REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 36 OF 2012

(Appeal from the judgment by HON. BILDAD OCHIENG, S.P.M in TIGANIA SPMCC NO 4 OF 2008 delivered on 20.3.2012)

(CORAM: F. GIKONYO J)

RAMESH V. HIRAN……....……APPELLANT

Versus

JUSTUS MURIANKI…….……..…….1ST RESPONDENT

SAMSON RAGIRA……..……..……..…….....……2ND RESPONDENT

JUDGMENT

Appeal on vicarious liability

[1] Being dissatisfied with the judgment by **HON. BILDAD OCHIENG, S.P.M in TIGANIASPMCC NO 4 OF 2008** delivered on 20.3.2012, the Appellant filed this appeal. He proffered the following grounds of appeal as set out in the Amended Memorandum of Appeal, to wit:-

> **(1) That the Learned Trial Magistrate erred in law and fact in holding that the (mere) fact that motor vehicle registration No. KAE 270E still reflected the names of the Appellant at the Registrar of Motor Vehicle's records as the registered owner when the accident between the same and the 1st respondent occurred on 4th August 2006, the appellant was liable to compensate the 1st respondent despite the overwhelming and uncontroverted evidence that indeed the Appellant and sold the same on 19thFebruary 2005 and gave physical possession thereof to the 2nd Respondent.**
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> **(2) The Learned Trial Magistrate erred in law and fact in failing to find that from the clear pleadings by the 1st Respondent vide paragraph 3A of the Amended Plaint and supported by evidence that indeed the 2nd respondent was the beneficial owner in possession and the (mere) fact that the 2nd Respondent had failed to transfer motor vehicle registration No.KAE 270 E into his names despite receiving from the Appellant all the instruments of transfer, was alone not sufficient to found liability against the Appellant.**
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> **(3) The Learned Trial Magistrate erred in law and fact in failing to find that the Appellant had satisfied the requirement of Section 8 of the Traffic Act Chapter 403 Laws of Kenya by proving that motor vehicle registration No. KAE 270E despite being registered in**

his names at the time of the accident, was fact not his but that of the 2nd respondent.

(4) The Learned trial Magistrate further erred in law and fact in holding that the Appellant did not fulfill the conditions of the sale agreement dated 19th February, 2005, which agreement was not in issue and which conditions the Appellant had met anyway, and therefore he was vicariously liable for. Worse still, the leaned trial magistrate found the 2nd respondent was also vicariously liable yet the 2nd respondent and the Appellant had no common or joint interest in motor vehicle registration No. KAE 278E.

(5) The award in general damages was excessive and therefore erroneous.

(6) The judgment is against the weight of evidence

[2] These grounds of appeal could, however, be summarized into the following three grounds:

(1) That the learned trial magistrate erred in finding that the Appellant was the owner of motor vehicle registration number KAE 270E despite the overwhelming evidence to the contrary, and more specifically that he had sold the vehicle to the 2nd Respondent; and

(2) That the trial magistrate erred in holding the Appellant vicariously liable for the accident that occurred on 4th August, 2006 when the 2nd Respondent was not the Appellant's agent.

(3) That the award of general damages made by the trial court was excessive and erroneous.

Directions

[3] On 3.4.2014, the court directed that this appeal shall be determined by way of written submissions. The Appellant and the 1stRespondent filed their respective submissions. But, the 2nd Respondent, did not file submissions despite having been given sufficient time to do. I will therefore consider the submissions filed.

Analysis of evidence

[4] I should state from the onset that upon careful perusal of this appeal, i should firstdecide the question on whether the Appellant was the owner of motorvehicle registration number KAE 270E at the time of the accident. And, upon that decision invariably, the issue of vicarious liability will be determined.

[5] As first appellate court, I will re-evaluate- not rehash-the evidence as was recorded by the trial magistrate.PW1, Justus Murianki, who is the 2nd Respondent in this appeal, testified that; on 4th August 2005 while travelling as a fare-paying passenger inmotor vehicle registration number KAE 270E which was being driven along Meru-Isiolo road, a herd of cattle suddenly emerged into the road. The driver braked but the vehicle rolled three times and rested in the bushes. He was injured and he produced treatment chits and medical report as proof of the injuries he sustained in the said accident. He blamed the driver of motor vehicle registration number KAE 270E for the accident for over-speeding beyond 80kmp. Although from where he was seated he could not see the speedo meter of the said vehicle, he made the estimation of the speed as a driver. Of importance to this appeal, his testimony was that a search by his counsel in the registry of motor vehicles showed the Appellant was the registered owner of motorvehicle registration number KAE 270E. He stated that he did not know whether the Appellant had sold the vehicle to one Ragira. What he knows was that the vehicle was registered to the Appellant and not Ragira.

[6] The Appellant testified as DW1. His testimony was that; on 19.2.2005, he sold the vehicle herein to the 2nd Respondent- a person he knew- for a sum of Kshs. 230,000. The 2nd Respondent paid him the

purchase price in instalments; the last one of Kshs. 20,000 having been paid on 22.2.2005. According to their agreement, the vehicle was to be transferred into the name of the 2nd Respondent upon payment of the last instalment. And, on being paid the entire purchase price, he handed over to the 2nd Respondent all the transfer documents. He told the court that the 2nd Respondent took possession of the said vehicle on 19.2.2005 and it has never come back to him again. He blamed the 2nd Respondent for not transferring the vehicle into his name. He said that he cannot therefore be sued or be held liable for this accident which occurred after he had sold the vehicle.

Submissions

[7] The Appellant submitted that he produced evidence which proved on balance of probabilities that he was not the owner of motorvehicle registration number KAE 270E. He referred to the agreement of sale dated 19.2.2005 and the police abstract. By this evidence the Appellant was convinced that, although the vehicle stood in his name, he proved the contrary as provided in section 8 of the Traffic Act. They cited judicial decisions on this point. Therefore, the Appellant urged the court to so find and upheld his appeal.

[8] The 1stRespondent, on the other hand, submitted that the certificate of search dated 20.5.2009 shows that the registered owner of motorvehicle registration number KAE 270E is the Appellant and no contrary position has been proved in this case. They also relied on section 8 of the Traffic Act.

Registered person is *prima facie* owner

[9] Clearly, from the submissions of the parties, there is a dichotomy on section 8 of the Traffic Act. And, the court must, therefore, ascertain the law and apply it to the facts of the case. What does the law say on registration of motor vehicle? Doubtless, Section 8 of the Traffic Act creates a rebuttable presumption that a person whose name a vehicle is registered is the owner of the vehicle. Accordingly, registration in the register of motor vehicles is *prima facie* proof of ownership but may be rebutted by evidence. The case of **SECURICOR KENYA LTD vs. KYUMBA HOLDINGS LTD [2005] eKLR**is on point here. I will apply that test to the facts of this case.

Sale agreement

[10] The evidence presented in this case was that the Appellant sold motorvehicle registration number KAE 270E on 19.2.2005 to the 2nd Respondent for a consideration of Kshs. 230,000 which was paid in full albeit in installments- the last one having been paid on 22.2.2005. He produced the agreement as D Exhibit 2. He said that the 2nd Respondent took possession of the vehicle on the date of the agreement. He also stated that, upon payment of the last instalment on 22.2.2005, he handed over all the transfer documents to the 2nd Respondent as had been stipulated in the agreement. According to the Appellant, he did not know whether the vehicle remained in his name. My critical evaluation of the record is that that Appellant adduced evidence on balance of probabilities that he sold motorvehicle registration number KAE 270E to the 2nd Respondent on 19.2.2005. Further, he showed that the 2nd Respondent took possession of the said vehicle on 19.2.2005. In addition, he showed that he handed over duly signed transfer forms to the 2nd Respondent. There is nothing on record by way of evidence or in cross-examinationthat controverted the evidence by the Appellant that he sold motorvehicle registration number KAE 270E to the 2nd Respondent. Accordingly, the Appellant adduced cogent evidence which rebutted the presumption that as the person whose name the vehicle was registered he is the owner of motorvehicle registration number KAE 270E. He proved that motorvehicle registration number KAE 270E was sold to the 2nd Respondent who for all purposes was the owner of the said motor vehicle from 19.2.2005. The trial magistrate did not appreciate the fact that the presumption of ownership in section 8 of the Traffic Act was rebuttable and that the Appellant had rebutted it through credible evidence which he presented to the court. Instead, the trial magistrate was preoccupied with condition precedent in the agreement and veered off course into a doomed mission that led him to a grave error. Heeventually, without any basis or evidence whatsoever, made an erroneous finding that those condition precedents were not met. It is worth

of note that the Appellant had categorically stated that the condition precedents were fulfilled by both parties to the agreement. In consequence thereof, the trial magistratemade an erroneous decision that motorvehicle registration number KAE 270E belonged to the Appellant. The festering waters of his impugned decision led him to hold that the Appellant and the 2nd Respondents were jointly and severally liable for the accident of 4.8.20015. Other than being seller and buyer, there was relationship that was established to exist between the Appellant and the 2nd Respondent as to justify joint liability. Thus, given the circumstances of this case and the issues in controversy, liability of joint tortfeasors was a critical element of the case especially because of three things. One, ownership of the motor vehicle herein was hotly contested; two, both the Appellant were sued as defendants; and three, joint liabilityhad the effect of making each of the parties liable for the entire damage resulting from the tort herein.Accordingly,the trial magistrate ought to have given it a serious consideration. On the basis of the evidence adduced, no liability ought to have attached to the Appellant for an accident which occurred on 4th August 2005. Any judgment herein ought to have been entered against the 2nd Respondent alone. In sum, I set aside the judgment against the Appellant. But, as things stand in this case, this decision is not to be taken as a release of joint tortfeasors. This is a case of clear misdirection on the part of the trial court on the ownership of the motor vehicle in question which if it had been properly decided would not have led to joint liability. Therefore, the judgment against the 2nd Respondent remains and will be executed as such. With this decision I need not determine the other grounds of appeal. Also, in view of the decision I have made, I order each party to bear own costs of the appeal and of the primary suit herein. It is so ordered.

Dated, signed and delivered in open court at Meru this 1st day of

March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate for F.K. Gitonga advocate for 1st respondent

Mr. Munene advocate for appellant

F. GIKONYO

JUDGE