REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 27 OF 2018

(FORMERLY MACHAKOS HCCA NO. 92 OF 2016)

CHRISTOPHER M. MUTHOKA.....APPELLANT

-VERSUS-

JAP QUALITY MOTORS.....1ST RESPONDENT

F.K WAMBUA.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. C.O. Nyawiri (SRM) in the Principal Magistrate's Court at Makueni Civil Case No.18 of 2013, delivered on 24th August 2016).

JUDGMENT

INTRODUCTION

1. The Appellant had instituted a suit in the lower Court against the Respondents seeking general damages, cost of the suit and interest following a road accident on 4th October 2012*(herein after 'the material day')* along the Wote-Makindu road.

2. The 1st Respondent neither entered appearance nor filed a defence within the stipulated time. Consequently, an Interlocutory Judgment was entered on 4th September 2013.

3. The 2nd Respondent filed his defence on 30th July 2013 and the matter was eventually slated for hearing on 12th March 2014. During the trial, the Appellant and doctor testified and produced most of the documents in evidence.

4. The police abstract later was produced by consent after which the parties agreed to file submissions.

5. Judgment was eventually delivered and the learned Trial Magistrate dismissed the Appellant's claim with costs to the 2nd Respondent.

6. Being aggrieved by the entire judgment, the Appellant filed the instant appeal and listed 13 grounds which can be summarized as follows;

i. The learned trial Magistrate erred in law and fact when he failed to consider that section 8 of the Traffic Act was fully cognizant of existence of other forms of ownership namely; beneficial owner and or actual possession and that those other forms of ownership makes the person a de facto owner of the motor vehicle.

ii. The learned trial magistrate erred in law and fact when he indicated that the Appellant had not proved negligence on the part of the Respondents.

iii. The learned trial magistrate erred in law and fact when he failed and or declined to recognize that it is enough for the purposes of vicarious liability to sue only the owner of the vehicle as long as it is pleaded that the vehicle was at the time being driven by his driver, agent and or servant without necessarily identifying the driver or joining him in the suit.

iv. The learned Magistrate's erred in law and fact when he failed to realize that the doctrine of res ipsa loquitor is concerned with the onus of proof and not a substitute for proof of negligence.

v. The learned magistrate erred in law and fact when he failed to consider that the Respondent had not tendered any evidence to controvert the testimony of the Appellant.

7. The parties agreed to canvass the appeal by way of written submissions. Accordingly, the parties filed their respective submissions.

8. The duty of a first Appellate Court as was held in the cases of ***Mwana Sokoni –Vs- Kenya Bus Service Ltd (1985) KLR 931*** *and* **Selle – *Vs- Associated Motor Boat company ltd (1968) EA 123*** is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

9. Having looked at the grounds of appeal and the rival submissions, the issues for determination in my view are;

i. Whether the Appellant had established the ownership of motor vehicle registration No. KBK 648T *(herein after 'the motor vehicle')* on a balance of probability.

ii. Who was liable for the accident and to what extent?

iii. What is the quantum of damages payable to the Appellant if any?

10. I will proceed to deal with the issues under the distinct heads.

OWNERSHIP

11. The Appellant pleaded that the registered owner of the motor vehicle was the 1st Respondent while the beneficial owner was the 2nd Respondent. He produced a copy of records to demonstrate that indeed the 1st Respondent was the registered owner. The elephant in the room was whether the 2nd Respondent was the beneficial owner by virtue of being indicated as an owner in the police abstract which was also produced as evidence.

12. The Appellant submitted that section 8 of the Traffic Act recognizes other forms of ownership apart from registered ownership. He relied *inter alia* on the case of **Charles Nyambuto Mageto –vs- Peter Njuguna Njathi (2013) eKLR** where it was held that;

"From the interpretation of section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need not necessarily produce a log book or a certificate of registration. The Courts recognize that there are other forms of ownership, that is to say, actual possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the police abstract report even…"

13. Relying on the Mageto case *(supra)*, the 2nd Respondent *(herein after, 'the Respondent')* submitted that a police abstract is temporary evidence of ownership which can be challenged by presentment of official search. He went on to submit that, in the primary suit, the Appellant never adduced any corroborative evidence and relied fully on the police abstract which is unsatisfactory evidence on it's own.

14. From the outset, it is important to note that the standard of proof in civil cases is 'on a balance of probability'.

15. It is clear from the record that the Respondent did not call any witnesses. Our jurisdiction is awash with authorities to the effect that when one of the parties to a suit fails to call witnesses, it essentially means that the other party's case remains uncontroverted.

16. In **Motex Knitwear Mills Limited Milimani HCC 834/2002** Honourable Lessit J citing **Autar Singh Bahra & Another -Vs- Raju Govindji HCC 548 of 1998** stated as follows;

"Although the Defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail……." Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged……."

17. I fully associate myself with the sentiments of the learned Judge. In my view, the trial magistrate fell into error by requiring the Appellant to prove beneficial ownership yet there was a police abstract which demonstrated ownership on a balance of probability. This requirement was tantamount to raising the standard of proof. The moment the police abstract was admitted into evidence, the Respondent was expected to do much more than merely denying in his defence.

18. In **Joel Muga Opija –Vs- East African Sea Food Limited Civil Appeal No. 309 of 2010 (2013) eKLR** the Court of Appeal observed that;

"In any case in our view, an exhibit is evidence and in this case, the Appellant's evidence that the police recorded the Respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even counter that evidence, we think with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the Court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection, it's contents

cannot be later denied".

19. Further, I looked at the Respondent's list of witnesses dated 29th July 2013 which indicated that he intended to call the driver of the motor vehicle as his witness. Now, if indeed he was a stranger to this motor vehicle, why did he list it's driver as a witness?

