REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 641 OF 2016

JACKSON OMOI RATEMO ..... APPELLANT

VERSUS

SILAS SIRMA YATOR .....1ST RESPONDENT

RICHARD OBINO OSORO.....2ND RESPONDENT

PETER A. OKAO.....3RD RESPONDENT

WALTER MUNGAI KIBET.....4TH RESPONDENT

(Being an Appeal from the judgment of the Honourable Usui SPM in CMCC. 940 of 2004

J U D G M E N T

The appellant herein was the first defendant in Chief Magistrate's Civil Case No. 940 of 2004 which was filed by the plaintiff Silas Sirma Yator who is the first Respondent in this appeal. The Appellant was sued together with the 2nd, 3rd and 4th Respondents.

In the plaint dated the 3rd day of February, 2014, the Appellant is described as the registered owner of motor vehicle registration number KAC 479Q Isuzu Matatu while the 2nd Respondent is said to have been his lawful driver and/or agent. The third Respondent was described as the registered owner of motor vehicle registration number KAL 755F Isuzu matatu, while the 4th Respondent was said to be his authorized driver and/or agent. There was a 5th defendant National Industrial Credit Bank Limited but the case against the 5th Defendant was withdrawn.

The cause of action as appears in the plaint was that on or about 9th day of August, 2003, along Muchumbi Road at South B shopping centre, the first Respondent who was travelling as a lawful fare paying passenger in motor vehicle KAC 479Q was injured in an accident when the aforesaid motor vehicle was negligently driven that he was thrown out from his seat and run over his right ankle as a consequence of which he sustained some injuries.

It was further pleaded that while he was writhing down in pain, the 3rd Respondent's motor vehicle registration number KAL 755F was negligently and/or carelessly driven that it ran over his left ankle and foot thus severing his skin on the lower foot thus sustaining multiple fractures. He attributed negligence to both the 2nd and 4th Respondents who were driving the respective motor vehicles at the material time. The particulars of negligence, those of injuries and special damages are set out in paragraphs 7, 8 and 9 of the plaint. He thus sought special damages in the sum of Kshs. 539,931.66, general damages for pain and suffering and the costs of the suit.

The Appellant, the 2nd, 3rd and 4th Respondents filed their statement of defence dated the 25th day of April, 2005 in which they denied the 1st respondents claim. The Appellant denied that he was the registered owner of motor vehicle KAC 479Q and that the 2nd Respondent was his lawful driver and/or agent. The 3rd Respondent also denied being the registered owner of motor vehicle KAL 755 F and that the 4th Respondent was his lawful driver and/or agent.

In the alternative, the aforesaid Respondents averred that if the said accident occurred, (but which is denied) the same was caused solely and/or substantially by an act of God and there was nothing the driver of motor vehicle KAC 479Q could have done to avoid the accident even after using all reasonable human diligence and foresight. The particulars of loss and damage as alleged were denied and the first respondent was put to strict proof.

Another defence was filed for the appellant on 10th July, 2008. He denied being the owner of motor vehicle registration number KAC 479Q or that the 2nd respondent was his lawful driver and/or employee working under his instructions or directions at the material time.

The Appellant averred that he owned the motor vehicle KAC 479Q, from sometime in the early 1990's until 23rd October, 1997 when he sold it to one Abel Nyaundi Onguso. He stated that he was a stranger to the accident and the particulars of injuries and loss that the first Respondent alleges to have suffered. He prayed that the suit be dismissed as against him.

Yet another defence was filed by the 3rd and 4th Respondents in which they denied the first Respondents claim. In the said defence, negligence was attributed to the first Respondent and to the Appellant and the 2nd Respondent.

The 3rd and 4th Respondents denied any negligence on their part and further denied any knowledge of injuries and special damages allegedly suffered by the first Respondent and put him to strict proof.

A reply to the appellant's defence was filed 25th July, 2018 in which the first Respondent joined issues with the Appellant's defence save where the same consists of admissions.

The first respondent denied that the Appellant had sold motor vehicle KAC 479Q to Ms. Abel Nyaundi Onguso and puts him to strict proof thereof.

The first Respondent filed a reply to the 3rd and 4th respondents' statement of defence, dated the 25th July, 2008, in which, the first Respondent joined issues with the said Respondents on their defence save where the same consists of admissions. The first Respondent denied that he was negligent as alleged, or he, in any way, contributed to the occurrence of the said accident. He denied the particulars of negligence enumerated (a) to (c) both inclusive.

The record shows that the appellant filed a chamber summons dated the 20th day of April, 2009 for leave to issue a third party notice to Abel Nyaundi Onguso which leave was granted and the third party notice served upon the said third party, but the third party did not file appearance to the claim.

