



REPUBLIC OF KENYA



**Rana Auto Selection Limited v Polle & another (Civil Appeal E107 of 2023)
[2024] KEHC 13899 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E107 OF 2023
JK NG'ARNG'AR, J
NOVEMBER 11, 2024**

BETWEEN

RANA AUTO SELECTION LIMITED APPELLANT

AND

JAPHETH MUYE POLLE 1ST RESPONDENT

SALIM MOHAMED 2ND RESPONDENT

(Being an appeal against the Judgment of Hon. R. Amwayi (PM) delivered on 19th April 2023 in Kaloleni Principal Magistrate's Court Civil Suit No. 151 of 2020, Japheth Muye Polle v Salim Mohamed & Rana Auto Selection Limited)

JUDGMENT

1. The background of the appeal is vide the Plaint dated 15th September 2020 and that at all material times to this suit, the Appellant was the registered and/or the beneficial owner of motor vehicle registration number KCY 841S make Toyota Probox and that on or about 27th May 2020, at around 6.45 pm, the 1st Respondent was lawfully riding his motorcycle Registration number KMEQ 561N and on reaching Mwatsama area along Jomvu kwa Mbaji Road, the 2nd Respondent drove motor vehicle registration number KCY 841S without due care and attention knocking the 1st Respondent's motorcycle.
2. That as a result, the 1st Respondent sustained serious injuries which included a depressed skull and multiple facial fractures, fractured left distal radius bone, sprain and strain right shoulder, compound fracture distal third left femur (thigh) bone with displacement fragments with post traumatic arthritis and stiffness of the left knee, fracture left foot, deep cut forehead and left foot, and bruises and abrasions on the left leg.



3. The Appellant prayed for damages against the Respondents for general damages, special damages of Kshs. 11,190, costs of the suit, interest at court rates from the date of filing the suit until payment in full, and any other relief that this court may deem fit to grant.
4. The Appellant in their Statement of Defence dated 10th May 2021 averred that it is in the business of importation and sale of motor vehicles and its interest thereby after sale of such vehicles is financial interest and it is at no time in possession, management and control of such motor vehicles that it had sold. That the motor vehicle registration number KCY 841S was sold to one Stephen Gwayi Agaya and immediately upon such sale took the control, possession and management of the motor vehicle from the Appellant by instructing the 2nd Respondent to deliver the subject motor vehicle to him and the Appellant could therefore not be held vicariously liable for the actions of Mr. Agaya, his driver, servant and/or agent.
5. This suit was heard in the trial court and judgment delivered on 19th April 2023 where the court entered judgment for the Plaintiff as against the Defendants jointly and severally for 100% liability against the Defendants, general damages of Kshs. 2,000,000, special damages of Kshs. 2,550, and costs of the suit plus interest at current court rates.
6. Being dissatisfied, the Appellant appealed against the judgment of the trial court through the Memorandum of Appeal dated 10th May 2023 on grounds that the learned magistrate erred in law and in fact: in making a finding that the Appellant was in possession and control of the subject motor vehicle; in failing to appreciate that the Appellant was in the business of selling motor vehicles and that possession, ownership and control of such motor vehicle passes with the sale of the motor vehicle; in failing to appreciate that the provisions of Section 8 of the *Traffic Act* as relates to ownership was applicable and the Appellant had discharged its burden of proof as far as ownership and possession is concerned; in failing to appreciate that the Appellant could not be held vicariously liable for the acts and/or omissions of the 2nd Respondent; in failing to appreciate that the Appellant being a motor cyclist did contribute substantially or wholly to the occurrence of the incident; in failing to appreciate that there was no employer/employee relations or agency relationship between the Appellant and the purchaser of the accident motor vehicle; and in failing to appreciate and wholly ignoring evidence of the Appellant and specifically the documentary evidence showing ownership had passed to the purchaser/2nd Respondent herein;
7. That further, the learned magistrate erred in law and in fact: in completely ignoring the submissions by the Appellant and the authority presented before her and specifically the binding authority of NBI *CA No. 73 of 2002*, Securicol Kenya Ltd v Kyumba Holdings Ltd; by failing to appreciate that comparable injuries should as far as possible attract comparable awards and thereby made an award of Kshs. 2,000,000 in respect of general damages which award is excessive in the circumstances; in failing to make any proper findings on quantum in accordance with the facts placed before him and in light of the submissions; in failing to adequately analyse and evaluate the evidence and exhibits tendered by the Appellant and thereby arriving at a wrong decision; in wholly ignoring the submissions filed by the Appellant thus arriving at a wrong decision; and in failing to make a finding that the 1st Respondent had proved this case when there was absolutely no evidence to support the decision.
8. The Appellant prayed for orders that this court sets aside the judgment of the learned trial magistrate which allowed the 1st Respondent's suit and replaces it with judgment dismissing the suit in the lower court as against the Appellant, and that the appeal be allowed with costs to the Appellant.



