



Twiga Transworld Traders Limited v MKM & 2 others (Civil Appeal E52 of 2023) [2024] KEHC 12546 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E52 OF 2023**

**FR OLEL, J
OCTOBER 17, 2024**

BETWEEN

TWIGA TRANSWORLD TRADERS LIMITED APPELLANT

AND

MKM 1ST RESPONDENT

AMA 2ND RESPONDENT

PMK 3RD RESPONDENT

JUDGMENT

A. Introduction

1. The 1st respondent did file the primary suit as mother and next friend of her child AM, where she deponed that on 10th August 2019, they were pillion passengers on Motorcycle registration Number KMEQ xxxZ (hereinafter referred to as the suit motor Motorcycle), which was being lawfully driven along Mwingi- Garrisa Road, when at Kivou area, motor vehicle registration Number KCR xxxR Nissan Salon, was so carelessly and recklessly driven that it lost control and knocked down the suit motor cycle resulting in her son sustaining severe bodily injuries.
2. The 2nd respondent, who was the defendant in the primary suit did file his statement of defence denying all the facts pleaded by the 1st respondent and in the alternative averred that it was the 1st respondent and the rider/driver of the suit motorcycle who were negligent, and failed to properly control the suit motorcycle, thereby allowing the same to be ridden while loaded with excess passengers amongst other failures and this significantly contributed to the said accident occurring. The 2nd respondent did initiate third-party proceedings and was granted leave to enjoin the appellant herein being that they were the registered owner of the said suit motorcycle.



3. The appellant did file their third-party statement of defence, denying all the averments made in the plaint and further stated that they were in the business of assembling and selling motorcycles. They had sold the suit motorcycle to one PMK, who had full control of the same and had passed proprietary interest therein to him. They therefore had been wrongly sued and no cause of action arose against them. The Appellant too initiated third-party proceedings against the said PMK (the 3rd respondent herein). Though served and enjoined as the 2nd third party he did not enter appearance nor did he file his statement of defence. The suit thus proceeded in his absence.
4. During the trial, the 1st respondent testified and called a traffic police officer to corroborate her case. The 2nd respondent did not offer any evidence, but the Appellant called their operations manager, who testified and adopted his witness statement. It was his evidence that they had long sold the suit motorcycle to the 3rd respondent on 7th December 2018 and handed over to him the duly signed transfer forms and logbook. As of the date of the accident, they had no control or interest over the subject motorcycle.
5. The trial Magistrate did consider the evidence presented and did find that all parties shared liability for the accident that occurred. Specifically, the Appellant had failed to discharge the burden that they had sold the suit motorcycle to the 3rd respondent herein. On liability ratio, the 1st respondent was to shoulder 33.3%, while the 2nd respondent and the Appellant were to share the remaining ratio at 66.6% equally. On quantum, the plaintiff was awarded general damages of Kshs.150,000/= Special damages of Kshs.7,600/= plus costs and interest.

B. The Appeal

6. The Appellant, being dissatisfied by the whole judgment did file their memorandum of Appeal dated 21st July 2023 and raised the following grounds of appeal namely: -
 - a. That the learned Magistrate erred in fact and in law by finding the Appellant liable for causing the accident without any evidence establishing and proving that the Appellant was in actual control, had actual authority, and derived a benefit from motorcycle registration Number KMEQ xxxZ.
 - b. That the learned Magistrate erred in law and in fact by finding the Appellant liable for causing the accident without any evidence establishing and proving vicarious liability, agent servant or employee relationship with the 2nd third party at the time of the accident involving motor cycle registration Number KMEQ xxxZ.
 - c. That the learned Magistrate erred in law and fact in fact and misdirected himself by finding liability against the Appellant on the basis that it was the registered owner of the motorcycle registration number without considering the unique facts of the case as regards the actual ownership of the same.
 - d. That the learned Magistrate erred in fact and in law in failing and misdirected himself by ignoring the Appellant's evidence on ownership and by failing to address the issue of the actual ownership of motorcycle registration number KMEQ xxxZ at the time of the traffic accident.
 - e. That the learned Magistrate erred in fact and in law and misdirected himself by ignoring and failing to consider the Appellant's evidence on the sale of motorcycle registration number KMEQ xxxZ to the 2nd third party, PMK, before the date of the traffic accident.
 - f. That the learned trial Magistrate erred in law and fact and misdirected himself by failing to appreciate that the appellant had discharged his duty by proving his case on a balance of



probabilities with regards to ownership of motorcycle registration number KMEQ xxxZ at the time of the accident.

