REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 198 OF 2009

SIDRA MOTOR SALES & SPARES LIMITED.....APPELLANT

VERSUS

1. ONESMUS NZIOKI MWINZI

2. ONESMUS MWASHIGADI.....RESPONDENTS

J U D G M E N T

Introduction and pleadings at trial

1. By a plaint dated the 20/6/2008 and filed in court on 23/6/2008 at Voi Resident Magistrates Court, the 2nd Respondent, as plaintiff then, sought as against the Appellant, as 2nd defendant then and 1st Respondents as 1st defendant, damage both general and special on account of alleged personal injuries suffered by the 2nd respondent out of an alleged road traffic accident pleaded to have occurred on the 11th January 2008.

2. In that suit the 2nd Respondent sued the 1st Respondent as the insured and equitable owner in possession of motor vehicle KAU 622E, Nissan Matatu while the Appellant was impleaded to have been the registered owner of the said motor vehicle. The two were sued and blamed to be liable to the plaintiff on account of alleged negligence in the manner the motor vehicle was driven managed and controlled on the said day thus leading to the injuries to the 2nd Respondent, particulars of negligence, injuries as well as those of special damages were all set out.

3. That suit was defended by the two said defendants by statements of defenses filed on the 24/7/2008 and 11/07/2008 respectively. In his defense the 1st Respondent generally denied and traversed the pleadings by the plaintiff including the allegation that he was the insured and equitable owner of the subject motor vehicle, that the Appellant was the registered owner, the vicarious liability between both and any negligence as pleaded and at all. There was then mounted an alternative and without prejudice defense that the accident was inevitable despite exercise of ordinary care or caution. Even the allegation that the plaintiff was a passenger in the motor vehicle and suffered any injuries was denied.

4. For the Appellant, as the second defendant then, a defense was filed essentially admitting the descriptive parts of the plaint but denied being the registered owner of the motor vehicle on the material date, denied knowledge of the accident or that its agent was in control of the motor vehicle with its authority as to make it liable hence all the particulars of negligence were denied and strict proof invited. The jurisdiction of the court was admitted but the injuries suffered by the plaintiff as well as service of letter before action.

Evidence adduced

5. At trial the 2nd Respondent called three witness being himself, PW 2, Dr. Mohammed Narif Zizi Manula P1 and No. 65584 PC David Ngene PW 3 while the Appellant called one Mokhtar Awadh, a sale manager with the Appellant.

6. The evidence of the 2nd Respondent was that on the material day he was travelling in the motor vehicle Registration No. KAU 622E from Wundanyi to Voi, as a fare paying passenger, when at show ground area the vehicle had a tyre-burst, rolled twice and landed in the middle of the road. The road was described as straight and the vehicle had been speeding on a sunny day. Three weeks after the accident, the 2nd Respondent viewed the motor vehicle at the police station and noted that its tyres were worn out.

7. After the accident the 2nd respondent found himself thrown into the bush as other passengers were also thrown on the road at which time a person came in a saloon car, who he later learnt was the owner of the motor vehicle. He was assisted to hospital where he was admitted for

four (4) days and underwent a surgery.

8. He produced medical report and treatment notes from Moi hospital Voi and a receipt for Kshs.6,590/=. After discharge the witness said it took him about one month to recover at home but remained with a deep scar on the left thigh and the right hand was week with inability to lift heavy objects. The witness equally produced a P3 form and police abstract, demand letter, a certificate of search at registrar of motor vehicles for which he paid Kshs.500/=. He therefore prayed for judgment for both special and general damages.

9. On cross examination, the said Respondent essentially repeated his evidence in chief on critical aspects including the fact that the Appellant was the registered owner of the motor vehicle. When shown a sale agreement marked DMFI 1, the witness remarked that the same had names inserted in a funny way and held the view that the same was made to cheat the court.

10. PW 1 DR. MOHAMED HANIF ZIZI MAWALA gave evidence of having examined the 2nd Respondent on 26/3/2009 and prepared a medical report with a history of having been involved in an accident on 11/11/2007. He reported multiple scars on the forehead, back right hand, elbow, left wrist and deep cut on the anal region. He charged Kshs.2,000/= for the medical report and Kshs.3000/= for court attendance.