The matter proceeded to hearing when the first Respondent gave evidence as PW1. It was his evidence that on the 9th August, 2003, he boarded motor vehicle KAC 755F and as he was preparing to sit, the driver drove off and he was thrown out of the vehicle and it ran over his leg. That another motor vehicle KAC 479Q also ran over him and he sustained injuries to his leg.

He was taken to Mater Hospital where he was admitted for two (2) months. He produced the discharge summary, the police abstract, P3 form and hospital invoices as exhibits in the case. He blamed both vehicles for the accident.

Dr. Wangata testified as PW2 and produced the medical report that he prepared for the first Respondent. According to him, the first Respondent sustained compound fracture of the 3rd metatarsal of the left foot, abrasions injury to the left foot. He was operated on.

Edith Muthoni gave evidence as DW1. She is the wife of the Appellant. She told the court that motor vehicle KAC 479Q was owned by the Appellant but he sold it in the year 1997. She produced a sale agreement which she witnessed. She stated that at the time of the accident the motor vehicle had been sold and thus the 2nd Respondent was not the Appellants driver at the material.

After the hearing, the learned Magistrate entered judgment for the first Respondent against the Appellant and the 4th Respondents in the ratio of 50% : 50%, general damages of Kshs. 680,000/-, special damages of Kshs. 465,732/- plus costs and interest.

That judgment is the subject of the appeal herein.

In his memorandum of appeal dated the 18th day of October, 2016, the Appellant has listed 8 grounds of appeal which can be collapsed into the following grounds of appeal;

1. That the learned Trial Magistrate erred in law and in fact in holding the appellant 50% liable for the accident.

2. That the learned Trial Magistrate erred in law and in fact in holding that the Appellant was the owner of Motor vehicle registration number KAC 479Q.

3. That the learned Trial Magistrate erred in law and in fact in failing to appreciate the Appellants evidence that, the 2nd Respondent was the beneficial owner of Motor vehicle registration number KAC 479Q.

4. That the learned Magistrate erred in Law and in fact in failing to consider that the Appellant had duly filed and served a third party notice.

5. The Learned Magistrate erred in law and in fact in failing to enter judgment against the third party.

6. That the learned Magistrate erred in law and in fact in awarding damages that were inordinately high in view of the injuries sustained by the 1st Respondent.

When the appeal came up for hearing, parties agreed to canvass the same by way of written submissions which they filed and which this court has duly considered together with the authorities relied on.

As rightly submitted by the appellant, the following issues arise for determination;

1. Whether the learned Magistrate erred in finding that the motor vehicle KAC 479Q belonged to the appellant at the time of the accident.

2. Whether the Learned Trial Magistrate erred in fact and in law in finding that the appellant did not join the third party to the suit.

3. Whether the trial Magistrate erred in fact and in law in apportioning liability at 50% to the appellant on the alleged accident.

4. Whether the learned Magistrate erred in fact and in law in awarding damages that were inordinately high in view of the injuries sustained by the 1st Respondent.

It is the appellants case that he was not the owner of motor vehicle KAC 479Q at the time of the accident. In support of this contention, he called DW1 who produced a sale agreement between the appellant and one Abel Nyaundi Onguso for sale of motor vehicle KAC 479Q dated 23rd October, 1997.

The agreement was witnessed by Esther Muthoni Ratemo and Isaiah Nyambane Onguso. He contended that ownership and possession of the said motor vehicle changed by virtue of the sale. He relied on section 8 of the Traffic Act and contended that he had produced evidence to the contrary. He submitted that it was not his fault that the buyer had not transferred the vehicle into his own name yet the appellant had signed the transfer into his name. The appellant relied on the case of ***Nancy Ayemba Naira vs. Abdi Ali Civil Appeal Number 107/2008 eKLR*** and that of ***Osapil Vs. Kaddy 2000/EALR*** cited in ***General Motors East Africa Limited vs. Eunice Alila Ndegwa & Another (2015) Civil Appeal No. 527/2013, eKLR*** and that of ***Securicor Kenya Limited vs. Kyumba Holdings Limited Civil Appeal No. 73 of 2002 (2005) eKLR.***

The 1st Respondent on his part submitted that, according to the copy of records obtained from Kenya Revenue Authority, the Appellant was the registered owner of motor vehicle KAC 479Q at the time of the accident. He relied on Section 9 of the Traffic Act to the effect that;

1. No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on the road for more than fourteen days after the date of such transfer unless the new owner is registered as the new owner thereof.

2. Upon the transfer of ownership of a motor vehicle or trailer, the registered owner thereof shall, within seven days from the date of the transfer inform the registrar in the prescribed form of the sale or disposition, name, postal and email address and telephone number of the new owner, the mileage recorder(if any) and such other particulars as my be prescribed and shall deliver the registration book in respect of such vehicle to the registrar together with the transfer fee, whereupon the vehicle shall be registered in the name of the new owner.

3. Subsections (1) and (2) shall not apply to a change of possession consequent on a contract of hiring where the period of hiring does not exceed there months or where the registered owner continues to employ and pay the driver of the vehicle.

4. Application for registration of a new owner may be made before the actual transfer of the vehicle, but the registration of a new owner shall not be effective until registration certificate has been surrendered to and re-issued by the authority.

The 1st respondent argued that the Appellant failed to comply with this section to, by law, cease being the registered owner of the motor vehicle.

In analyzing this issue, the court is guided by provision of Section 8 of the Traffic Act. The same provides 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"

This position was espoused in the case of ***Wenny Ayemba (supra)*** in which the court stated:

"There is no doubt that the registration certificate obtained from the Registrar 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 fully cognizant of the fact that a different person, or different other persons may be the defacto 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 and 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. Indeed, the evidence adduced in the form of police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question.

In the case of ***Securicor Kenya Limited (Supra***) the court had this to say about section 8 of the Traffic Act;

"We think that the Appellant had, by evidence led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in OSAPIL VS. KADDY (2000)

Eala 187 in which it was held by the court of Appeal of Uganda that:

> ***"a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise."***

The appellant had, indeed, proved otherwise.

The court has perused the record of proceedings and it shows that DW1 gave evidence in support of the Appellant's case. She produced a copy of an agreement for the sale of the aforesaid motor vehicle to a third party. The sale was done long before the accident herein occurred.

It was the evidence of DW1 that, the Appellant gave the possession of the vehicle to the third party and since then, he has been residing in the United States of America. This means that the Appellant did not have possession of the vehicle at the time of the accident and the 2nd Respondent could not have been driving the same as his authorized agent and/or servant. The production of the sale agreement is evidence to the contrary under Section 8 of the Traffic Act. This being a civil matter, the Appellant proved on a balance of probability that he was not the owner of the motor vehicle in as much as the records held by the Registrar of Motor Vehicles shows otherwise but as to whether the court was right in entering judgment on liability against him, I shall consider that shortly.

On whether the learned Magistrate erred in finding that the Appellant did not join the third party to the suit, the record shows that through a chamber summons dated 20th day of April, 2009, the Appellant sought leave to issue a third party notice to Abel Nyaundi Onguso and a third party notice was filed in court on the 4th day of July 2012. The court is able to confirm from the record that, that application was heard on 30th July, 2009 and it was allowed. The court granted leave and ordered that, the 3rd party be served within 30 days from the date thereof.

The record further shows that on 12th September, 2012 when the matter came up in court for hearing, a Ms. Kiplagat informed the court that Ms. Sang has filed a 3rd party notice and she needed it to be disposed off, and though the court had confirmed the matter for hearing on account of its old age, later in the day, it noted that there are 3rd party proceedings filed by the appellant (1st defendant) to bring in a third party. On the same day, Mrs. Githae informed the court that the 3rd party was served for that day.

On the 25th day of June, 2013, counsel for the Appellant informed the court that they had to take directions as the third party notice had been issued. He further stated that he may seek to appeal and seek directions to have judgment against third party (I guess, the appeal was against the ruling delivered on 7th June, 2013). The court adjourned the matter and noted that there are other issues of determination as between the 1st defendant and the third party. However, there is no indication as to whether the appellant applied for judgment against the third party, but an affidavit of service sworn by Boniface Muema and filed in court on 24th August, 2012 shows that the third party was served with the pleadings, together with the third party notice. This was done on the 4th day of July, 2017. The said affidavit of service further shows that he received the court documents and accepted service by signing at the front page of the process server's copies.

From the record, it is therefore clear that the appellant filed third party proceedings and served the third party with the notice. In the circumstances, it was erroneous for the learned magistrate to make a finding that the third party was not enjoined.

As to whether the learned Magistrate erred in apportioning liability as he did, the record shows that the only witness who gave evidence on liability is PW1, the first Respondent herein. According to him, he blamed the two subject vehicles for the accident. The learned magistrate evaluated the evidence and apportioned liability as he did. The evidence of PW1 was not controverted by the appellant.

