



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 112 OF 2019

BOLPAK TRADING COMPANY LIMITED.....APPELLANT

VERSUS

MONICA AWUOR AYIEKO.....RESPONDENT

JUDGMENT

The Appellant, **BOLPAK TRADING COMPANY LIMITED**, was the Defendant in a suit which had been lodged by the Respondent herein, **MONICA AWUOR AYIEKO**.

1. After a full trial, the learned trial magistrate found the Appellant 100% liable for the accident which gave rise to the case.
2. The trial court awarded General Damages in the sum of Kshs 800,00/=, and Special Damages of Kshs 4,500/=.
3. The trial court also awarded to the Plaintiff the costs of the suit.
4. Being dissatisfied with the entire judgment, the Appellant lodged an appeal to challenge it. In the Memorandum of Appeal, the following grounds of appeal were raised;

“1. The learned magistrate erred in law and in fact by finding that appellant was 100% vicariously liable for the accident without establishing on the evidence adduced that the driver of the accident motor vehicle was the Appellant’s servant or that at the material time, the driver was acting on the appellant’s behalf as its agent.

2. The learned magistrate erred in law and in fact by finding that the appellant was unable to demonstrate that the motor vehicle had been sold to a third party even when documentary evidence adduced by the Appellant established quite evidently that the accident motor vehicle had been a subject of sale.

3. The learned magistrate erred in law and in fact by misconstruing the provisions of Section 8 of the Traffic Act thereby failing to appreciate that the entry shown on on the motor vehicle registration certificate is not final proof that the sole owner thereof is the person whose name is shown therein, and ignoring all evidence of contrary proof tendered by the appellant.

4. The learned magistrate erred in law and in fact by completely disregarding the weight of evidence adduced by the appellant and failing to make a determination on whether or not property in the accident motor vehicle had passed and who bore the risk as a result thereof.

5. The learned magistrate erred in law land in fact by finding that the Appellants had failed to demonstrate that the purchase price had been paid on delivery of the accident motor vehicle made to Dishon Indimuli and yet:

5.1 where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both are postponed.

6. The learned magistrate erred in law and in fact by awarding damages that are so inordinately high which amounted to an erroneous estimate.”

5. Based on those grounds, the Appellant sought to ask this court to set aside the Judgment of the trial court, and to substitute it with an order dismissing the Respondent’s case.

6. When canvassing the appeal the Appellant submitted that it ought not to have been held vicariously liable for the actions of the driver who is said to have caused the accident.
7. As far as the Appellant was concerned, there existed absolutely no relationship between it and the said driver, as the driver was neither its servant nor its agent.
8. The Appellant further submitted that the driver was not using the vehicle at the request of the Appellant, nor was he performing a task or duty that had been delegated to him by the Appellant.
9. The said submissions are premised on the Appellant's assertion that it had sold the vehicle long before the time when the accident occurred.
10. The Appellant emphasized that the Original Sale Agreement which it produced in Court was sufficient proof that the vehicle had been sold by the Appellant.
11. Pursuant to **Clause 2** of the said Sale Agreement, the buyer had, in the Appellant's understanding, confirmed that he had taken possession of the motor vehicle.
12. The Appellant acknowledged that pursuant to the provisions of **Section 8** of the **Traffic Act**, the person in whose name a vehicle is registered shall be deemed to be the owner thereof unless the contrary is proved.
13. Having produced the Sale Agreement in evidence, the Appellant submitted that it had proved that, although it is the registered owner of the vehicle, the said vehicle had been sold well before the vehicle was involved in the accident.
14. In answer to the appeal, the Respondent submitted that the Appellant had completely failed to prove that the vehicle had been sold to a third party.
15. According to the Respondent, the accident which gave rise to this case was caused by the Defendant's driver.
16. The Respondent pointed out that the Appellant failed to call any evidence to disprove the factual evidence which she had tendered, and which proved that the Appellant's driver had been negligent in the manner he drove the vehicle belonging to the Appellant.
17. It was the Respondent's position that the Sale Agreement which was produced in evidence lacked credibility for the following reasons;
 - (a) *The appellant's witness did not execute the Agreement nor was he a witness to its execution;*
 - (b) *There was no proof that the Agreement was signed by the Third Party who had allegedly purchased the vehicle;*
 - (c) *There was no proof that the Purchase Price was paid;*
 - (d) *No receipts were produced to prove payment of the full purchase price;*
 - (e) *There was no evidence to prove that the vehicle had been delivered to the alleged purchaser;*
 - (f) *There was no evidence that the logbook and Transfer documents were given to the purchaser;*
 - (g) *The Transfer Form was not signed by the purchaser;*
 - (h) *The appellant failed to offer an explanation for failing to transfer the vehicle to the purchaser within the time-lines stipulated in the Traffic Act;*
 - (i) *The appellant failed to demonstrate that the vehicle was not in its control at the material time, or that it was being used by the purchaser at the said time.*
18. On the issue as regards the quantum of damages awarded by the trial court, the Appellant submitted that the same was so inordinately high, that the trial court must be taken to have applied the wrong principle.
19. On her part, the Respondent submitted that the assessment of compensation by the learned trial magistrate cannot be faulted, as the same was well within the range applied to other cases that were comparable to this case.
20. Being the first appellate court, I am obliged to re-evaluate all the evidence that had been tendered during the trial. I will therefore undertake that task, whilst always being alive to the fact that I did not have the opportunity of observing the witnesses when they testified.
21. The starting point is the pleadings; that is because the evidence adduced is supposed to provide proof of the assertions pleaded.
22. The second stage is to analyze the evidence within the context of the pleadings.

23. In this case, the Plaintiff had asserted that the motor vehicle registration **KBP 921U** was being driven by her husband, along the Bondo-Kisumu Road, when the

*“defendant’s driver, servant and/or agent drove the said Motor Vehicle Registration Number **KAT 884R**, Toyota Matatu so negligently, recklessly and/or carelessly causing an accident consequence of which the plaintiff sustained injuries and has suffered loss and damage.”*

24. At paragraph 5 of the Plaintiff, it was reiterated that;

“The said accident was solely caused by the negligence on the part of the defendant’s driver, servant and/or agent.”

25. In its Defence, the Defendant stated that it was not the beneficial owner of the motor vehicle in question.

26. Whilst conceding that it was the initial owner of the vehicle **KAT 884R**, the Defendant said that it had sold the vehicle on 24th March 2005.

27. The Defendant asserted that the Purchaser, **DISHON INDIMULI**, had paid the purchase price, and that the Defendant gave to him, the duly executed Transfer Forms in order to enable the purchaser effect the transfer.

28. It was the contention of the Defendant that the purchaser took immediate possession of the vehicle after he paid the deposit of Kshs 600,000/= on 14th March 2005.

29. As far as the Defendant was concerned, it had transferred the property together with the control and possession of the vehicle to **DISHON INDIMULI** pursuant to the Sale Agreement dated 24th March 2005.

30. The Defendant filed an application dated 20th April 2016, seeking to be struck out from the pleadings. By the said application, the Defendant asked the court to direct that its name should be substituted by **DISHON INDIMULI**.

31. After giving due consideration to the application dated 20th April 2016, the learned trial magistrate dismissed it on 11th June 2016. It was the finding of the court that the issue regarding the relationship between the Defendant and **DISHON INDIMULI** could only be determined after a full trial. As the trial court said;

“It is only at the full hearing that the issue of liability and any other relevant issues can be canvassed to enable the court arrive at a fair and just decision.”

32. The Defendant then filed an application dated 24th June 2016, seeking leave of the court to issue a Third Party Notice upon **DISHON INDIMULI**.

33. On 8th August 2016, the trial court granted leave to the Defendant to issue the Third Party Notice.

34. A copy of the Third Party Notice shows that the Defendant was seeking indemnity from the Third Party, on the grounds that the said Third Party purchased the vehicle in question and had taken delivery, possession and control of the same.

35. On 6th September 2016 the Plaintiff sought leave to amend her pleadings. The Defendant had no objection to the Plaintiff’s application.

36. The trial court granted the leave as sought; and it also granted leave to the Defendant to amend its own Defence, after being served with the Amended Plaintiff.

37. However, on 19th October 2016, the Plaintiff informed the court that she had decided not to amend the Plaintiff. She said;

“The 3rd Party Notice is sufficient. We intend to rely on the pleadings as they are.”

38. This court notes that although leave had been granted to the Defendant to issue a Third Party Notice, the case title did not reflect the presence of the said Third Party, both before the trial court and before this court.

39. In my considered opinion it is necessary to always incorporate amendments into pleadings, through lodging pleadings that embody the said changes.

40. When the amended pleading is filed after the court grants leave, it will show on the face thereof, the date when the amendment was effected. From that date going forward, the Court and the parties will be aware that the pleadings prior to the date of amendment were no longer being accorded consideration.

41. The draft amended pleadings, which are annexed to applications for leave to effect the amendments, are nothing but the draft. It is not the amended pleading.

42. Even when leave is granted for an amendment in terms of the annexed draft, the annexure does not constitute the amended pleading.

43. I have deemed it necessary to delve into that aspect of the case because it does appear to me that notwithstanding the joinder of the Third Party to these proceedings, the trial court and the other two parties appear to have proceeded with the trial, oblivious to the absence of the said Third Party.

Consolidation

44. It is common ground that the case of **MONICA AWUOR AYIEKO Vs BOLPAK TRADING CO. LIMITED, CMCC NO. 50 OF 2015** was consolidated with the case of **MONICA AWUOR AYIEKO (suing as the Legal Representative and Administrator of the Estate of the late GEORGE ACHIENG AYIEKO) Vs BOLPAK TRADING CO. LIMITED, CMCC NO. 51 OF 2015**.

45. George Achieng Ayieko was the husband of Monica. The two of them were travelling together in one vehicle, when the said vehicle was involved in an accident. The accident in question left Monica with injuries, whilst George passed away.

46. Therefore, as the 2 cases emanated from the accident, it was prudent to consolidate the cases as the evidence on the issue of liability would be the same.

The Evidence

47. Monica testified as **PW1**. She said that George was driving their car Registration Number **KBP 921**, on the material date.

48. **PW1** was seated in the co-driver's seat.

49. When they got to the area around Malele, **PW1** saw two matatus approaching from the opposite direction. One of the matatus slowed down to pick up a passenger. The second matatu overtook the first matatu, and drove straight into the path of George's car. The result was a collision.

50. Good Samaritans rushed both Monica and George to the Aga Khan Hospital, Kisumu.

51. Regrettably, George succumbed to the injuries he had sustained in the accident.

52. Meanwhile, Monica was admitted in hospital for 2 weeks. She was then discharged in order to enable her attend the burial of her husband, George.

53. A Medical Report dated 10th April 2014 showed that Monica had sustained the following injuries;

(a) Multiple Rib Fractures;

(b) Dislocation of the left thumb, MCP joint with fracture; and

(c) Displaced fracture of the right ulna mid-shaft.

54. **PW2, DR L.W. OKOMBO** reiterated that the Plaintiff had sustained the injuries she told the court about. He had examined Monica on 21st March 2017, and verified the said facts.

55. In his medical report, Dr. Okombo stated that Monica had not recovered fully, and she still had pain on her chest as well as on her hands and her left thumb.

56. In his considered opinion, Monica required further physiotherapy, and the fractured bone required the attention of an orthopedic surgeon.

57. A perusal of the record of the proceedings on 6th December 2017 shows that **CPL JEFFERSON MUNYIKA**, (although indicated as **PW2**), was deemed to be **PW3**.

58. He testified that the police officers based at the Siaya Traffic Base carried out investigations into the accident, and concluded that;

“The driver of KAT 884R was to be blamed for the accident.”

59. **PW3** produced the Police Abstract which showed that the police had decided to prefer charges against he said driver for the offence of Causing Death by Dangerous Driving.

60. He went on to explain that the driver had not been arrested because the police were unable to trace him.

61. In the circumstances, the police preferred charges against;

“The owner of the MV KAT 884R, who was Bernard Ochieng Odiege. He was charged on 1/12/2015 with failing to keep records of his employed driver. The matter was concluded. He was fined Kshs 2,000/= or to serve 30 days imprisonment.”

62. After **PW3** testified, the Plaintiff closed her case.

63. **DW1, RAYMOND WAWERU GITERU**, was the only witness who testified for the Defendant. He was a Manager with the Defendant Company.

64. **DW1** testified that the Defendant had imported the Vehicle Registration Number **KAT 884R** from Japan. Thereafter, the vehicle was sold to **DISHON INDIMULI**, on 24th March 2005.

65. According to **DW1**, the Defendant released the motor vehicle to Indimuli on 24th March 2005, after he paid the deposit of Kshs 600,000/=.

66. On 28th June 2006, Indimuli collected the Original logbook and a signed Transfer, after he had paid the balance of the purchase price.

67. However, during cross-examination **DW1** confirmed that the Transfer had not been signed by Indimuli.

68. Nonetheless, **DW1** testified that the Defendant had transferred all rights, obligations and responsibilities to Indimuli. His reason for the said belief was that Indimuli had executed the Agreement for Sale; and at Clause 5 of the said Agreement the Defendant was exonerated from responsibility.

69. I have re-evaluated all the evidence on record and find that the Appellant was, at all material times, the registered proprietor of the vehicle registration number **KAT 884R**.

70. However, as the learned trial magistrate noted in her judgment;

“In the case of Nancy Ayemba Ngana Vs Abdi Ali, HCCA NO. 107/2008 [2010 eKLR] Ojwang J. (as he then was) observed that;

‘There is no doubt that the registration certificate obtained from the register of Motor Vehicles will show the name of the registered owner of the 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 cognizant of the fact that a different person may be the defacto owner of the motor vehicle.’

71. The trial court held that the Defendant had failed to prove that it had transferred the ownership of the vehicle to Dishon Indimuli.

72. In my understanding, **DW1** demonstrated that he witnessed the execution of the Sale Agreement which was executed by both the Defendant and Dishon Indimuli. That constituted evidence of the Defendant’s intention to dispose of the vehicle, by way of sale to Indimuli.

73. **DW1** also said that the vehicle was released to Indimuli immediately after he had paid the deposit of Kshs 600,000/=.

74. In my considered opinion, there is no legal requirement that the purchaser of a motor vehicle must sign a Delivery Note before he can be said to have received the vehicle.

75. More significantly, the Plaintiff produced the Police Abstract through **PW3**, Cpl Jefferson Munyika. The said police officer testified that the owner of the motor vehicle registration **KAT 884R** was **BERNARD OCHIENG ONDIEGE**.

76. It therefore follows that whilst the Plaintiff had asserted that the Defendant owned the vehicle in issue, her own witness testified that the vehicle belonged to a person other than the Defendant.

77. Following the conviction of Bernard Ochieng Odiege for the offence of Failing to Keep Records of his employed driver, I find that Plaintiff actually led evidence that exonerated the Defendant.

78. As the driver was an employee of Bernard Ochieng Odiege, I find that the Defendant could not have been vicariously liable for the actions or omissions of the said driver.

79. Accordingly, the learned trial magistrate erred when she held the Defendant vicariously liable for the actions of the un-named driver, about whom there was no evidence that linked him to the Defendant.

80. I therefore allow the appeal, set aside the trial court’s finding on liability, and substitute the same with an order that the Plaintiff’s suit be and is hereby dismissed, as against the Defendant.

81. Costs of the appeal and the costs of the suit are hereby awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU This 13th day of October 2020

FRED A. OCHIENG

JUDGE