11. On cross examination, he said he examined the claimant one year after the accident, held the view that he got proper treatment in hospital but suggested that he goes for physiotherapy. He also confirmed that he had no receipts from moneys paid to him and that the injuries he saw were not of a permanent nature.

12. PW 2, was a police officer from Voi police station gave evidence of a fatal accident involving a motor vehicle KAU 622F on 11/1/2008. He produced a copy of the P3 and police abstract issued to the plaintiff. According to the police records the motor vehicle was owned by the 1st Respondent. When cross examined he could not confirm the status of the traffic case because he did not carry the police file but only the occurrence book. He confirmed having not been the investigating officer and said that the investigating officer had visited the scene and could not confirm who reported matter to the police. However he said police records confirmed the 1st Respondent as the owner of the motor vehicle. With the three witnesses the plaintiff's case was closed.

13. For the defendant, MOKHTAR AWADH gave evidence to the effect that they sell imported and local used motor vehicles.

14. For KAU 622F, he admitted having imported the motor vehicle in 2006 and sold it to one Mohammed Salim who did not pay in full hence the vehicle was repossessed and sold again to one Fredrick Kileta Mghanga on 11/2/2006 at Kshs.600,000 and the purchase price was paid in full by 15/7/2006. For that subsequent sale he produced Exhibit D1 dated 11.2. 2006. To him as at the date of the accident they had sold the motor vehicle and were therefore not in control and could not tell who was driving it on the material day.

15. On cross examination, he denied any relationship with Onesmus and that even though they sold to Kileta, it was Onesmus who gave to him a copy of the logbook after transfer. The 1st defendant did not call any witness to give evidence and therefore the statement of defense filed remained bare allegation with no evidentiary value for consideration by the court.

16. After the parties closed their respective cases and filed submissions, the court delivered a reserved judgment dated 01/10/2009 and found the two defendants before him jointly and severally liable. In holding the Appellant liable the court said:-

> **"If the vehicle had been repossessed it follows that the same had not been transferred and/or registered in the said Mohamed Salim's names and therefore he had no capacity to enter into the sale agreement of 11/2/06 produced as**
>
> **DExh No. 1 as the Seller. That notwithstanding, though Mohamed Salim is indicated as the Seller in the said Vehicle sale agreement it is clear that he is not the one who executed the agreement as the same is clearly executed by the 2nd defendant herein**.
>
> **I therefore have no doubt that the defense exhibit were specifically and hurriedly prepared to defeat the Plaintiff's claim herein. This is so as there is no proof that the provisions of S.9 of the Traffic Act were ever complied with. I hold that the 2nd defendant is the registered owner of motor vehicle registration number KAU 622E and therefore liable herein as he has not proved the contrary. The rebuttable presumption created under S.8 of the Traffic Act has therefore not been rebutted. I accordingly hold that the defendants are liable jointly and severally".**

17. He went on to assess damages and awarded to the said Respondent, the aggregate sum of 304, 410/= being Kshs.300,000/= for general damages and Kshs.4,410/= for special damages.

18. The Appellant felt aggrieved by that judgment and filed the current appeal in which some 14 grounds of appeal have been set out.

19. Having read the Record of Appeal the supplementary Record of Appeal as well as the written submissions filed and highlighted I have come to the conclusion that the following three substantial issues have crystalized for the determination by the court:-

(i) Whether the 1st Respondent, as the plaintiff at trial, proved his case as agent the Appellant as the 2nd Defendant at trial.

(ii) Whether the findings by the trial court were in congruence with the evidence adduced.

(iii) Whether the assessment of damages was proper or erroneous.

(iv) What orders should be made as to costs.

20. I consider the three substantive issues to be adequate to dispose of all the 14 grounds of Appeal because this being a first appeal, the court proceeds by way of a retrial and it shall only be relevant whether liability was proved by evidence and if the assessment of damages was properly done.

Did the 1st Respondent prove the case against the Appellant?

21. That an accident occurred on the day at the place and in the manner pleaded was not in dispute. I so say because in the statement of defense 10/7/2008 the Appellant did not address the 2nd Respondent pleading at paragraph 7 to the effect that he was on the material day a fare paying passenger when the accident occurred.

