



Car & General (Trading) Limited v JNK (Suing as the mother and legal representative of the Estate of EWK - Deceased) & 2 others (Civil Appeal 17 of 2020) [2023] KEHC 2289 (KLR) (20 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 17 OF 2020
DK KEMEL, J
MARCH 20, 2023**

BETWEEN

CAR & GENERAL (TRADING) LIMITED APPELLANT

AND

JNK (SUING AS THE MOTHER AND LEGAL REPRESENTATIVE OF THE ESTATE OF EWK - DECEASED) 1ST RESPONDENT

MARGARET SANGURA 2ND RESPONDENT

LEONARD MAMBO SIMIYU 3RD RESPONDENT

(An appeal from the judgement and decree of Hon M. Munyekenye PM in Webuye PMCCC No. 59 of 2017 delivered on 29/1/2020)

JUDGMENT

1. The the 1st respondent sued the appellant as well as the 2nd and 3rd respondents claiming damages arising from a road traffic accident which claimed the life of EWK who was then a lawful pedestrian along Wenuye-Kitale road and who was then hit by motor cycle registration number KMDG 667P then registered under the appellant and beneficially owned by the 2nd respondent and driven by the 3rd respondent. The 1st respondent attributed the occurrence of the accident to negligence on the part of the appellant and the 2nd and 3rd respondents.
2. The appellant filed its stament of defence denying liability over the accident and also disputed ownership of the motor cycle registration number KMDG 667P. The suit thereafter proceeded to hearing.



3. It was the 1st respondents case that the deceased was hit by the motor cycle while lawfully walking along the road. She called into court her evidence and that of corporal James Kigicha showing that the rider of the motor cycle was negligent.
4. Upon considering the evidence, the trial court found liability at 70:30 % in favour of the 1st respondent and awarded kshs 694,033/- triggering the instant appeal which is anchored on the following grounds;
 - a. The learned magistrate erred in law and fact in failing to consider the issue of vicarious liability between the appellant, the 2nd and 3rd respondents.
 - b. The learned trial magistrate erred in law and fact in making a finding on liability against the appellant without any evidence proving vicarious liability against it.
 - c. The learned trial magistrate erred in law and fact in making a finding on liability against the appellant despite there being no evidence or nexus to prove that there was an agent, servant or any employment relationship existing between the appellant, 2nd and 3rd respondents at the time of the alleged accident.
 - d. The learned trial magistrate erred in law and fact in making a finding on liability against the appellant despite there being no evidence showing that the rider of the motor cycle was in the course of lawful employment with the appellant at the time of accident.
 - e. The learned trial magistrate erred when she failed to make any finding on vicarious liability on the part of the appellant against the 3rd respondent when there was no evidence tendered by the 1st respondent whilst the appellant presented the court with sufficient evidence that the 3rd respondent was completely unknown to the appellant.
 - f. The learned trial magistrate erred in entering 70% liability against the appellant when no evidence was tabled to show that the appellant was in control, had authority or derived any benefit from the use of the motor cycle registration number KMDG 667P.
 - g. The learned trial magistrate erred in finding against the appellant whereas the police abstract indicated that the 2nd respondent was the beneficial owner by virtue of having purchased the said motor cycle and having insured it with Explico Insurance Company thus having an insurable interest.
 - h. The learned trial magistrate erred in failing to appreciate the appellant's evidence with regard to the sale of motor cycle to m/s Khetia Drapers Ltd which occurred prior to the accident date.
 - i. The learned trial magistrate erred in failing to appreciate the pleadings as filed and the 1st respondent's evidence absolving the appellant of any liability whatsoever with regard to the filed police abstract.
 - j. The learned trial magistrate erred by entering judgement against the appellant which sum is high and will cause the appellant tremendous financial loss and damage.



