



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 92 OF 2013

AL HUSNAIN MOTORS LIMITED.....APPELLANT

VERSUS

ROSE ABONDO.....RESPONDENT

(Being an appeal from the decision and judgment of Chief Magistrate A. Onginjo (Mrs.) dated 21/06/2013 in the original KISII CMCC NO. 1554 OF 2004).

BETWEEN

ROSE ABONDO.....PLAINTIFF

VERSUS

AL-HUSNAIN MOTORS LTD.....1ST DEFENDANT

SCOOBY ENTERPRISES LTD.....2ND DEFENDANT

MARSHALS EAST AFRICA LTD.....3RD DEFENDANT

JUDGMENT

Pleadings

1. In her plaint dated 25th November 2004, the respondent herein Rose Abondo, who was the plaintiff before the lower court in Kisii CMCC No.1554 of 2004, sued the appellant herein and two others seeking the following reliefs:-

- a. General Damages.**
- b. Special Damages.**
- c. Costs of the suit.**
- d. Interest on (a), (b) & (c) above.**
- e. Any other relief that the Honourable Court may deem fit to grant.**

2. The cause of action was captured at paragraph 6 of the plaint wherein the respondent stated that she was on the 17th January 2004 travelling along Kisii-Kisumu Road aboard the appellant's motor vehicle

registration No. KAR 358J(hereinafter "the suit motor vehicle") when at Mosoch area an accident occurred in which she sustained severe bodily injuries. The respondent attributed the accident to the negligence of the appellant's driver and his 2 co-defendants who were the owners of motor vehicle registration number KAP 118A which collided with the suit motor vehicle

3. The respondent listed the particulars of her injuries as follows:-

- a. Fractured pelvis**
- b. L3/L4.L4 & L5 Disc prolapse.**
- c. Fracture L5 transverse process with paresis of the right lower limb.**
- d. Cuts & bruises on hands and legs**
- e. Loss of ability to procreate.**

4. The respondent also claimed for special damages as follows-

- a. Police abstract Kshs. 100/=**
- b. Medical report Kshs. 3,100/=**
- c. Medical expenses Kshs. 63,662/=**
- d. Future medical expenses**
- e. Ongoing treatment -physiotherapy**

- TOTAL Kshs. 66,762/=**

5. In its statement of defence dated 16th December 2004 the appellant denied being the owner of the suit motor vehicle together with the claim that the said motor vehicle had been involved in an accident on 17th January 2004. The appellant also denied the allegation that the respondent was a passenger in the suit motor vehicle and contended, on a without prejudice basis, that the same was solely caused by the negligence of the 2nd and 3rd defendants driver in driving and managing M/V Reg No. KAP 118A.

6. The particulars of negligence of the 2nd & 3rd defendants driver, servant , agent and/or employee were particularized as follows:-

- i. Overtaking other vehicles when he knew was not safe to do so.**
- ii. Colliding with the 1st defendant's motor vehicle.**
- iii. Driving while intoxicated.**
- iv. Driving a motor vehicle which he knew or ought to have known it was unroadworthy.**
- v. Allowing the said accident to occur.**
- vi. Driving beyond the legally accepted speed limit.**
- vii. Causing the said accident.**

7. In their amended defence filed on 8th April 2008, the 2nd and 3rd defendants denied being registered

owners of motor vehicle registration No. KAP 118 and instead attributed the accident to the sole negligence of the appellant's driver, servant or agent.

Oral evidence

8. Pw1 Dr. Ezekiel Ogando Zoga was the medical officer who on 12th May 2005 examined the respondent following the accident and established that she sustained a fracture of the lumbar vertebral No.5 and prolapse of the inter vertebral base between L3 and L4 and L5. His testimony was that the said injuries had resulted in weakness of the lower limbs for which the respondent was treated at the Aga Khan Hospital in Kisumu where she was admitted for 15 days. His conclusion was that the respondent had sustained very serious fractures which were however expected to heal with time, albeit with severe arthritis. He confirmed that the plaintiff's back pain would continue for the rest of her life.

