



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CIVIL APPEAL NO. 48 OF 2018**

**(CONSOLIDATED WITH HCA 49, 50 & 51 OF 2018)**

**AUTO SELECTION (K) LIMITED.....APPELLANT**

**VERSUS**

**EDMOND SHIUNDU ALELE.....1<sup>ST</sup> RESPONDENT**

**PETER NJOROGE NGANGA.....2<sup>ND</sup> RESPONDENT**

**(An appeal from the Judgement and Decree of Hon. S. O. Mogute P.M**

**in Bungoma CMCC No. 58/2012 delivered on 25/7/2018)**

**JUDGEMENT**

In his plaint dated 27<sup>th</sup> February, 2012, the plaintiff (now 1<sup>st</sup> respondent) sought special damages, general damages and costs of the suit as a result of a road traffic accident which occurred on the 26/11/2011 at Mayoni Junction along the Busia-Bungoma-Mumias road where he sustained injuries.

The appellant in its statement of defence denied liability and attributed the occurrence of the accident, if any, to the 1<sup>st</sup> respondent's negligence.

PW1 PC Nzioka testified and stated that the accident occurred on 26/11/11 involving Motor vehicle registration number KBE 409L wherein a number of passengers including the 1<sup>st</sup> respondent sustained injuries. That the vehicle was being driven by the 2<sup>nd</sup> respondent. The accident occurred after the brakes failed. He produced the police abstract.

PW2, the 1<sup>st</sup> respondent stated that he was a passenger in the vehicle when it rolled at Bungoma/Mumia Roundabout. He sustained injuries to the head and chest and treated at St. Mary's Hospital.

Duncan Okochi testified for the defence (now appellant). His testimony was that the appellant had sold out the motor vehicle to one Erick Makori on 29/9/2008. He produced a sale agreement Dexh 1 to that effect.

The court found in favour of the 1<sup>st</sup> respondent and awarded general damages of Kshs 80,000/= and special damages of Kshs 8,450/= thus the instant appeal which is premised on the following grounds;

- 1. That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.**
- 2. That the learned trial magistrate did not consider the law relating to the liability of a financier in respect of a road traffic accident involving a hire purchase vehicle during the subsistence of a hire purchase agreement hence arriving at a wrong conclusion.**
- 3. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.**

4. **The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.**
5. **The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.**
6. **The learned trial magistrate erred in failing to hold that the 1<sup>st</sup> respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the 1<sup>st</sup> respondent.**
7. **The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the 1<sup>st</sup> respondent and failed to apply precedents and tenets of law applicable.**
8. **The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-a vis the respondent's claim.**
9. **The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.**

The appeal was disposed of by way of written submissions. The appellant through the firm of L.G Menezes raised the following issues for determination; -

1. Proof of ownership by the 2<sup>nd</sup> defendant.
2. Causation of the accident.
3. Was the 1<sup>st</sup> defendant an employee/ servant of the defendant
4. Transfer in the property had passed.
5. Quantum.

On the 1<sup>st</sup> issue, the appellant submits that there was no evidence that the appellant was the owner of the motor vehicle that caused the accident.

That the police abstract did not indicate who the owner of the motor vehicle was. The police officer who testified was not the investigating officer. The sale agreement demonstrated that the appellant had sold the motor vehicle. That the certificate of search shows the 2<sup>nd</sup> respondent as the registered owner.

In support of this proposition, counsel has cited a number of authorities *to wit*; ***Superfoam Ltd & Anor Vs Gladys Nchororo Mbero (2014)eKLR***, ***Samuel Mukunya Kamunge Vs John Mwangi Kamuru Civ Application No. 34 of 2002*** and ***Wellington Nganga Muthiora Vs Akamba Public Road Services Ltd & Anor (2010)eKLR***.

On the 2<sup>nd</sup> issue, counsel submits that no eye witness was called to corroborate the plaintiff's evidence and that the police officer who testified never witnessed the accident, no inspection report was produced or the police file to prove that the vehicle was defective. That there were no proceedings to prove that the driver was ever charged. Counsel relies in ***Statpack Industries Vs James Mbithi Munyao (2003)eKLR***.

On the third issue, it is submitted that the plaintiff failed to prove that the 1<sup>st</sup> defendant was the 2<sup>nd</sup> defendant's employee to establish vicarious liability. The cases of ***Jane Wairimu Vs Githae John Vickery & 2 others (2013)eKLR*** and ***Securicor Kenya Ltd Vs Kyumba Holdings Limited (2005)eKLR*** have been cited.

On the 4<sup>th</sup> issue, it is submitted that ownership of the motor vehicle had passed to one Erick Makori and therefore the appellant was not in any way in control of the vehicle and that the goods had passed to another person. Reliance has been placed in the case of ***Osapil Vs Kaddu (2000)1 E.A 193***.