On this issue, the appellant has argued that the court ought not to have found the appellant liable since he was neither the owner of the motor vehicle nor was it being driven by his authorized agent. The case of ***General Motors East Africa Limited vs. Eunice Alila Ndegwa & another (2015) eKLR*** was relied on in which the court stated;

> ***"For a court to find the appellant was vicariously liable for acts of the 2nd defendant, first, it had to be proved conclusively that the motor vehicle belonged to the appellant whether beneficially or otherwise and that the 2nd defendant was the driver , agent or servant of the appellant herein at the time of the accident"***

The appellant also made reliance to the case of ***Morgan Vs. Launchbury*** which was cited in the case of ***General Motors East Africa Limited (Supra)*** in which the court stated:

> ***"In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owners behalf as an agent. To establish agency relationship, it is necessary to show that the driver was using the car at the owners request express or implied or in its instruction and was doing so in the performance of the task or duty, thereby delegated to him by the owner".***

The appellant urged the court to find that there was no evidence of agency/ principal or master/servant or any relationship of whatever nature between the appellant and the driver of the aforesaid motor vehicle.

On his part, the first Respondent has relied on Section 9 of the Traffic Act and has argued that the appellant failed to comply with that provision. Of interest is Section 9(2) which requires a registered owner to inform the Registrar of Motor Vehicles of the sale or disposition, name, postal and email address and the telephone numbers of the new owner among other particulars set out therein.

The court has perused the defence filed by the appellant on 10th July, 2008. In paragraph 4 of the same, he stated that he sold the vehicle to one Abel Nyaundi Onguso. Save for giving the name of the person he sold the motor vehicle to, he did not disclose any other particulars in the said defence. The court has also perused through the proceedings and in particular, the evidence of DW1. Nowhere does she state that the appellant complied with section 9 and in particular 9(2) of the Traffic Act. The subsection requires that he delivers the registration book in respect of the vehicle to the registrar with the transfer fee so as the vehicle can be registered in the name of the new owner.

Due to that failure, there was no way the first Respondent would have known that the vehicle had been sold to another party upon carrying out an official search with the Registrar of Motor Vehicles and therefore he had every justification to sue the appellant as he did.

The appellant chose to enjoin the buyer as a third party in the proceedings. He issued a third party notice and there is evidence that the same was duly served upon the third party who failed to enter appearance. Order 1 of the Civil Procedure Rules relates to "***parties to suits***". When an accident involves two vehicles, a plaintiff can decide to sue one party or both of them as defendants. In the case herein, the 1st respondent sued the appellant on the strength of the certificate of ownership following an official search carried out at the registrar of motor vehicles which was perfectly in order.

The appellant chose to enjoin the buyer as a third party in the proceedings and he initiated the process. The 1st Respondent was not a party to the agreement and was not privy to the transaction that took place between the appellant and the third party. The Appellant gave notice to the third party under Order 1 Rule 15 of the Civil Procedure Rules but the third party failed to enter appearance. I have perused the third party notice as issued, the Appellant has claimed indemnity and/or contribution from the third party on the ground that the appellant did not own the motor vehicle KAC 479Q at the time of the accident. Order 1 Rule 17 provides that the third party should enter appearance within the time specified in the notice and in this case, he ought to have entered such an appearance within 15 days from the date of service upon him of the third party notice.

In default, he shall be deemed to admit the validity of the decree obtained against the Defendant.

In the above scenario which also applies to the Appellant's case herein, he ought to have followed the procedure set out in order 1 rule 19 and for the benefit of the parties, I will set it out verbatim;

> ***"When a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third party notice, the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him".***
>
> ***"Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just."***

Suffice it to state that the appellant's remedy lay in that provision and not in appeal. The learned Magistrate could not have entered judgment against the third party unless the same was applied for by the appellant under the aforegoing provision and neither can this court do so on appeal as requested by the appellant. The Learned Magistrate did not err in entering judgment against the Appellant in the circumstances of this case.

On the quantum of damages, the court has considered the medical reports produced as exhibits in the lower court and the submissions by both counsels. In my view, the amount of general damages awarded by the trial court is reasonable and commensurate to the degree of injuries sustained. I find no reason to interfere with the same. The court has also confirmed that receipts produced in support of general damages amounts to the total figure of Kshs. 465,732 awarded.

In the end, and for the reasons stated, the court finds no merits in the appeal and same is hereby dismissed. Due to the nature of the case, the court makes no orders as to costs.

Dated, Signed and Delivered at NAIROBI this 11TH Day of JULY, 2019.

…….

L. NJUGUNA

JUDGE

<u>In the Presence of</u>

……. For the Applicant

……. For the Respondents