- k. The learned trial magistrate erred by failing to appreciate that the appellant had discharged the case against it to the standard required by law.
- l. The learned trial magistrate erred by failing to consider the evidence tendered by the appellant to prove that it was not the owner nor did it derive any benefit from the use of the suit motor cycle.
- m. The learned trial magistrate erred in failing to consider the position of law under the *Evidence Act* with regard to ownership.
- n. The learned trial magistrate erred by applying improper standard of proof whereas the appellant had presented the trial court with sufficient proof to meet the legally required threshold on balance of probabilities.
- o. The learned trial magistrate erred when she failed to consider the testimony of the appellant's witness which proved the appellant's non-involvement with the subject matter of the suit.
- p. The learned trial magistrate erred in finding that the appellant was the owner of of motor cycle registration number KMDG 667P despite evidence to the contrary.
- q. The learned trial magistrate erred in failing to consider the principle of *stare decisis* to the holdings in the Court of Appeal authorities on the issues before the court holding contrary to the finding of the learned trial magistrate.
- r. The learned trial magistrate erred disregarding the cumulative evidence adduced by the appellant which was not countered or disproved.
- s. The learned trial magistrate erred by holding that the appellant was liable for the accident and further misdirecting herself on the legal principles in awarding damages that were excessive in the circumstances.
- t. The learned trial magistrate erred by failing to consider that the deceased was a minor and thereby not allowed to engage in gainful employment.
- u. The learned trial magistrate erred in law when she failed to acknowledge that the suit motor cycle was not in the possession or actual ownership of the appellant at the time of the alleged accident and consequently holding it liable for the negligence as alleged by the 1st respondent.
- v. The learned trial magistrate erred when she failed to take into account the findings of the police investigation which wholly exonerated the appellant from the subject matter of the suit and in which subsequently an abstract was issued which did not bear the appellant's name as the owner of the motor cycle.
- w. The learned trial magistrate erred by failing to appreciate that the suit motor cycle was not in the possession and control of the appellant and therefore it was the responsibility of the beneficial and actual owner to have the same registered in their name.
- x. The learned trial magistrate erred by failing to appreciate that the appellant was in the business of selling motor cycles and the registration in its name was solely for purposes of enabling it carry its business effectively.



- y. The learned trial magistrate erred by delivering judgement against the appellant by failing to consider the evidence on record tendered by the 1st respondent and on behalf of the appellant.
5. The appeal was disposed of by way of written submissions. Both parties complied. The appellant raised the following issues;
 - a. Whether the trial magistrate erred in finding the appellant as the owner of the motor cycle.
 - b. Whether the trial magistrate erred in finding the appellant liable for the accident.
 - c. Whether the trial magistrate erred by not appreciating the evidence adduced when rendering the judgement.
 - d. Costs.
6. On whether the trial magistrate erred in finding the appellant as the owner of the motor cycle, the appellant argues that the appellant was the registered owner of the motor cycle for purposes of meeting its statutory requirements to enable it sell the motor cycle and once a motorcycle is sold, the appellant signed all the transfer documents and it was the duty of the purchaser to have it transferred to their names. That the trial magistrate failed to appreciate that the motor cycle had been sold off prior to the accident and was owned by Margaret Sangura (2nd Respondent). In support of this, counsel cites the provisions of section 9(1) of the *Traffic Act*, cap 403, the decisional authorities in *Muhambi Koja Vs Said Mbwana Abdi* (2013) eKLR, *Abson Moors Limited Vs Tabitha Syombua Mutua & another* (2019) eKLR, *Nancy Ayemba Ngaira Vs Abdi Ali* (2010) eKLR, *Samuel Mukunya Kamunge Vs John Mwangi Kamuru* (2005) eKLR, *General Motors East Africa Limited Vs Eunice Alila Ndeswa & another* (2015) eKLR
7. It is submitted that the insurance sticker showed that the 2nd respondent was the insured and in the circumstances she ought to be the owner as no person can take out an insurance policy on behalf of the other. On this limb, the decisions in *Lion Of Kenya Insurance Company Limited Vs Edwin Kibuba Kbone* (2018) eKLR and *Abson Motors Limited (supra)* have been cited.
8. On whether the trial magistrate erred in finding the appellant liable for the accident, it is asserted that there was no employer-employee relationship between the appellant, 2nd and 3rd respondents. That the magistrate misdirected herself in light of the evidence that the 3rd respondent was under the control of the 2nd respondent while the appellant was in the business of selling motor cycles that the appellant had not delegated any work to the respondents at the time of accident.
9. That the 1st respondent did not adduce any evidence showing that the rider was the appellant's employee. In this regard, the decision in *Securicor Kenya Limited Vs Kyumba Holdings Limited* (2005) eKLR, *John Nderi Wamugi Vs Rubesh Okumu Otiangala & 2 others*-Kisumu CA 24 of 2015, *General Motors East Africa Limited* (Supra), *Joseph Wabukho Mbayi Vs Frida Onyango* (2019) eKLR and *Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd* (1991) 2KAR 258.
10. On the issue of whether the trial magistrate erred by not appreciating the evidence adduced when rendering the judgement, it is submitted that the evidence adduced in court showed that the suit motor cycle was not owned by the appellant or that the appellant was in any way liable for the accident. That in light of the weight of the evidence on record, the appellant established the requisite burden of proof