9. PW2 Rose Achieng Abondo, the respondent herein, testified that she was on 17th January 2014 travelling in the suit motor vehicle when at Mosochi area the said vehicle collided with motor vehicle Reg. No. KAP 118 A. She produced a copy of the records of motor vehicle registrar (P exhibit 3 and P exhibit 4) to show that the suit motor vehicle and vehicle No. KAP 118A belonged to the appellant and its co-defendants respectively. She also produced a medical report from Aga-Khan and Eldoret Hospitals as P Exhibit 5 and 6 respectively together with a police abstract as P exhibit 7. She confirmed that she sustained the injuries enumerated in her plaint and added that she was yet to recover fully from the said injuries.

10. PW3 No. 78779 George Ndiema was the police officer who investigated the accident and issued the respondent with the police abstract. He stated that none of the drivers of the accident motor vehicles was charged following the accident as the case was still pending under investigations but added that a covering report prepared in respect to the case indicated that the driver of the suit vehicle was to blame for the accident as he rammed into the other vehicle from behind. This marked the close of the plaintiff's case.

11. The appellant presented the testimonies of 4 witnesses as follows:

12. DW1 was Alfred Kisira Kayia an employee of the appellant in charge of operations. His testimony was that the appellant was in the business of buying and selling motor vehicles whereupon he produced a sale agreement dated 23rd October, 2003 made between the appellant and one Antony Okoth Onyango in respect to the sale of the suit motor vehicle. He stated that the purchase price was to be paid by instalments and that the first instalment of Kshs. 450,000 was paid on 23rd October, 2003 after which the said vehicle was handed over to the buyer. On cross examination, he confirmed that ownership of the suit motor vehicle was formally transferred to the said Antony Okoth on 9th December 2004 several months after the accident.

13. DW2 was Morris Lwala Nyangaga a Senior Clerical Officer in charge of Kisii Chief Magistrates Court Civil Registry. He produced civil case files nos. 159, 1450, 1458 and 1451 of 2004 as exhibits and stated that in all those files, the appellant was cited as a third party but that the proceedings against the third party were dismissed and judgment had been entered against the 2nd defendant.

14. DW3 Ahmed Iftikr, a director of the appellant confirmed that the suit motor vehicle was sold to one Antony Okoth Onyango on 23rd October 2003. He produced a sale agreement to that effect as D Exhibit 1. He thus contended that as at the time of the accident on 17th January 2004 the suit motor vehicle no longer belonged to the appellant and as such the appellant had wrongly been enjoined in the suit.

15. DW4 Pakesh A. Haria the 2nd defendant's manager admitted that the 2nd defendant owned motor vehicle Reg No. KAP 118A that it was on the material day being driven by one Eliud Odoto who later died. He further conceded that the said motor vehicle was involved in a road traffic accident on the material day and that the High Court sitting in Kisumu in **HCC No. 55 of 2005 Jane Adhiambo Owiri v Al- Husnain Motors and Scooby Enterprises Ltd**, (hereinafter "the Kisumu case") dealt with a case

involving the same accident and apportioned liability at 60% against appellant, Al Husnain, and 40% against 2nd defendant. He produced a copy of judgment as MFID4. This marked the close of the defence case.

Lower court's judgment

16. In its judgment, the trial court found that the issue of liability had been adjudicated upon and determined by the High Court in the Kisumu case, and held that the said determination was binding on the trial court being a decision of superior court. The court did not therefore find the evidence tendered by the appellant on the ownership of the suit motor vehicle useful in view of the fact that the issue of liability had already been determined by the High Court which finding on liability the trial court adopted before proceeding to enter judgment for the respondent in the sum of Kshs. 917,162.00 together with costs of suit and interest from the date of judgment.

17. Aggrieved by the said judgment and decree, the appellant filed the instant appeal and listed the following grounds of appeal in its memorandum of appeal dated 19th July 2013:

1. THAT the learned magistrate erred in law and fact by assessing liability at 60:40(The 1st Defendant 60% liability, the 2nd and 3rd defendant 40% liability jointly and severally when there was overwhelming evidence that the 1st Defendant had sold motor vehicle registration number KAR 358J long before the accident.

2. The learned magistrate erred in law and in fact by failing to critically analyze the evidence together with the issues before the court and thereby arrived at a patently wrong decision.

3. The learned magistrate erred in applying the wrong principle of law which was inapplicable in the circumstances thereby arriving at a wrong decision.

4. The judgment was against the weight of evidence adduced and thus contrary to law.

18. The appellant sought the following orders in the appeal:

1. The judgment of the Chief Magistrate aforesaid be set aside and in its place be substituted an order finding the 2nd and the 3rd respondents 100% liable for the accident.

2. Costs of the appeal be awarded to the appellant.

Determination

19. When the appeal came up before me for hearing on 5th December, 2016, it was agreed that the same be argued by way of written submissions. Both parties filed their submissions and I have perused the same. After considering the appeal, the proceedings taken before the lower court together with the judgment and the written submissions filed by the respective advocates of each party, I discern the issues for determination to be:-

1. Whether the appellant was the owner of the suit motor vehicle at the time of the accident.

2. Whether this court should interfere with liability as assessed by the trial court.

20. As a first appellant court, my duty, as provided for under section 78 of the Civil Procedure Act is to approach the whole evidence on record from a fresh perspective and with an open mind. I am also enjoined to analyze, evaluate assess, weigh, interrogate and scrutinize all the evidence and arrive at my own independent conclusion bearing in mind the fact that unlike the trial court, I had no advantage of seeing or hearing the witnesses as they testified. **See Selle v Associated Motor Boat Co. Ltd (1968) EA 123.**

21. This court is equally alive to and shall be guided by the decision in the case of **Mbogo v Shah & Another (1968) EA 93**, wherein the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

" I think it is well settled that that this court will not interfere with the exercise of discretion by the inferior court unless it is settled that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

22. On the first issue of the ownership of the suit motor vehicle, the respondent produced a copy of records of the registrar of motor vehicles to show that it belonged to the appellant. On its part, the appellant did not deny that the suit motor vehicle was registered in its names but contended that it had, prior to the date of the accident already sold it to a third party one Antony Okoth Onyango. The appellant's case therefore was that the suit motor vehicle was neither in its custody or control at the time of the accident and as such it had been improperly included in the case.

23. Section 8 of the Traffic Act Cap 403 Laws of Kenya stipulates 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. In **Nancy Ayemba Ngaira v Abdi Ali Civil Appeal 107 of 2008[2010] eKLR, Ojwang J** (as he then was) observed as follows:-

"There is no doubt that the registration certificate obtained from the Registrar of motor vehicle will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sale 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 de facto 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 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 the Police Abstract, showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question."

24. In the present case, it was an undisputed fact that the appellant was the registered owner of the suit motor vehicle according to the police abstract and the copy of the motor vehicle registrar's records. The defendants on their part tried to rebut the above evidence through the evidence showing that the said vehicle had been sold to a third party identified as Antony Okoth Onyango.

25. In my humble view, if indeed the appellant had already sold the suit motor vehicle to the third party as he wanted the court to believe, then it was incumbent upon it, as was held in the **Nancy Ayemba Ngaira** case (supra) to not only plead the fact of the said sale in its defence, but also to enjoin the said Antony Okoth Onyango (the beneficial owner of KAR 358J) to this suit as a third party since there is no way the respondent would have known of the alleged change of ownership unless the appellant made the said disclosure. The appellant chose to introduce the issue of the alleged beneficial owner/purchaser of the suit motor vehicle during its evidence which, to my mind, was too late in the proceedings when both the pleadings and the respondent's case had already been closed. I find that the respondent proved that the appellant was the owner of the suit motor vehicle on a balance of probabilities and having failed to enjoin the alleged buyer of the said vehicle to the suit, the only remedy open to the appellant is to sue the third party in a separate suit for compensation should it deem it necessary.

26. Furthermore, I find that the trial court was justified to adopt the findings on liability in the Kisumu case which was determined earlier than the instant case in view of the fact that both cases relate to the same accident. It is noteworthy that the appellant herein did not challenge the decision of the Kisumu case

either through an appeal or an application to set it aside. I further find that if indeed the appellant had sold the suit motor vehicle at the time of the accident as it wanted the court to believe, then nothing would have been easier than for the appellant to initiate third party proceedings against the said third party in the same manner and fashion that the appellant issued a notice of claim dated 7th July, 2008 against the 2nd and 3rd defendant.

27. I therefore find that the trial court was justified in adopting the findings on liability made in the Kisumu case wherein liability was apportioned at 60% against the appellant herein. In the end I find that the above appeal is without merit and I hereby dismiss it with costs to the respondent.

Dated, signed and delivered in open court this 6th day of June, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. G. S. Okoth for Yogo advocate for the Appellant
- Mr. Ochwangi for Kimanga for the Respondent
- Omwoyo court clerk