22. What was therefore in dispute was whose negligence occasioned the accident and therefore the injuries suffered by the 1st respondent. There having been evidence that the accident was occasioned by a tyre burst which sent the motor vehicle rolling, the evidence led on behalf of the Appellant did not address the causation of the accident and how it occurred. It is evidence from reading of the proceedings on record that the accident was self-involving. This court takes the view that vehicles when carefully driven and controlled don't just role or otherwise cause accidents. It is also the the courts understanding that vehicle tyres when maintained in good and roadworthy conditions just don't burst. Additionally, the 1st Respondent was merely a passenger with no control over the manner of the motor vehicle was driven. The plaintiff having lead evidence that showed, prima facie, that there was some default on the persons in control of the motor vehicle, the evidentiary burden then shifted upon the defendants to counter such evidence. Here no counter evidence on how and why the accident occurred. That being my finding, and it having not been disputed by evidence that the 1st Respondent was at the time of the accident a passenger, the pleading and evidence of that 1st Respondent was never controverted. Accordingly the standard of proof expected in a civil proceedings was adequately met and the trial court cannot be faulted in coming to the conclusion it reached.

23. It therefore follows that the 1st Respondent having been injured while aboard the motor vehicle, whoever was proved to be the driver and owner of the motor vehicle was liable to the 1st Respondent and the trial courts finding that both were jointly and severally liable cannot be faulted.

Who was the registered owner of the motor vehicle?

24. The evidence adduced by the 1st Respondent included a certificate of search as at 11/01/2008. That was a prima facie evidence of who

was the registered owner of the motor vehicle as at the date of the accident. Being prima facie it was capable of rebuttal by evidence offered by the person challenging that fact. DW 1 sought to lead evidence that they did sell the motor vehicle to one Fredrick Kileta Maganga on 11/2/2006 at Kshs.600,000/=. That became a critical and important issue for determination. The trial court did apply its mind to the evidence in totality and held that the documentary evidence was a makeup purposely for the purpose of defeating the plaintiff's case. Part of the reason given is that if it was the appellant selling the agreement did not say so and that the seller did not sign the agreement produced as Exhibit D1. Those, to this court was court were factual matters whose truth are best assessed by a trial court with the benefit to observe the demeanor of the witness as he gives evidence. That benefit obviously is not available to this court in this appeal. In ***Mwangi v Wambugu*** ***[1984] KLR 453*** where it was held:

"2. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally."

(emphasis provided)

25. Such matters of fact which was sought to be proved before the

> trial court which is shown by record to have evaluated same and came to a determination. Before an appellate court sets on a journey to disturb such a finding it observe and remind itself of the law applicable. The law is that an appellate court should be hesitant to reverse a finding of a trial court on matters of facts because the appellate court does not enjoy the benefit the trial court enjoyed in listening, seeing the witness testify and observing his demeanor[1].

26. I have read the reasoning by the trial court and I am bound and shall observe my legal boundaries and find that the trial court cannot be faulted on its finding disbelieving the Appellants evidence of sale the of the motor vehicle before the date of accident. The concerns raised by the trial court were genuine and any fair and impartial judicial and mind would raise same and come to the same conclusion.

27. To rebut the legal presumption under Section 8 of the Traffic Act one needs to lead credible evidence that suffices to displace a public document exhibited to court in the nature of a certificate of search. In any event, the Appellants witness was to the court very casual in his appreciation of the magnitude of the matter and the Appellants obligation under sector Section 9 Traffic. The obligation placed on a registered owner under section 9, Traffic Act, must be seen to serve the public good sought to be taken care of by regulation and other related statutes like Cap 405 which imposes an obligation upon an owner to insure a motor vehicle being used on public road against claims by 3rd parties. It is that public interest to be served which make it an offence under section 14 of the same act for failure to answer to the obligation

imposed.

28. I can only concur and uphold the trial court that the Appellant failed to discharge its duty to displace the prima facie evidence availed by the evidence of registration as at the date of the accident.

29. On quantum of damages, the law is that this court can only interfere, if the award is demonstrated to be overly and manifestly high as to demonstrate erroneous estimate of damages[2].

30. For this case, I find nothing so demonstrated and I refuse to substitute my own assessment for that of the trial court. For those reasons, the appeal lacks merit and the same is dismissed with costs.

Dated and delivered at **Mombasa** this **6th** day of **July 2018.**

P.J.O. OTIENO

JUDGE

---

[1] DAMIANO MIGWI v TIMOTHY MAINA WAITUGI [2009] eKLR

[2] ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**