- g. That the learned trial magistrate erred in law and fact and misdirected himself by failing to consider evidence and testimony in support of the appellant's case showing that it was registered as the owner of the motorcycle since it was in the business of importing and selling motorcycles and such registration was a statutory requirement set down by NTSA for purposes of sale and not actual possession.
 - h. That the learned trial magistrate erred in law and fact and misdirected himself by failing to approve the principle of stare decisis.
7. The appellant thus urged this court to allow this Appeal and set aside the award made by the trial court on 22nd June 2023.

Evidence at Trial.

8. PW1 MKM adopted her witness statement, where she stated that on 10th August 2018, she and her son were pillion passengers on the suit motorcycle, and while on Mwingi -Garissa road at Kivou area, the suit motor vehicle rammed into them from behind causing her son to sustain severe bodily Injuries. She blamed the driver of the said motor vehicle for speeding and driving carelessly thus causing the said accident. After the accident, they were rushed to Mwingi Level 4 Hospital for treatment and later she reported the accident to the police. Her child had not fully recovered from injuries sustained, she produced all her claim supporting documents as Exhibit, and prayed to be compensated.
9. Upon cross-examination, the 1st respondent confirmed that at the time of the accident she had carried her two children aged 11 years and 9 years on the said motorcycle and acknowledged that the law did not allow for a motorcycle to carry more than one pillion passenger. She also confirmed that they were not putting on helmets as required and had recovered from the injuries sustained. She reiterated that the driver of the suit motor vehicle was to blame for the accident because he was over speeding. She did not lay any blame on the Appellant company.
10. PW2, PC Majungu Mohammed Juma of Mwingi traffic base confirmed that an accident did occur on 10.08.2019 at about 5.30 pm involving the suit motor cycle and the suit motor vehicle, whose driver was to shoulder the blame as he had knocked the said motorcycle from behind. As a result, PW1 and her children were injured and they were rushed to Mwingi level 4 hospital, where they were treated and discharged on the same day. The police did visit the accident scene and after investigations were complete, they issued the 1st respondent with a police abstract, which he produced into evidence.
11. Upon cross-examination, PW2 confirmed that he was not the investigating officer and had relied on the OB record to get his facts. He was not aware that the suit motorcycle was carrying three pillion passengers and that was against the law, for the said motorcycle should have carried only one pillion passenger. He also reiterated that the driver of the said suit motor vehicle was to blame for the accident as he had hit the suit motorcycle from behind.
12. The 2nd respondent who was the defendant in the primary suit did not call any witness to testify on his behalf, but the Appellant did call their operation manager Jacob Mwaniki Mulyungi who testified and stated that the Appellant's company dealt in the trade of motorcycle import and sale of the same to third parties. They had sold the suit motorcycle to the 2nd third party/ 3rd respondent herein on 07.12.2018 and after he completed payment of the purchase price, they handed over the original logbook and duly signed transfers to him to enable him to process the logbook in his name. As at the time of the



accident, they had no control or interest in the suit motorcycle. He urged the court to absolve them from shouldering any liability.

C. Analysis & Determination

13. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).
14. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Ouseph* AIR 1969 Kerala 316.
15. The only issue that arises for determination is whether the trial court correctly apportioned liability amongst the parties herein and specifically if he was right to hold that the appellant had failed to discharge the burden of proving that they had sold the subject suit motorcycle to the 3rd respondent herein.
16. The issue of apportionment of liability was discussed in *Khambi and another Vs Mahithi and another* (1968) E.A 70 where it was held that;

“It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.” Similar decisions have been reached in *Mahendra M Malde Vs George M Angira* Civil Appeal No 12 of 1981.

17. In the case of *Ali Abdi Dere v Hash Hauliers Limited & another* [2018] eKLR Odunga J(as he then was) analyzed the above case and held that;

“Obviously, the High Court (not the Court of Appeal as erroneously stated by the Plaintiff) in *Leonard Mungania v Jessikay Enterprises & Another*, supra, a decision only of persuasive value, did not consider whether a financier of a motor vehicle who is jointly registered as a co-owner of a motor vehicle to protect his interest in the payment of the installments of the hire purchase agreement has a duty of care, and or is liable, to a person who is injured in an accident involving the motor vehicle over which he has no control and driven by a person who is an agent of the hirer who operates the vehicle for his own purposes and not purposes of the financier

.....

...a person in the position only of a financier to the acquisition of a motor vehicle and who is registered as a joint owner of the motor vehicle for the purpose of protecting his interest in the full payment of the funds that he has invested in the financing arrangement, without any interest in the operation of the motor vehicle by the purchaser of the motor vehicle, and



therefore not vicariously liable for the use of the vehicle by the purchaser's agent/driver is not a necessary party to a suit for the recovery of damages in negligence arising from alleged negligent use of the motor vehicle.”

18. In the decision of [*Samuel Mukunya Kamunge Vs John Mwangi Kamuru Civil Appeal NO 34 OF 2002*](#)

“It is true that a certificate of search from the Registrar of motor vehicle would have shown who was the registered owner of the motor vehicle according to the records held at the registrar of motor vehicle, 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 in recognition of the fact that often time's vehicle changes 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 vehicle could prove ownership of the motor vehicle.”

19. The court of Appeal also in the case of Jared Magwaro Bundi & Another Vs Primarose Flowers limited (2018) eklr , held that;

“It was therefore held in Muhambi 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 a possessory owner. Such a owner though not registered for the practical purpose maybe more relevant than in whose name the vehicle is registered.”

The position taken by this court in Joel Muga opija (supra) and Muhambi Koja (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance that the technical chains of form, the latter which does not ordinarily look at the justice of a case.”

20. Finally, the same finding was also arrived at by the Court of Appeal in the case of Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 others where they stated that;

“the ownership of a vehicle passes on the sale and the delivery and the registration book of the vehicle is only evidence of title. This court has held that sections 9(1) and 14 of the [*Traffic Act*](#) provide penal sanctions but do not decide the issue of ownership of a vehicle..... ownership of a vehicle (which is a chattel) is upon sale governed by the [*sale of Goods Act*](#).”

21. The Appellant's witness did testify that they engage primarily in the business of importing motorcycles and selling them to third parties. They sold the suit motorcycle to the 3rd respondent on 07.12.2018 and after he completed paying the purchase price, they handed over the original logbook and duly signed transfers to him to enable him to process the logbook in his name. At the time of the accident, they had no control or interest in the suit motorcycle. They were thus not vicariously liable for the accident that occurred and should not be made to bear any liability. The Appellants witness did produce the sales receipt and inspection document to confirm that the said motorcycle had been sold. It is my finding that this evidence on a balance of probability did prove that the said suit motorcycle had been sold, though ownership was not yet registered to the de facto, beneficial, or possessory owner, who in this case was the 3rd respondent.



22. The trial magistrate did err in his assessment of the Appellant's evidence and was wrong to find that they had not proven the sale of this motorcycle. Further, his finding that since the logbook was in the name of the appellant, they could not escape liability too was a fallacy as ownership of a vehicle passes on the sale and delivery. The registration/Logbook of the vehicle is only evidence of the title.
23. The respondent, therefore, did discharge the legal and evidential burden placed on them as provided under sections 107, 109 & 112 of the *Evidence Act*, Chapter 80 laws of Kenya. The evidential burden to disapprove the Appellant's evidence, then fell/shifted on the 1st respondent to be discharged as provided for under section 108 of the *Evidence Act*, Chapter 80 laws of Kenya. She failed to do so and was the party who would fail if no proper rebuttal was made.
24. Finally, there was also no evidence to show that the rider of the said motorcycle was either the appellant's driver, agent, and/or servant. No vicarious liability could therefore be passed to them. The trial court finding that the Appellant was also jointly liable for this accident that occurred was therefore made without any factual basis and the said finding must be set aside Ex debito justitiae.

E. Disposition

25. Accordingly, the holding of the trial magistrate to find that the Appellant and 2nd respondent were jointly and equally liable at 66.6% for the accident that occurred, is hereby set aside and the same is substituted with a finding that the 1st and 3rd respondent will equally share 50% liability for the accident that occurred, while the 2nd respondent herein will also share 50% liability for the accident given that his driver knocked the suit motorcycle from behind.
26. The Appellant is awarded half costs of this Appeal which is assessed at Kshs.75,000/= all-inclusive.
27. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 17th Day of October, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Susan Court Assistant