On quantum, it is submitted that the respondent did not demonstrate negligence hence the issue of damages based on liability cannot arise against the appellant. Counsel the case of ***Kemfro Africa Ltd v/a Meru Express Service, Gathogo Kanini Vs A.M Lubia & Alice Lubia (1982-88) KAR 727*** and ***Herbert Hahn Vs Amrik Singh (1985)eKLR***

The respondents through Mr. Abok learned counsel submits on liability that the motor vehicle was being driven at an excessive speed thus the accident. That the 1<sup>st</sup> respondent testified as PW-2. His testimony was affirmed by PW-1, a police officer. That the driver PW2 was later charged and fined Kshs 5,000/= in Mumias Court for driving a defective vehicle as the brakes had failed.

He further submits that the evidence of DW-1 was that they had sold the motor vehicle to one Erick Makori and were in possession of the motor pending clearance of payment which was due in the year 2009. Counsel cites the case of ***Independent Electoral and Boundaries Commission & another Vs Stephen Mutinda Mule & 3 others. (2014) eKLR*** for the proposition that parties are bound by their own

pleadings.

That the appellant being the registered owner of the motor vehicle, it is vicariously liable for the accident. It neither filed an application on time to be struck out of the suit. The authority in the cases of *Al Husnain Motors Ltd Vs Rose Abondo (2017)eKLR*, *Leonard Mugania Vs Jessikay Enterprises & Another (2009)eKLR* and *Karisa & Another Vs Solanki & another (1969)EALR 318*.

The respondents further submit that since the alleged purchaser was not enjoined in the proceedings, no orders can be made against him. Reliance has been placed in *Republic Vs Director of Public Prosecutions & another Ex Parte Patrick Onyango Ogola (2016)eKLR*.

On quantum, it is submitted that the learned trial magistrate's finding was according to the law and evidence presented and also commensurate with the injuries sustained. Counsel has cited the case of *Kemfro Africa Ltd t/a Meru Express Services (1976) & another Vs Lubia & another (1985) eKLR*. That the 1<sup>st</sup> respondent sustained moderate soft tissue injuries.

Counsel relying on *Simon Taveta Vs Mercy Mutitu Njeru (2014)eKLR*, *Butt Vs Khan (1977) KAR 1* and *Easy Coach Limited Vs Emily Nyangasi (2017)eKLR* submits that an award of general damages is an exercise of judicial discretion based on the injuries sustained and comparable awards made in the past for comparable injuries.

This being a first appeal, the guiding principles are as enunciated in *Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR*, where the court held;

**“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.....**

After a perusal of the record together with the parties' rival submissions, this court is of the view that the issues arising for determination are; whether the subordinate court rightfully held the appellant liable for the accident and secondly whether the award of damages by that court was in line with the legally established principles.

On liability, the appellant's contention is that it is not the registered owner of the accident motor vehicle. The appellant in support of its case called one Duncan Okochi whose testimony was that the motor vehicle had been sold to one Erick Makori. The sale agreement was produced as Dexh 2. The police abstract did not indicate the owner in possession of the motor vehicle.

A similar scenario played out in the case of *Nancy Ayemba Ngaira V Abdi Ali [2010] eKLR*, where J.B 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.**

Section 107 and 108 of the Evidence Act places upon the appellant the duty of proving that the motor vehicle had indeed been sold to another person. By failing to enjoin the said Erick Makori to these proceedings, the appellant failed to discharge this onerous duty placed on it. The trial court's finding on this point cannot be faulted.

As regards causation of the accident, PW-1 sated that the accident was self-involving. The motor vehicle was defective as the brakes failed. PW-2 on his part stated that the motor vehicle rolled. He was a passenger in the said motor vehicle. Black's Law Dictionary 9<sup>th</sup> Edition defines negligence *as*

**“ failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarding of other rights. The term denotes culpable carelessness”**

The appellant has not demonstrated how the 1<sup>st</sup> respondent who was a mere passenger in the motor vehicle could have avoided the occurrence of the accident or mitigated the injuries as a result of the accident.

In the circumstances, there is no fault in the trial magistrate's finding on liability which is hereby affirmed.

On quantum, there are several authorities of this court regarding the assessment thereof. For example in *A.A. M.V Justus Gisairo Ndarera & Another (2010) e KLR* the court held;

**“Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums**

**which must be regarded as giving reasonable compensation and the award must be fair---”**

The appellant's submissions is anchored on the special damages awarded. The trial court awarded Kshs 8, 450/= . Kshs 5,000/= for the medical report, Kshs 3,000/= for the demand letter and Kshs 450/= for treatment.

This court finds that the award this limb was proved to the required standards.

In sum total, this court finds no merit in the appeal which is hereby dismissed with costs to the 1<sup>st</sup> respondent. Same orders to apply to HCCA 49/2018, 50/2018 and 51/2018.

**DATED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021**

**S.N. RIECHI**

**JUDGE**