 778J and holding the appellant 100% liable for causing the accident when the appellant had adduced evidence rebutting.
 - e. The learned magistrate erred in law and in fact in finding and holding that the appellant had failed to prove on a balance of probability that motor vehicle KCC 778J had been sold to the 3rd respondent as at the date of the accident giving rise to the suit.
 - f. The learned magistrate misapprehended the law on the rebuttable presumption that the person in whose name a motor vehicle is registered shall unless the contrary is proved be deemed to be the owner.
 - g. The learned magistrate erred in law and in fact in failing to find and hold that as at 24th August, 2017, the appellant had long sold motor vehicle KCC 778J to the 3rd respondent and the 2nd and 3rd respondents were the beneficial owners.



- h. The learned magistrate erred in law and in fact in finding and holding that the appellant was 100% liable for the accident giving rise to the suit when there was evidence on record and she had made a finding that motor vehicle KCC 778J was in the possession and use of the 2nd respondent and driven by the 2nd respondent's driver.
 - i. The learned magistrate erred in law and in fact in finding and holding the appellant vicariously liable for the 2nd and 3rd respondent's actions when there was evidence on record that they were not the agents of the appellant and the appellant had no interest in and/or control of motor vehicle KCC 778J.
 - j. The learned magistrate erred in law and in fact in failing to determine the case/issues between the appellant and the 3rd respondent.
 - k. The learned magistrate erred in law and in fact in holding and finding that the evidence adduced by the appellant had not proved its case/defence on a balance of probabilities.
 - l. The learned magistrate erred in law and in fact in deciding that the appellant was 100% liable for the accident giving rise to the suit against the weight of the evidence on record.
9. This court directed that the appeal be canvassed by way of written submissions. At the time of writing this judgement, I could only see the 1st respondent's submissions on record.
 10. In their submissions, the 1st respondent agrees with the finding of the trial court that the appellant had not transferred motor vehicle registration number KCC 778J Eicher Coach to anyone as at 24th August, 2017 and as such the appellant was the lawful and registered owner at the material time.
 11. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the 1st respondent and has established that the issue for determination is;- whether the appellant is liable for the accident that occurred on 24/8/2017.
 12. As the first appellate court, my duty is to review the evidence by subjecting it to a fresh scrutiny and analysis so that I can arrive at my own independent conclusion albeit with the knowledge that, unlike the trial court, I did not have that advantage of seeing or hearing the witnesses testify. See *Selle vs. Associated Motor Boat* [1968]EA 123.
 13. It was the finding of the trial court that motor vehicle registration number KCC 778J (hereinafter referred to as the "suit vehicle") was responsible for the accident that led to the 1st respondent sustaining injuries. The 1st respondent adduced a motor vehicle search for the suit vehicle which showed that the appellant was the registered owner of the motor vehicle.
 14. The gravamen of the appellant's appeal is that it is a motor vehicle dealer and that it sold the suit vehicle to the 3rd respondent the month of November 2016 prior to the occurrence of the accident and as such, it should be absolved of any liability involving the suit vehicle.
 15. Section 8 of the *Traffic Act* (Cap 403 of the Laws of Kenya) 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.”



16. This provision contemplates other aspects of ownership such as possession which are independent of registration and this position was echoed by the Court of Appeal in the case of *Securicor Kenya Limited v Kyumba Holdings Limited* [2005] 1KLR 748 where it was held as follows:-

“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle was the appellant.”

17. In line with section 116 of the *Evidence Act*, the burden rested with the appellant to prove that at the time of the accident, the ownership of the suit vehicle had passed to the 3rd respondent. The section provides as follows: -

“When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

18. The appellant, through its witness presented before the trial court a retail vehicle order dated 17th November, 2016 for motor vehicle chassis number 63283 addressed to the 3rd respondent capturing the value of the vehicle at Kshs. 400,000/-. They also produced an invoice and a receipt for the suit vehicle addressed to the 3rd respondent to prove that it sold the suit vehicle to the 3rd respondent. At the end of the hearing, the appellant’s testimony remained uncontroverted as the third-party failed to adduce any evidence in his defence.

