



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.21 OF 2015

JOSPHAT JAOKO KERRA.....APPELLANT

VERSUS

JAMAKA ENTERPRISES.....1ST RESPONDENT

DENNIS OTIENO LANGO alias Nabii.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of MR. B.O. Ochieng (PM)

in Maseno PMCC NO.3 of 2012 delivered on 13th March, 2015)

JUDGMENT

1. **Josphat Jaoko Kerra** (*hereinafter referred to as appellant*) sued **Jamaka Enterprises** and **Dennis Otieno Lango** (*hereinafter referred to as respondents*) in the lower court claiming damages for injuries allegedly suffered on 10th August, 2007 when he was knocked down by respondents' motor vehicle KUG 059 while riding on motor cycle motor vehicle KAJ 745N as a result of which he was injured.
2. The defendants/respondents filed separate statements of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **13th March, 2015**, the learned trial Magistrate found that the appellant had not proved his claim and dismissed it with costs to the defendants/respondents.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 23rd May, 2017 filed the Memorandum of Appeal dated 24th March, 2015 which sets out 5 grounds of appeal to wit:-

- 1) **The Learned Magistrate grossly misdirected himself on the issue of liability by arriving on a wrong finding that the respondents were not at fault**
- 2) **The Learned Magistrate misdirected himself on applying the wrong principles of law in determining the ownership of the suit motor vehicle KAJ 745N**
- 3) **The Learned Magistrate misdirected himself by believing the sale agreement furnished by the respondents in spite of glaring gross conflicting and contradictions contained in the sale agreement *vis a vis* the witness testimonies and statements filed in court**
- 4) **The sum award in quantum falls far below expectation of the law**
- 5) **The judgment was against the weight of evidence**
- 6) **The learned trial Magistrate erred both in law and fact in failing to consider the appellant's submissions**

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 17th October, 2017; the parties' advocates agreed to canvass it by way of written submission

which the appellant and second respondent dutifully filed.

Appellant's submissions

6. Appellant contends that motor vehicle KUG 059 belonged to the 1st respondent as at 10th August, 2007 as shown by the copy of records produced as PEXH. 4 and that the alleged sale to Moses Odhiambo and John Odida was false since the sale agreement is dated 5.6.05 while the 2nd respondent in his witness statement stated that the vehicle was sold on 5.2.07. He relied on **Section 8** of the Traffic Act Cap 403 Laws of Kenya which provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. He also relied on Thuranira Karauri –Vs- Agnes Ncheche (1997) eKLR, where the Court of Appeal held that the plaintiff's reliance on the police abstract on proof of ownership of a motor vehicle was not sufficient and that the plaintiff was supposed to produce certificate of search signed by Registrar of Motor Vehicles as proof of ownership; General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR where the court held that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise, Charles Nyabuto Mageto -Vs- Peter Njuguna Njathi [2013] eKLR where the court stated that the courts recognize that there are various forms of ownership..... actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence and Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another [2015] eKLR where the court held that it is now established law that the copy of records or the logbook is only prima facie evidence of ownership and can be rebutted.

2nd respondent's submissions

It was submitted for the respondent that the copy of records produced by the appellant did not show that 2nd respondent was registered owner of the accident motor vehicle. He contends that all the authorities cited by the appellant bolster his position that he was not the owner of the accident motor vehicle and was therefore not liable for the accident in which the appellant was injured. He further contends that he had sold the accident motor vehicle to Moses Odhiambo and John Odida as shown in the sale agreement is dated 5.6.05.

The evidence

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR)

12. I have perused the entire record of appeal and considered the submissions by on behalf of the appellant and the 2nd respondent. I note that the appeal revolves around the issue of liability and quantum.

13. Mary Omollo testified on behalf of the 1st defendant and stated that she was a director of the 1st defendant. She does not deny that motor vehicle KUG 059 was registered in the name of the 1st respondent as at 10th August, 2007 as shown by the copy of records produced as PEXH. 4 but stated that the vehicle had been sold to one Ravinder Singh Brar by a sale agreement dated 2.8.02 DEXH. 1.

14. The 2nd respondent stated that he bought the accident motor vehicle in 2001 but that he sold it to Moses Odhiambo and John Odida as shown in the sale agreement dated 5.6.05 DEXH. 2. It was his evidence that he was not in possession of the accident motor vehicle on the date of the accident.

15. From the evidence on record, the learned trial magistrate rightfully found that the respondents had shown by documentary evidence that they had sold the accident motor vehicle and that it was not in their possession and control when the accident occurred.

16. I am convinced that the learned trial magistrate arrived at the correct decision when he found that the respondents had by their evidence rebutted the evidence contained in the copy of records and shifted blame on two named persons who were not enjoined to this suit.

17. On quantum, the learned trial magistrate awarded Kshs. 150,000/- for fracture of left tibia and left fibula which the appellant submits is inordinately too low.

18. I have considered the case of Butt v Uwais Ahmed Khan [1982-88] KAR 5 in which the Court of Appeal held that;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

19. I have also considered the case of Kigaraari – Vs Aya [1982 – 88] 1 KAR 768 where the court held that:

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees.”

20. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered but the advocates in this case failed to do so. In the case of Stephen Kamau Wanderi & Another v Gladys Wanjiku Kungu [2006] eKLR cited in the lower court by the appellant, the plaintiff was awarded Kshs. 600,000/- for both the fracture of the left fibula and tibia, extensive skin loss

from the knee downwards, the skin loss led to the skin being removed from her left thigh to graft the part of the leg which had no skin and it was disfigured and ugly. The fracture had united but led to the said leg being 2cm shorter than the right leg assessed at 20% disability. The 2nd respondent relied on Insurance (Motor Vehicle Third Party Risks)Cap 405 Laws of Kenya.

22. Clearly, appellant suffered less serious injuries than the one in the cited authority.

23. There is no evidence that the learned trial magistrate, in assessing the award of Kshs. 150,000/- proceeded on wrong principles, or that he misapprehended the evidence in some material respect to warrant this court's interference.

24. In the result the appeal is found to have no merit and it is disallowed. Each party shall bear its own costs of this appeal.

DATED AND DELIVERED THIS 7th DAY OF March, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix &Carolyne

Appellant - Mr Odeny

1st Respondent - N/A

2nd respondent - Ms Ayiela