



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.16 OF 2016

BETWEEN

PAUL JUSTINE OKWERO.....APPELLANT

AND

VIOLET AKHABELE AMALEMBA.....1ST RESPONDENT

MAURICE OTIENO.....2ND RESPONDENT

JACKSON MOSES EMISIKO.....3RD RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.421 of 2011 by Hon.C. I Agutu- Resident Magistrate).

JUDGMENT

1. **Paul Justine Okwero**, the appellant herein, was the second defendant in the Busia Chief Magistrate's Court Civil Case Number 421 of 2011. He had been sued together with Maurice Otieno the second respondent herein for a claim of Kshs.8,700/= special damages and for general damages for injuries the first respondent sustained as result of a motor traffic accident that she was involved in with motor vehicle KBG 481E.

2. The third respondent, was enjoined as a third party in the trial court.

3. In her judgment, the learned trial magistrate found the appellant and the 2nd respondent jointly and severally liable for an award of Kshs.8,360/= special damages and Kshs.200,000/= general damages.

4. The appellant was aggrieved by the judgment which was delivered on 6th June 2016 and filed this appeal. He was represented by the firm of Bogonko, Otanga & Company, Advocates. In the Memorandum of Appeal, the appellant set out five grounds of appeals as follows: -

- a) The learned trial magistrate erred in law and in facts in making a finding that the plaintiff had proved her case.
- b) The learned trial magistrate erred in law and in fact by finding that the appellant was liable to the claim on grounds that he was the registered owner of the motor vehicle at the time of the accident.
- c) The learned trial magistrate erred in law and in fact in failing to hold that the third respondent was the employer of the second respondent and in possession of the accident motor vehicle and therefore vicariously liable for acts of the second respondent.
- d) The learned trial magistrate erred in law and in fact in awarding damages that were inordinately high in the circumstances of this case.
- e) That the judgment of the learned trial magistrate was against the weight of the evidence adduced.

5. The first respondent was represented Gabriel Fwaya, learned counsel. He opposed the appeal.

6. The second and the third respondents were represented by the firm of Ashioya & Company Advocates. They equally opposed the appeal.

7. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no

advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

8. The accident that gave rise to this case occurred on the 29th June 2010. At the time of the accident, the registered owner of motor vehicle number KBG 481E was Justine Paul Okwero, the appellant. This was established by the production of the logbook and the evidence on record. This was not in dispute. The dispute was and still is whether the appellant ought to be liable after he had temporarily ceased to have the control of the said motor vehicle.

9. On 28th June 2010, a day prior to the accident, the appellant and Jackson Moses Emisikho, the third respondent herein, entered into a loan agreement. The appellant was advanced Kshs.150,000/= and the third respondent took motor vehicle number KBG 481E as lien. He was to keep the motor vehicle in his custody until after repayment of the loan.

10. When the accident complained of occurred, the motor vehicle was being driven by Maurice Otieno, the second respondent. The appellant contends that Maurice Otieno was not his agent but that of third respondent, Jackson Moses Emisikho.

11. The learned trial magistrate failed to appreciate that the production of a logbook is prima facie evidence of ownership for in some circumstances this fact may be qualified. There are instances a motor vehicle may be sold to another party without effecting the changes promptly or a motor vehicle may be in control of another person other than the registered owner like what happened in this case. In the circumstances of this case, even if we assume that the agreement was for sale, the documents in the Registrar of motor vehicles would still have shown the appellant as the owner. Section 8 of the Traffic Act (Cap.403) must have envisaged such circumstances. It 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.

In the case Of **Samwel Mukunya Kamunge vs. John Mwangi Kamuru Civil Application No.34 of 2002** Hon. H. M. Okwengu, J as she then was, stated: -

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 by 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 vehicles change hands but the records are not amended.

In the instant case the contrary was proved. I find that the trial magistrate was wrong in holding that the production of a copy of logbook could prove ownership of the motor vehicle. The third respondent herein, Jackson Moses Emisikho was a special owner of the motor vehicle number KBG 481E at the time of the complained of accident. Maurice Otieno, the second respondent, was therefore his agent and not of the appellant.

12. The appellant ought not to have been found liable to the first respondent for the accident. I therefore set aside the finding of the trial magistrate and substitute it with a finding that the second and the third respondents are severally and jointly liable to the first respondent for the accident.

13. The appellant complained that the award was inordinately high considering the injuries the first respondent sustained. According to the evidence of Dr. Charles Andai (PW2) she sustained the following injuries:

- a) Cut wound on the right side of the face;
- b) Blunt injury to the left buttock;
- c) Multiple small scars on the forehead; and
- d) Pain in the left hip joint.

She was awarded Kshs.200,000/= for these injuries.

14. The learned trial magistrate correctly found that the injuries suffered by the first respondent compared closely with injuries in the case of **Road Nyanchama (minor) suing through her next friend Rachel Nyaguru vs. Kamau Mbugua High Court (NBI) Civil Case No. 5499 of 1989**. For almost similar injuries the plaintiff was awarded Kshs.50,000/= on 26th September 1991. Though this decision was made twenty-five years prior to the award complained of here, the award in the instant case was inordinately high. The Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777** stated as follows:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

15. In the instant case, after factoring in the effluxion of time since the above decision was made, and considering the injuries, am of the opinion that Kshs.100,000/= would be adequate compensation. I therefore set aside the award of Kshs. 200,000 general damages and

substitute it with an award of Kshs.100,000/=.

The appeal by the appellant is allowed in terms which I have expressed hereinabove with costs. For avoidance of doubts the second and the third respondents will be jointly and severally liable. The costs of the appellant in the trial court shall be borne by the first respondent.

DELIVERED and SIGNED at BUSIA this 4th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE