



REPUBLIC OF KENYA



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**Omumachi v Sakwa (Civil Appeal E008 of 2022)
[2023] KEHC 21166 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E008 OF 2022**

**PJO OTIENO, J
JULY 21, 2023**

BETWEEN

WYCKLIFFE OMULUBI OMUMACHI APPELLANT

AND

MICHAEL OSUNDWA SAKWA RESPONDENT

JUDGMENT

Case Background

1. The plaintiff filed this suit via a plaint filed on April 23, 2018 seeking judgment as against the defendant for special general damages, costs of the suit and interest. The cause of action is pleaded to have arisen out of road traffic accident that was said to have occurred on November 2, 2018. The particulars of negligence pleaded against the defendant were that the plaintiff on the incident day and time was a lawful riding as pillion passenger on a motorcycle along the Sabatia-Ebuyangu road when at Shikunga area the defendant's motor vehicle KAP 478T Range Rover was negligently driven that it caused an accident by knocking down the plaintiff and causing him injuries.
2. PW1, Corporal Vincent Obare of Butere Traffic Base who conducted the investigation produced the police abstract in respect to the accident to the court. His testimony was that investigations revealed that the motor cycle was turning right and that the motor vehicle ought to have kept its distance and allowed the motorcycle to turn. On cross-examination he told the Court that he was not able to identify or trace the motorcycle involved in the accident.
3. PW2, the plaintiff, testified that he was a lawful pillion passenger on a motorcycle along the Sabatia-Ebuyangu road coming from Sabatia direction when at Shikunga area the rider indicated he was turning right and moved to the right side of the road when the defendant's motor vehicle KAP 478T Range Rover came from behind, lost control and veered onto the right lane thus knocking them down. On cross-examination, he told the Court that the defendant's motor vehicle was coming from the opposite direction and that his medical expenses were catered for by NHIF.



4. Prior to the occurrence of the accident, the motorcycle on which the plaintiff was a pillion passenger was being ridden on the left hand side of the road heading towards Shikunga direction. Upon reaching Shikunga junction, the motorcyclist switched on the right indicator to show that he was turning right. The motorcyclist safely moved from the left lane of the road to the right hand side of the road but before the motorcyclist got off the tarmac road, the defendant's motor vehicle that was coming from opposite direction and that was being driven at a very high speed failed to slow down and allow the motorcycle thereby knocking it from the side hence causing the accident.
5. For the defence, DW1, Michael Osundwa, told the court that the motor vehicle which was involved in the accident no longer belonged to him being that he had sold it to Timothy Mutuma Muchiri who took possession of the same on April 30, 2018. He produced the sale agreement dated April 30, 2018 and transfer as exhibits in the case. It was his position that at the time of the accident he had fulfilled all his obligations as a seller by executing the transfer of the said motor vehicle. He conceded that he was the owner of the motor vehicle registration number KAP 478T as the registration details of the vehicle reflect his name and that being the plaintiff had identified him as the registered owner of the motor vehicle prior to the accident but should not be held liable for injuries suffered by the plaintiff.
6. DW2, Timothy Mutuma Muchiri testified that he purchased the accident motor vehicle on April 30, 2018 from the defendant and immediately took possession of the same after paying the defendant Kshs 750,000 and took the original logbook but did not to have the same transferred into his name and the insurance policy was still in the Defendant's name.
7. DW3 told the court that he became the driver on part-time basis for the said Timothy Mutuma Muchiri immediately after he purchased the said motor vehicle from the defendant. He testified that on the material day while he had been sent by Mr Muchiri to Kisumu International Airport to pick a friend of his, on his way while passing the Sabatia-Shikunga area, a motorcyclist rode a motorcycle across the road and perpendicular to the direction at a great speed in which he was at the time heading and right in front and path of the vehicle which he was driving in such a manner that he was forced to, maneuver the vehicle so as to avoid colliding with the motorcycle head-on. When he realised that the rider had already crossed the yellow line and moved from the right lane with which he had joined the road to the left lane on which he was driving, he swerved to the right thereby allowing the motorcycle to continue its trip across the road but because of the speed and abruptness with which the said motorcycle had crossed the road, he could not avoid the motorcycle altogether and the front left corner bumper of the vehicle which he was driving collided with the mid to rear section of the motorcycle.
8. In a reserved judgment, the trial court, dismissed the plaintiff suit against the defendant on grounds that the defendant was not in any way vicariously liable to the accident caused by DW3 being that as at date and time of the accident, he was not the owner of the said motor vehicle. however, the Police abstract and copy of records produced both indicated that the defendant as the owner the said accident motor vehicle KAP 478T.
9. The evidence led left no doubt that the defendant had sometimes on or about April 30, 2018 sold the motor vehicle to one Timothy Mutuma Muchiri, DW2 who took possession and control of the same.
10. The appellant being aggrieved and dissatisfied with the judgment and decree of the trial court has lodged this appeal on the grounds that; the trial court committed an error of law and fact in his appreciation on the standard of proof in civil cases based on the admission by the defendant of the occurrence of the accident and being the insured and registered owner of the motor vehicle at the time of the, by arriving at a finding against the weight of evidence tendered by the Appellant thereby occasioning a miscarriage of justice, by creating an inference that the Appellant ought to have enjoined a third party unknown to the appellant thereby occasioning a miscarriage of justice.