20. It is my considered view that he knew the whereabouts of the driver and this leads to the irresistible conclusion that the driver was actually working as an agent of the Respondent at the time of the accident.

21. The upshot of the foregoing is that the Appellant had proved, on a balance of probability, that the Respondent was the beneficial owner of the motor vehicle.

LIABILITY

22. PW1, the Appellant testified that on the material day, he was travelling on board the motor vehicle when it's hind tyres burst causing the driver to lose control. It veered off the road and rolled three times. In re-examination, he testified that the driver was speeding otherwise he would have been able to control the motor vehicle.

23. Having already opined that the Appellant's case was uncontroverted, it automatically follows that the Appellant's version of how the accident occurred was unchallenged as well.

24. There is no contest that indeed there was an accident on the material day involving the Appellant and the motor vehicle. The learned trial magistrate found as much and the police abstract buttressed this fact. The Respondent pleaded that the accident was as a result of an act of God however and as rightly submitted by the Appellant; vehicles that are properly maintained do not go around having tyre bursts.

25. On the flip side, it is true that a tyre burst does not automatically mean that a vehicle must roll. The aspect of rolling connotes the existence of speeding that was alluded to by the Appellant. All these factors lead to the irresistible conclusion that indeed there was negligence that could be attributed directly to the Respondent.

26. In Abdul Halim T/A Tawfique Bus Services -Vs- Justus Thuranira *(suing as legal representative of the estate of Kithinji M'Irura (deceased) Civil appeal Case No. 305 of 2005 (Nyeri)* the Court of Appeal held: -

a. "In Kenya bus Services Ltd -Vs- Kawira [2003] 2 EA 519, this court authoritatively stated of accidents such as this one, as follows;

b. "Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into rivers without any explanation.'

c. In that case unlike this one, the doctrine of *res ipsa loquitor was pleaded. We, however, think that on the facts and circumstances of this case, it does not matter whether the doctrine was pleaded or not. The evidence adduced by PW2 established negligence on the part of the Appellant's driver.*

d. If the burst tyre was new, there is no explanation, other than that the tyre burst on hitting the bridge rails, to show why the tyre burst. New tyres do not just burst. It is either they run over a sharp object or surface or upon impact over an obstruction.

e. The Appellant, in effect, wants us to infer that because the bus had a burst rear right side tyre after the accident, then the tyre must have been the cause of the accident. With due respect to the Appellant, evidence having been adduced to the effect that the bus was moving fast, it was incumbent upon the Defendant to show, by evidence, that it was not the speed and lack of proper control which were the cause of the accident."

27. To rely on the defence of 'act of God' it was incumbent upon the Respondent to demonstrate that despite due diligence and ensuring that the vehicle was properly maintained, the tyre burst still occurred. No inspection report was produced and there is absolutely nothing that could lead the Court to the conclusion that the accident was as a result of an act of God.

28. On the question of vicarious liability, the Respondent relied inter alia on the case of **General Motors East Africa Limited –Vs- Eunice Alila Ndeswa & Anor (2015) eKLR** which is my view is distinguishable from the current case.

29. In that case the Appellant had no identifiable interest in the motor vehicle and could therefore not be held to be vicariously liable for the actions of the 2nd Defendant who was the beneficial owner of the said motor vehicle independent of the Appellant.

30. Having found that the Respondent was the beneficial owner, it mattered not that the Appellant did not establish the relationship between the driver and the Respondent.

31. A presumption arises that whoever was in direct control of the motor vehicle on the material day had the instructions of the Respondent.

32. It was incumbent upon the Respondent to rebut that presumption. It was therefore erroneous for the learned trial magistrate to hold that the relationship should have been established.

33. The Appellant was a passenger and there was nothing to show that he contributed to the accident in any way. It is therefore my considered view that the Respondent was to blame at 100%. The Appellant did not attribute any negligence against the 1st Respondent neither did he lead evidence to demonstrate it's culpability. It is highly probable that this is one of those cases where someone buys a vehicle but does not bother to change the ownership details.

QUANTUM

34. The treatment notes and medical report produced by the Appellant showed that he sustained the following injuries;

1. Blunt injury to the left shoulder.

2. Mild injury to the left leg.

3. Mild head injury-cut on the scalp.

35. In his submissions before the trial Court, the Appellant proposed an award of Kshs.200,000/= as general damages and relied on the following authorities;

36. Patrick Kiptoo & Anor -Vs- John Ewoi Eldoret, HCCA No 82 of 2008; the Respondent sustained inter alia, injuries to the head and had a bruised forehead. General damages were upheld at Kshs.300,000/=.

37. Leah Nyaguthii Kamunya -Vs- Kenya Broadcasting Corporation, Nairobi HCCC No 1128 of 1993; the plaintiff sustained a cut wound on the scalp, blunt injuries on the left calf region, blunt trauma right shin and multiple hand injuries. General damages were assessed at Kshs.200,000/=.

38. Having gone through the cited authorities, it is my considered view that the injuries in the cited authorities were abit severe. There are however some injuries which are similar to the ones suffered by the Appellant herein. Consequently, taking into account the inflationary trends and the ever rising cost of living, it is my considered view that **Kshs.100,000/=** as general damages will be adequate compensation.

CONCLUSION

39. The appeal has merit and same is allowed in the following orders;

i. The trial court judgement is set aside.

ii. Judgement is entered for Appellant on liability @ 100% against 2nd Respondent.

iii. The court makes an award in damages for Kshs. 100,000/= against 2nd Respondent.

iv. Plus costs and interests.

SIGNED, DATED AND DELIVERED THIS 11TH DAY OF JULY 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE