



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL 46 OF 1996**

OSUMO APIMA NYAUNDI.....APPELLANT

AND

- 1. CHARLES ISABOKE ONYANCHA KIBONDORI**
- 2. ATTORNEY GENERAL**
- 3. P. C. (DRIVER MOSES MWALIMU**
- 4. NO. 33280 CPL NDUBI.....RESPONDENTS**

(Appeal from the Judgement and Decree of the High Court of Kenya at Kisii (Mr. Justice Tom Mbaluto) dated 27th day October, 1995

IN

CIVILCASE NO. 125 OF 1991)

JUDGMENT OF THE COURT

In May, 1989 the appellant, Mr. Osumo Apima Nyaundi, agreed to purchase a Toyota Motors vehicle registration number KUN 015 from Nakuru Yellow Motors. This vehicle is referred to as a “matatu” in the invoice issued to Mr. Nyaundi by Nakuru Yellow Motors. Mr. Nyaundi had agreed to pay the cost of the vehicle plus insurance premium (totaling Shs. 158 110/=)

Deposit: Shs. 70,000/=

Balance by 12 monthly installments of shs. 8,737/60 with effect from 30th June, 1989.

The installments agreed to be paid included administration expenses in the sum of shs.16,740/= payable to Nakuru Yellow Motors. Mr. Nyaundi took delivery of the said vehicle on 30th may, 1989.

It is not in dispute that at the time the vehicle was released to Mr. Nyaundi its registration book was not handed over to him. According to Mr. Nyaundi he had paid a total sum of Shs. 163,939/= by 7th may, 1990 thus completing the payment of the new purchase price in full.

In his defence to amended plaint filed in the superior court, the first respondent, Mr. Charles Isaboke Onyancha Kibondori (the first defendant) states:

“4. The 1st defendant states that on 13th March, 1989 he gave his motor vehicle to M/s. Yellow Motors Nakuru valued at Shs. 130,000/= to be used as a deposit for a new vehicle to be sold through M/s Nakuru Yellow Motors.”

“5 The 1st defendant states that the said Nakuru Yellow Motors gave him a new vehicle Reg. No. KAA 020E and falsely told him (2nd defendant) that they (Nakuru Yellow Motors) had paid k. Shs. 130,000/= the value of vehicle KUN 015 to M/s Consumer Hire Purchase Limited who had financed the purchase of the said vehicle KAA 020E”.

In his affidavit titled “replying affidavit” Mr. Kibondori says:

“that sometime in 1989 I gave my vehicle KUN 015 to Nakuru Yellow Motors to sell for an (sic) on my behalf and the proceeds paid to me on commission.”

Mr. Kibondori after stating that motor vehicle KUN 015 was stolen from Nakuru agreed that he had taken it to Nakuru Yellow Motors for sale at a price of not less than Shs. 130,000/=

There can be no doubt that Mr. Kibondori had authorized M/s. Nakuru Yellow Motors to sell the said motor vehicle on his behalf. He even accepted two cheques (one for shs. 100,000/= and another for Shs. 30,000/=) from Nakuru Yellow Motors, both of which cheques were dishonoured by non-payment. He even accepted a sum of Shs. 40,000/= in 1989 from Nakuru Yellow Motors in part payment of sale price of motor vehicle KUN 015.

Mr. Kibondori’s manner of handing over the motor vehicle to Nakuru Yellow Motors shows that he authorized the sale thereof. Nakuru Yellow Motors had the right to sell the motor vehicle and they sold the motor vehicle to Mr. Nyaundi at a price hereinbefore referred to and Mr. Nyaundi paid the agreed sums.

Mr. Kibondori had bought the motor vehicle from one Mr. Ngetich. He had obtained the registration book in respect of the motor vehicle from Mr. Ngetich. It becomes clear therefore that Mr. Ngetich had title to the motor vehicle. He sold it and delivered it to Mr. Kibondori. Mr. Kibondori authorized Nakuru Yellow Motors to sell the motor vehicle, who sold and delivered the same to Mr. Nyaundi.

In the face of these facts the learned judge (Mbaluto J.), by reference to Sections 9(1), and 14 of the Traffic Act (Cap403) held that Mr. Nyaundi had no title in the motor vehicle to be able to come to the superior court for redress after the vehicle was seized by the police at the instance of Mr. Kibondori. We think, with respect, the learned judge fell into error in so relying on said sections of the Traffic Act. To properly go into these two sections into these two sections we set the same out below:

“9(1) No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner thereof”

S.14 “any person who contravenes or fails to comply with any of the provisions of this part shall be guilty of an offence and is liable on a first conviction to be a fine not exceeding one thousand shillings or to imprisonment for a term not exceeding three months -”

The Traffic Act is an Act of Parliament to consolidate the law relating to traffic on the roads. It is not an Act which decides the de facto or de jure ownership of vehicles. Ownership of a vehicle passes by sale and delivery. The registration book of the vehicle is only evidence of title. Section 8 of the said Act reads:

“8. A person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

This section signifies that a registered owner will be deemed prima facie, the owner. It is open for the

real owner (should he be not the registered owner) to prove to the contrary.