11. He urges this court to re-evaluates the evidence afresh, set aside the judgment by substituting the same with an order granting damages to the appellant. He also prays for the costs of the subordinate court to be awarded to him with interest from the date of judgement.

Analysis and Determination

12. Having perused appellant's testimonies, the defence case, trial court's judgment on the same as well as the respective submissions by both the applicant and the respondent, I find the only issue for determination to be on the liability. The fact of occurrence of the accident and injury to the appellant is not in dispute because the evidence by DW3 confirms the occurrence of the accident and that the motor vehicle which he was driving at the time knocked the motorcycle.
13. That leaves the question on liability on whether the respondent was liable. The question takes a two steps determination; weather with the evidence of disposal of the subject motor vehicle, the respondent could be liable, and if that be answered in the affirmative if having been not the driver he was vicariously liable to the appellant for the accident.
14. A look at the statement of defence filed show that the defendant put up a general traverse but proceeded to file witness statements and documents to show that he had sold the subject motor vehicle before the occurrence of the accident. As said earlier, the registration of the motor vehicle remained with the defendant who however asserted in his witness statement filed and served with the defense that he had sold the motor vehicle to one Timothy Mutuma Muchiri and exhibited a sale agreement to that effect. With such information, the appellant opted not to reconsider his pleadings and instead opted to sojourn on. He equally had the opportunity to object to the production of evidence of sale but opted to actively participate in the production of such evidence by very extensive cross examination thus inviting the application of the exception to the rule that parties are bound by their pleadings. The way the cross examination was conducted, both sides must be taken to have invited the court to determine whether or not the respondent had sold the motor vehicle before the accident. In [Sarab Jelangat Siele vs Attorney General & 3 Others](#) [2018] eKLR the Court of Appeal held:

“It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination... However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court's decision when a party addresses the court and leads evidence on the issue.”

15. It is evident from the evidence led in the instant case that the defendant had let go of his interest in the subject motor vehicle. The agreement of sale as well as the admission of the transaction by DW2 told it all that the defendant had let go of his interest in the motor vehicle by way of sale. Section 8 of the [Traffic Act](#) 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. The principle envisaged in this section is that there can be actual, possessory and beneficial ownership of a motor vehicle which exists independently of registration. In [Samuel Mukunya Kamunge vs John Mwnagi Kamuru](#), Nyeri (2002) the court held: -

“It is true that a certificate of search from the Registrar of Motor vehicles would have shown who was the registered owner of motor vehicle according to the records. That however, is not conclusive proof of actual ownership of the motor vehicle as section 8 of the [Traffic Act](#) provides that the contrary can be proved. This is the recognition of the fact that often



times motor vehicles change hands but the records are not amended. I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of Motor Vehicles could prove ownership of the motor vehicle. I find a police abstract report having been produced showing the respondent as the owner of the motor vehicle No. KAH 204A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle and 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 No. KAH 204A was owned by the respondent."

16. Similarly, in *Nancy Ayemba Ngaira vs Abdi Ali* (2010) eklr the court held that;

"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. Indeed, the evidence adduced in the form of the police Abstract, showed on a balance of probabilities, the 1st defendant was one of the owners of the matatu in question."

17. In line with innumerable authorities on the interpretation of section 8 of the *traffic Act*, the court holds that presumption of ownership in section 8 of the *Traffic Act* is rebuttable and that the respondent had rebutted it through credible evidence which he presented to the court. That evidence on rebuttal is not displaced by the reliance on the provisions of section 9(5) of the *Traffic Act* which commands that upon the sale of motor vehicle the seller shall submit the transfer forms and such other particulars as may be prescribed and shall deliver the registration certificate in respect of such vehicle whereupon the vehicle shall be registered in the name of the new owner.
18. Even the invitation of section 9(6) of the *Traffic Act* rendering it unlawful to use a motor vehicle or continue keeping it in possession for more than 14 days after assuming its possession, without changing its ownership affords no assistance to the appellant.
19. In light of the above, I find the defendant to have discharged sufficient evidence on a balance of probabilities indicating that ownership of the said motor vehicle had been transferred to DW2 who had from time of its purchase become a beneficial owner or a possessory owner. I hold that DW2, though not registered owner for practical purposes qualified to be the more relevant party that the applicant was to sue. The applicant upon knowing that the defendant had sold the said motor vehicle to DW2, he ought to have at the very least moved to enjoin DW2 as a defendant in the suit. The trial magistrate rightfully expressed itself in finding that the defendant was not liable for the accident.
20. The only natural and logical from the foregoing discussion is that the exposition of the law when applied to the evidence adduced before the trial court affords no room for interference with the decision dismissing the claim. The decision is upheld that the appellant was non suited against the respondent on account of the fact of sale. Having found that the respondent was not the owner as pleaded, and



having not been the tortfeasor, the questions as to his liability to the appellant is moot and need no consideration by the Court.

21. The appeal is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Ms. Anono for the Appellant

Mr. Shikanda holding brief for Khaemba for the Respondent

Court Assistant: Polycap

