



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 89 OF 2010

BETWEEN

AKAMBA PUBLIC ROAD SERVICES LIMITEDAPPELLANT

AND

TABITHA KERUBO OMAMBIARESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at

Kakamega (G. B. M. Kariuki, J) dated 15th February 2007

in

KAKAMEGA HCCC No. 32 OF 2004)

JUDGEMENT OF THE COURT

This is a first appeal from the judgement of the High Court of Kenya at Kakamega (G. B. M. Kariuki, J (as he then was) delivered on 15th February, 2007 where the respondent Tabitha Kerubo Omambia was successful in the suit against the appellant Akamba Public Services Limited. Being a first appeal it is our duty to review the whole matter, reconsider the evidence and reach our own conclusions but must be mindful that we did not hear the witnesses nor observe their demeanour, an advantage solely retained by the trial judge. See **Mwanasokoni v Kenya Bus Services Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur)**.

Sir Kenneth O'Connor speaking for the predecessor of this Court in **Peters v Sunday Post Limited [1985] EA 424** expressed himself thus:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...”

Therefore it is only when the finding of fact that is challenged on appeal is based on no evidence, or on a

Total ...732,600/=.”

The learned Judge awarded the plaintiff interest at court rates from the date of judgement until full payment and also awarded the plaintiff costs of the suit.

The findings of the Judge did not find favour with the defendant which provoked this appeal. The plaintiff also filed a cross – appeal against part of the judgement.

In the Memorandum of Appeal drawn by the appellants Advocates seven (7) grounds of appeal were taken. They are:

- “1. The Learned Trial Judge erred in law and in fact in misinterpreting the facts that led to the accident and thereby arrived at a wrong decision.**
- 2. The Learned Trial Judge misdirected himself in accepting the Respondent's evidence in isolation and thereby precluded himself from assessing or assessing with anxious care needed the Appellant's case.**
- 3. The Learned Trial Judge erred in law in awarding special damages whilst wholly disregarding the principles that the same ought to have been strictly proven.**
- 4. The Learned Trial Judge erred in law by analyzing the facts in a manner so as to require the Appellant to disprove the Respondent's evidence whilst the onus of proof lay with the Respondent.**
- 5. The Learned Trial Judge erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant.**
- 6. The Learned Trial Judge erred in law and fact by failing to appreciate that the Respondent had no locus standi to institute the suit and thus could not have been entitled to any damages.**
- 7. The Learned Trial Judge erred in law and fact by failing to find that the Respondent's “subject motor vehicle” substantially contributed to the accident and should have been held contributorily negligent.”**

The appeal came for hearing before us on 4th July, 2013. Counsel for the appellant who took all the grounds of appeal together, identified as the main issue on appeal, determination of the question whether the appellant was liable to compensate the respondent for the loss of the motor vehicle as a result of the accident and whether assessment of quantum by the learned judge was lawful. On these questions counsel submitted that the appellant was not liable to compensate the respondent because the respondent had failed to prove ownership of the motor vehicle. Accordingly to counsel, possession of the motor vehicle without a valid transfer did not confer any rights to the respondent who in the event lacked the necessary locus standi to institute the suit. Counsel finally questioned the findings on quantum which in counsels' opinion had not been proved specifically as pleaded and as required by law.

Counsel for the respondent opposed the appeal and supported the judgement only in part. Counsel supported the findings of the learned judge on the value of the motor vehicle and submitted that the motor vehicle could not have depreciated in value as it was involved in the accident hardly a month after it was purchased.

On the issue of ownership, counsel submitted that the respondent had proved ownership through the sale agreement which gave the respondent immediate possession of the same while the seller of the motor vehicle would retain the log book as security for the balance of Kshs. 103,000/= which remained unpaid on execution of the agreement.

On liability counsel for the respondent submitted that the same had been established because the appellants driver was charged and convicted in a traffic court.

On valuation of the motor vehicle counsel for the respondent submitted that valuation had been proved through valuation report produced in court. In any event, continued counsel, the learned judge did not award the full value of the motor vehicle in the valuation report but applied depreciation reducing the value to Kshs. 680,000/=.

Counsel, in urging cross – appeal, submitted that the learned Judge erred in awarding interest from the date of judgement when, according to counsel, and relying on Section 26 Civil Procedure Act, interest on a liquidated sum should be awarded from the date of filing suit.

We have carefully considered the grounds of appeal, the submissions by counsel and the law applicable in an appeal such as this one. We are grateful to counsel for the industry employed while preparing and presenting of this appeal.