9. The appeal was canvassed by way of written submissions. The Appellant filed their submissions dated 27th May 2024 while the 1st Respondent filed their submissions dated 25th June 2024, which have been considered by this court.
10. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co. (1968) E.A 123* as follows: -

“... 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 make due allowance in this respect ...”
11. I have considered the Record of Appeal dated 29th May 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether the Appellant was liable for occurrence of the accident
 - b. What quantum of damages was the 1st Respondent entitled to
12. On the first issue, the Appellant submitted that they were in the business of selling motor vehicles and that the motor vehicle had been sold to a third party. That having exhibited the motor vehicle sale agreement, it discharged its burden of proof in accordance with Section 8 of the *Traffic Act*. That the Appellant was not the owner of the suit motor vehicle and therefore not in possession, control and/or management of vehicle. That they cannot therefore be held liable for acts of omission and/or commission by a third party.
13. The 1st Respondent on the other hand contended that it is not in dispute that at the time of the accident, the motor vehicle was registered in the name of the Appellant. That the 1st Respondent produced a motor vehicle search/motor vehicle records to prove that at the time of the accident, the vehicle was registered in the name of the Appellant. That the Appellant alleged that they had sold the motor vehicle to a third party but the sale agreement produced by the Appellant does not show that the Appellant was a party or vendor thereto.
14. The 1st Respondent submitted that the sale agreement did not comply with Section 35 (1) of the *Companies Act*, that there was no evidence that the purchase price/consideration was paid, that the Appellant did not hand over physical possession of the motor vehicle to the alleged buyer, that there was no transfer of the motor vehicle ownership to the alleged buyer, that the alleged buyer did not exist, that the Appellant’s allegation that it sold the motor vehicle to Stephen Gwayi Agaya contradicts the position taken earlier by the Appellant, and that the motor vehicle was insured by the Appellant as at the date of the accident, meaning the Appellant was still the insured thereof. That it therefore naturally follows that the Appellant was liable for the accident as the registered and beneficial owner.
15. 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.
16. The court in *Jared Magwaro Bundi & Another v Primarosa Flowers Limited (2018) eKLR* provides: -

“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 an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.

The position taken by the court in Jael Muga Opija (supra) and Mohamed 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 than the technical chains of form, the latter which does not ordinarily look at the justice of a case ...”

17. This court has perused the Record of Appeal and established that the motor vehicle copy of records shows the Appellant as the registered owner of the motor vehicle as at 24th August 2020. The Appellant therefore did not discharge the burden of proof on a balance of probabilities to the contrary. It is the view of this court that the Appellant was indeed the beneficial owner of the motor vehicle as at the time of the accident and therefore liable.
18. On the second issue, the Appellant was of the opinion that the 1st Respondent on cross examination admitted not to have had a helmet at the time of the alleged accident and that the head injuries would have been mitigated had the 1st Respondent complied with the laws by putting on a helmet. That he therefore substantially contributed to the injuries sustained. The Appellant submitted that based on recent decisions, an award of Kshs. 400,000 would be adequate compensation for the 1st Respondent.
19. The 1st Respondent submitted that he was left with 35% permanent disability and dependent on a crutch to stay mobile. That the 1st Respondent’s life has been altered as a result of as a result of pain on the injured areas especially the depressed skull, the fractured foot and thigh. That taking the said factors into account together with loss of earnings, passage of time and awards on comparable injuries, the trial court’s award of Kshs. 2,000,000 should be upheld.
20. The principles upon which an appellate court interferes with an award of damages were set out in *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others*, Civil Appeal Case No. 192 Of 1992 as follows: -

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt vs. Uwais Ahmed Khan*, By M. Akmal Khan [1982-88]I KAR 1 at pg 5 as follows-

‘An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded “on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

21. I have perused some precedents for similar injuries where the court awarded as follows: -
In Sospine Co. Ltd & Another v David Nganga Kanyi, Nakuru Civil Appeal No. 215 of 2001, the court assessed general damages at Kshs. 2,000,000 where the Plaintiff had suffered compound depressed skull fracture of the right frontal bone.
In Kenya Wildlife Services v Godfrey Kirimi Mwiti (2018) eKLR, the court awarded Kshs. 2,000,000 as general damages for multiple injuries with incapacity assessed between 23% - 25%.
In Joseph Mwanza v Eldoret Express, Kisumu Civil Case No. 160 of 2004, the court awarded Kshs. 1,200,000 as general damages where the Plaintiff suffered 40% disability.



22. In consideration of the above and authorities cited by the parties, this court upholds the award of the trial court of Kshs. 2,000,000 on quantum of damages taking into account the injuries suffered and awards on comparable injuries.

23. In the upshot, I find no merit in the Appeal. It is therefore dismissed with costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF NOVEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Siwolo Advocate for the Appellant (holding brief) present

Kilonzo Advocate for the Respondent (holding brief) present

Court Assistant – Mr. Samuel Shitemi