as required by law. On this limb, reliance is placed on the provisions of section 107,108 and 109 of the *Evidence Act* and the case of *Alice Wanjiru Rubiu Vs Messic Assembly of Yahweh* (2021) eKLR.

11. On the issue of costs, it is submitted that the award of costs is at the discretion of the court and follows the event. In the instant appeal, the appellant was wrongly sued in the trial court and this court and thus entitled to costs.
12. For the 1st respondent, the following issues were identified; whether the appellant proved that ownership of the motor cycle had passed on to the 2nd and 3rd respondents, whether the 1st respondent proved her case on a balance of probability and the costs of this appeal.
13. On the 1st issue, it is submitted that when the 1st respondent testified, she produced copies of records showing that the motor cycle was registered in the appellant's name and that it was incumbent upon it to produce evidence of sale of the said motor cycle. That the invoice produced fell short of a sale agreement. That in all, the appellant failed to prove that ownership had passed to the 2nd and 3rd respondents. He relies on the provisions of section 8 of the *Traffic Act* and *Muhambai Kojia (supra)* and *Lake Flowers Vs Cila Franclyn Onyango Nyonga & another*-Nakuru Civil No 2010 of 2006 (UR).
14. On the 2nd issue, it is asserted that the trial magistrate correctly found that the defendants were jointly and severally liable. It was submitted that the appellant did not at all prove that it had sold the subject motor cycle to the 2nd Respondent.
15. On costs, it is submitted that the appeal be dismissed with costs to the 1st respondent.

Analysis and Determination

16. I have given due consideration to the record and the rival submissions. The duty of a first appellate court was stated in the case of *Oluoch Eric Gogo -Vs- Universal Corporation Limited* [2015] eKLR, where the court restated the duty as follows:

"As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another v Associated Motor Boat Co Ltd & Another* (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect....."

17. From my analysis of the record and the submissions filed in the subordinate court and this court, I am of the view that the issue of ownership of the subject motor cycle is of paramount importance in this appeal.
18. On the issue of ownership, the appellant pleaded before the trial court that it was only registered as the owner of the motor cycle for purposes of compliance with with statutory requirements to enable it transact its business of selling the same.
19. The appellant produced into evidence an invoice number DIST000003949 showing that 10 motor cycles had been sold to Khetia Drapers Ltd. The invoice does not make reference to any registration number or other feature identifying the subject motor cycle to the others.
20. The police abstract produced showed the owner of the motor cycle as Margaret Sangura, the 2nd respondent herein. It is not in doubt that the rider of the cycle at the time of the accident was the 3rd respondent herein and who was a servant and or agent of the said 2nd respondent.



21. The question then to be asked herein is whether in the circumstances of this appeal, the appellants proved that it was not the owner of the subject motor cycle. This is in light of the records produced by the 1st respondent.

22. It is trite law that under section 8 of the *Traffic Act*, the owner of a motorcycle or motor vehicle is the one whose name appears on the logbook or as portrayed by the copies of records. The section provides thus;

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

23. From the section, unless the contrary is shown, the person whose name appears on the logbook is the owner. In the circumstances herein, the appellants argued that it sold off the subject motor cycle to the 2nd respondent. It did not however produce copies of the sale agreement or receipt of sale to the said Margaret Sangura.