The sanctions in sections 9(1) and 14 of the Act are of a different nature than what the learned judge, with respect, held. These sections provide penal sanctions but do not decide the issue of ownership of the vehicle. Ownership of a vehicle (which is a chattel), upon sale, is governed by the Sale of Goods Act. Section 20 of the Sale Of Goods Acts states:

“20 Unless a different intention appears, the following rules apply for ascertaining the intentions of the parties as to the time at which the property in the goods is to pass to the buyer:

- (a) where there is an unconditional contract for sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed;
- (b)

When Nakuru Yellow Motors sold and delivered the motor vehicle to Mr. Nyaundi, Mr. Nyaundi became the de facto and de jure owner of the motor vehicle save for the formality of registration. We say this because Nakuru Yellow Motors were authorized by Mr. Kibondori to sell the motor vehicle and Mr. Kibondori had ownership of the motor vehicle form Mr. Ngetich.

The first ground of appeal therefore succeeds.

However the learned judge proceeded to make further findings should he have been shown to be wrong. In his alternative findings he came to the correct conclusion when he said:

“The position between the 1st defendant (Mr. Kibondori) and Nakuru Yellow Motors would not in any way affect the plaintiff’s rights over the motor vehicle because in my view he purchased it openly from a dealer who was authorized to sale(sic) motor vehicles. He paid a substantial part, if not all, the purchase price and was thereafter given possession of the motor vehicle.”

We must point out that the possessions was given prior to full payment. But S20(a) of the Sale of Goods Act covers the situation property. Mr. Nyaundi became the owner of the vehicle on 22nd May, 1989 when the contract for sale was made between him and Nakuru Yellow Motors.

Equally, the learned judge (in his alternate findings) came to the correct conclusion when he held that the seizure of the motor vehicle was unjustified and unlawful. Police officers acting on wrong information by Mr. Kibondori seized the motor vehicle. Had Mr. Kibondori told the police officers that he had infact authorized Nakuru Yellow Motors to sell the motor vehicle, there would have been no seizure. The learned judge was right in thinking that the seizure was motivated by the desire on the part of the police at Nakuru to assist their fellow police officer, the first respondent, who lost money as Nakuru Yellow Motors did not pay him what it ought to have paid.

The appellant purchased the motor vehicle from Nakuru Yellow Motors in open market and the conditions which may have been imposed by Mr. Kibondori on Nakuru Yellow Motors as regards sale of the motor vehicle would not affect the ownership by Mr. Nyaundi of the motor vehicle. There is no evidence that Mr. Nyaundi was aware of any restrictions imposed on Nakuru Yellow Motors by Mr. Kibondori. However, the evidence shows, to the contrary, that Mr. Kibondori had authorized the sale.

The learned Judge, as indeed he was bound to, assessed damages in the event he was held wrong. He found that had he held Mr. Nyaundi was entitled to damages, he would have awarded the same in the sum of Shs. 264,000/=. In arriving at this figure he took into account the fact that the motor vehicle was held for 264 days. Taking in figure of Shs. 1000/= per day for loss of user of the motor vehicle he awarded a sum of Shs. 264,000/= to Mr. Nyaundi. Mr. Nyaundi had not claimed any specific figure for his loss of user. It is trite law that special damages must not only be pleaded but must be strictly proved. Mr. Nyaundi simply claimed general damages for trespass to vehicle and unlawful conversions and/or

detention of the vehicle. In his evidence Mr. Nyaundi claimed loss of income for 'Matatu' business at the rate of shs. 2,000/= per day for 264 days. This claim, as it turned out in his evidence, was for special damages, No evidence of accounts to prove any loss was adduced. The learned judge was not entitled to pluck out a figure form the air and award such figure damages for loss of user. There was absolutely no basis upon which the learned judge could have awarded a sum of shs. 1,000/= per day for loss of user. With respect, the learned judge erred in so assessing damages.

The damages assessed were, in the event the learned judge was wrong in his initial findings, payable by all the defendants jointly and severally. So this conditional award against all the defendants fails. As such damages have not been proved properly the first defendant does not become liable in respect thereof and therefore the other defendants also do not become liable in respect thereof.

The upshot of all this is that this appeal is allowed and we make the following orders:

- (i.) It be and is hereby declared that the appellant is the lawful owner of motor vehicle registration number KUN 015.
- (ii.) It be and is hereby ordered that the appellant is in lawful custody of the said motor vehicle.
- (iii.) There will be no award of damages as against any of the defendants.

As the appellant has succeeded in his appeal in respect of his claim for the title to the motor vehicle but has not succeeded in respect of his claim for damages he is awarded one half the costs of his appeal and one half the costs of the suit in the superior court which costs will be paid jointly and severally by all defendants.

Dated and delivered at Kisumu this 27th day of September, 1996.

P.K TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL