



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 402 OF 2018

CAPTAIN MOTORCYCLE MANUFACTURING CO. LTD.....APPELLANT

VERSUS

JAMES MAXWELL OKIRI MOCHACHE1ST RESPONDENT

BENARD OMOI2ND RESPONDENT

(Being an appeal from the Judgment of the Hon. Mr. D.O. Mbeja (S.R.M) in the chief magistrate's court

at Milimani Commercial Court in C.M.C.C No. 2232 of 2014 delivered on the 8th September, 2017)

JUDGMENT

This appeal arises from the judgment of the lower court delivered on 8th September, 2017. The 1st respondent was said to have been injured after he was knocked down by a motor cycle registration No. KMDC 392X which was being ridden by the 2nd respondent. The 2nd respondent though served did not enter any appearance or file any defence. An interlocutory judgment was then entered against the 2nd respondent and the suit proceeded for hearing.

At the close of the 1st respondent's case, counsel for the appellant informed the court that he had one witness. A sale agreement dated 23rd August, 2013 was admitted as defence exhibit 1 by consent and the defence case closed. Submissions were then filed followed by the judgment now challenged in this appeal.

The thrust of this appeal is that the motor cycle had been sold to a 3rd party who was then vested with all legal responsibility for acts of negligence committed after the sale. The lower court was therefore wrong to hold the appellant liable for acts of the 2nd respondent.

Both parties have filed submissions in the argument of the appeal. It is my duty as the first appellate court to consider the evidence adduced before the trial court so as to arrive at independent conclusions.

There is no dispute that the records held by the registrar of motor vehicles indicated the appellant was the owner of the subject motor cycle. Defence exhibit 1 is a motor cycle sale agreement between the appellant and one Benard Michika Mose. It is dated 23rd August, 2013. The motor cycle sold to the buyer is the one cited in the pleadings as registration No. KMDC 392X. It is said the appellant is a manufacturer of motor cycles. This document was admitted in evidence by consent. Prima facie therefore, the 1st respondent in this appeal conceded the appellant had sold the motor cycle to the party named therein. In his judgment, the trial magistrate referred Section 8 of the traffic Act which states as follows,

“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 lower court placed emphasis on the fact that the original sale agreement was not produced and that the copy of records dated 27th February, 2014 indicated the motor cycle was owned by the appellant herein. The 1st respondent did not object to the production of the copy of the sale agreement. In any case, chances are that the original agreement was in the possession of the 2nd respondent who had purchased the motor cycle from the appellant.

It is important to note that the provisions of Section 8 of the Traffic Act are not absolute in that, if the person in whose name the motor vehicle is registered were to provide evidence, to prove otherwise, then that registration is dislodged. Proof is on a balance of probability.

So, in effect, ownership is qualified. The appellant in this case produced evidence in the form of a copy of the sale agreement to prove that it had sold was the owner of the motor cycle. That alone was enough to tilt the scales in its favour. - **see Muhambi Koja vs. Saidi Mbwana Abdi (2015) e KLR.**

The 2nd respondent on the other hand was supposed to change the ownership of the motor cycle after 14 days from the date of purchase - **see Section 9 of the Traffic Act.** His failure to do so cannot be blamed on the appellant.

In view of the foregoing, there was no relationship that was established by way of evidence between the appellant and the 2nd respondent to justify vicarious liability on the part of the appellant. It must be remembered under Section 107 of the Evidence Act, Cap 80 laws of Kenya, that the 1st respondent had a duty to persuade the court on all fronts stated in his pleadings.

The production of the sale agreement by the appellant which formed its defence was sufficient to dislodge the 1st respondent case. He could only blame the 2nd respondent who did not appear or file any defence. I have come to the conclusion that there is merit in this appeal which is hereby allowed but each party shall bear their own costs.

Dated and delivered at Nairobi this 15th day of October, 2020.

A.MBOGHOLI MSAGHA

JUDGE