19. In the third-party statement of defence captured on page 123 of the record of appeal, the 3rd respondent does not expressly dispute ownership of the suit vehicle. In fact, in his witness statement, the 3rd respondent who was by then the third party, Bryan Kariuki states that he is a director of the 2nd respondent company and confirms that the suit vehicle was owned by the 2nd respondent and duly insured by Kenya Orient Insurance Limited at the time of the accident. According to the CR12 at page 132 of the record of appeal, the 3rd respondent is listed as a director and shareholder of the 2nd respondent company. In my view, the totality of this evidence confirmed that the appellant had transferred ownership of the suit vehicle to the 3rd respondent who may then have been utilizing the subject motor vehicle for the benefit of his company. The trial court dismissed the appellant’s proposition in its judgement where it was held as follows: -

“With the evidence analyzed hereinabove, I find and hold that there was no proof of a sale agreement of motor vehicle no. KCC 778J and no reasons furnished as to why, if there was such a sale, bearing in mind the laws on registration of motor vehicle after sale wit NTSA which came into effect in 2012...”

20. Though the trial magistrate noted in her judgment that the provisions of section 8 of the *Traffic Act* were rebuttable, her findings spoke otherwise since she did not appreciate the evidence presented by the appellant and instead found that the absence of a sale agreement inferred no sale and that if all the sale occurred, the lack of registration of the motor vehicle after the sale vitiated the sale.



21. Courts have time and again held that a sale agreement and a logbook are not the only proof of ownership of a motor vehicle and that ownership should be determined on a case-to-case basis. The Court of Appeal in the case of *Mubambi Koja said v Mbwana Abdi* (2015) eKLR, held as follows:-
- “In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of ownership to the person named in that other form of evidence.”
22. This position was buttressed by the Court of Appeal in *Jared Magwaro Bundi & another v Primarosa Flowers Limited* (2018) eKLR where it was held as follows;
- “.. It was therefore held in *Mubambi Koja (supra)* that Section 8 of the *Traffic Act* recognizes registration book or the Registrar’s extract of the record as *prima facie* evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered”.
23. The accident in issue occurred on 24th August 2017 whereas the appellant stated that they transferred the ownership of the suit vehicle to the 3rd respondent in the month of November, 2016. This evidence was never challenged by the 3rd respondent. Further, from the police abstract, the subject motor vehicle was recorded as belonging to the 2nd respondent company and insured by Kenya Orient Insurance Limited. This is in concurrence with the witness statement file in court by the 3rd respondent who stated:-
- “The vehicle is owned by the 1st Defendant and duly insured by Kenya Orient Insurance Limited at the time of the accident and the insurance ought to defend the claim. We intend to bring it on board.”
24. Although the 3rd respondent did not attend court and testify during the hearing, the court had a duty to consider his defence which was already on record. The defence constituted an admission. Had the court considered the said defence, it would have arrived at the conclusion that either the 2nd respondent or the 3rd respondent were the beneficial owners of motor vehicle registration number KCC778J and had its control at the time of the accident that resulted in the injuries sustained by the 1st respondent.
25. The finding of this court is that the appellant discharged its burden of proof on a balance of probabilities as having divested itself of the ownership of the suit vehicle at the time of the accident and as such it is absolved of any liability arising out of the accident.
26. Accordingly, for the reasons set out above, I allow this appeal and set aside the judgement holding the appellant and the 2nd respondent jointly and severally fully liable for the accident. Instead, I find the 2nd and 3rd respondent jointly and severally liable for the accident. Consequently, judgement is hereby entered against the 2nd and 3rd respondents jointly and severally.
27. Since the 1st respondent did not challenge the trial court’s finding on quantum, the award of the trial court of Ksh 680,000/= being general damages and Ksh 71,617/= being special damages shall stand.



I also award the appellant costs of this appeal as well as the costs of the lower court, to be paid by the 2nd and 3rd respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 19TH DAY OF JULY 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Awori for the appellant

Ms. Keya holding brief for Mutunga & Co. for the 1st respondent

No appearance for 2nd and 3rd respondent