24. Section 107 and 108 of the *Evidence Act* places upon the appellants the duty of proving that the motor vehicle had indeed been sold to another person. The evidence in this case was in the form of an invoice in favour of Khetias Drapers Ltd.

25. Our jurisprudence recognizes that a different person may be in possession of a motor vehicle at a given time though the details of registration may be in somebody else's name. Our jurisprudence is replete with such authorities which I will make reference to the authority in *Nancy Ayemba Ngaira V Abdi Ali* [2010] eKLR, where JB Ojwang held;

"There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership."

26. The police abstract in this case makes reference to Margaret Sangura as the owner and therefore, in this case, can the abstract be taken as conclusive proof that the abstract was sufficient proof that the appellants were the owners of the motor cycle?

27. This question was answered in *Wellington Nganga Mathiora v Akamba Public Road Services Ltd & Anor* [2010] eKLR where it was held:

"Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even.....challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as a proof of ownership in the absence of anything else as proof in civil cases was within the standard of probability and not beyond reasonable doubt as in criminal cases....."



28. In *Thuranira Kaururi v Agnes Mubeche* [1997] KLR the Court of Appeal stated:
- "As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicles showing the registered owner of the lorry.
- ...where ownership is denied it was incumbent upon the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicles showing the registered owner of the lorry."
29. It also gave the following guidelines regarding the interpretation of section 8 of the *Traffic Act*,
- i. That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.
 - ii. Where there exists other compelling evidence to proof otherwise then the court can make a finding of ownership that is different from that contained in the logbook.
 - iii. Each case must however be considered in its own peculiar facts.
30. In this case, the appellant categorically stated that it is in the business of importing and selling motor cycles and that the registration of the motor cycle in its name was in compliance with a statutory obligation to enable it carry on its business. The 1st respondent did not dispute this fact. During the evidence of the appellant, DW1 stated that the motorcycle had already been sold to Khetia Drapers prior to the accident and that it was the 2nd Respondent who was to pursue the issue of transfer of ownership as she was the new owner thereof. It was therefore improper for the appellant to be roped into the proceedings yet the ownership had changed hands. Indeed, the 2nd respondent went ahead and had the motor cycle insured under her name.
31. Going back to the circumstances of this case, the 1st respondent at paragraph 5 of the plaint pleaded thus,.
- "At all material times relevant to this suit, the 1st defendant was the registered owner of motor cycle registration number KMDG 667P make, TVS type motor cycle, the 2nd defendant was the owner in possession and or the beneficial owner of the said motor cycle while the 3rd defendant was the rider of the said motor cycle." (Emphasis)
32. From the above, I find that the 1st respondent acknowledged that the motor cycle was in possession of the 2nd respondent. This is further fortified by the legal principle that a party is bound by his pleadings where in this case, the 1st respondent makes the express admission that the motor cycle was owned by the 2nd respondent as opposed to the appellant. The insurance sticker produced by PW-2 equally showed that the insured was the 2nd respondent. Clearly, an individual other than the owner of the motor cycle can take an insurance policy as opposed to the registered owner.
33. For the foregoing reasons, I find that the motor cycle was indeed owned by the 2nd respondent as opposed to the appellant.
34. Having found as such, the issue of liability of the appellant in the causation of the accident is dispensed with. There is no liability attaching to the appellant. The finding on liability by the learned trial magistrate was therefore arrived at in error and must be reversed.



35. In view of the foregoing observations, it is my finding that the appeal has merit. The same is allowed with an order that I hereby set aside the trial magistrate's finding on liability as against the appellant with the result that liability for the accident is to be jointly and severally borne by the 2nd and 3rd respondents. I shall not disturb the trial court's finding on quantum of damages. The appellant is also awarded costs of this appeal.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH ,2023.

D.KEMEI,

JUDGE.

In the presence of :

Miss Muthee for Kabiru for Appellant

Miss Wanyama for Bw'Onchiri for 1stRespondent

No appearance for 2ndRespondent

No appearance for 3rdRespondent

Mr Kizito - Court Assistant