On the first and second grounds of appeal the appellant has faulted the learned Judge for misinterpreting the facts that led to the accident and for accepting the respondents evidence “... **in isolation and thereby precluded himself from assessing or assessing with anxious care needed the Appellant's case...**” We understand this as questioning the learned Judges' findings on the issue of liability.

As we have stated the respondent testified that an accident occurred involving her motor vehicle and the appellants' motor vehicle. The respondents motor vehicle became a total loss as a result of the accident. The respondent called as witnesses inter alia a police officer who produced police traffic file relating to a charge that was preferred against the appellants' driver who was tried, convicted and sentenced by the traffic court. No appeal was preferred against those findings. The appellant did not call any evidence to rebut the plaintiff's allegations.

Section 47A of the Evidence Act provides that:

“A final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

In the premises where the appellants' driver was convicted of the offence resulting from the accident and in the absence of any appeal against conviction, the learned Judge was entitled, as he did, to find that the appellant was vicariously liable for the acts and omissions of its authorized driver who drove the appellants motor vehicle with such negligence that led to the accident subject of the suit. The appellant did not in any event call any witness, including its convicted driver, to rebut the respondents case and prove particulars of negligence set out in the statement of defence or any contributory negligence.

The appellant has faulted the learned Judge for awarding damages while, according to the appellant, disregarding the principles requiring strict proof on a suit for special damages. It is, indeed, true that special damages must be pleaded and proved. This has been held to be so in the many decisions of this court such as **Herbert Hahn v Amrik Singh (1982 -88) 1 KAR 738.**

What was the case put forward by the respondent in proof of the suit as regard loss of the motor vehicle and loss of attendant business?

It was that the respondent purchased a motor vehicle from a third party at Kshs. 750,000/= on 27th August, 1999 and took immediate possession of the same. The motor vehicle was employed for transport service on the Kakamega -Majengo – Luanda road. The net daily earnings were Kshs. 2,500/=. The motor vehicle was involved in an accident on 11th September, 1999, about 15 days after it was

purchased, and became a total loss. The respondent tendered as part of the evidence the agreement of sale of the motor vehicle, an assessors report, a Police Abstract Report and documents prepared and maintained by the plaintiffs son to show daily earnings of the motor vehicle.

This is how the learned Judge pronounced himself on this aspect of the case before him:

“... The matatu cost Shs. 750,000/= on 27.8.99. It was written off with a salvage of Shs. 45,000/= on 11.9.99. The report by the assessors was not made by competent persons and it is my finding that it was not made by persons with expertise and therefore lacked value as a valuation report. But the matatu was in working condition and was on the road. Mr. Oloo, the defendant's counsel, puts its pre-accident value at 400,000/= less salvage. The Plaintiff claims Shs. 780,000/= for the matatu. At the point in time when it was irreparably damaged in the accident, it was in working condition and was plying its route carrying passengers. But at the point in time when it was valued, it was a decrepit and valueless mangled wreck. Having been purchased on 27.8.99, the matatu had been on the road for barely a month when the accident in which it was destroyed on 11.9.99 occurred. It had cost the plaintiff Shs. 750,000/=. This is not disputed. Nor is it suggested this price was inflated or did not represent roughly its value. The burden of proving that the matatu was valued Shs. 780,000/= rested on the Plaintiff. On the evidence placed before the court, it would not be unreasonable to take that the price paid for it roughly represented its value for the simple reason that being a second hand vehicle, its condition dictated the price and generally reflected its value. Allowance for depreciation for about a month, ought to be made. It is my finding, after weighing all the circumstances and the evidence, that a sum of Shs. 680,000/= as the pre-accident value for the matatu would not be unrealistic. To that figure, I add Shs. 100/= being the cost of the police abstract.”

On the aspect of value of the motor vehicle it was alleged in the Complaint that the motor vehicle was valued at Kshs. 780,000/= and the plaintiff prayed for this sum less salvage value Kshs. 45,000/=. The learned judge considered the evidence before him and in his discretion reduced the value to Kshs. 680,000/=.

We are satisfied, firstly, that the learned Judge exercised his discretion correctly in arriving at a fair valuation of the motor vehicle at Kshs. 680,000/= and, secondly, in holding that the respondent had specifically proved the claim.

On loss of business the learned judge awarded Kshs. 2500/= per day for 21 days. The judge said this in respect of this aspect of the matter:

“...Both Mr. Samba, learned counsel for the plaintiff and Mr. Oloo learned counsel for the Defendant, were in concurrence in their submissions that the plaintiff is entitled to loss of business for a period of 21 days. It is my finding therefore that the plaintiff is entitled to compensation for loss of business for 21 days at the rate of Shs. 2500/= per day..”

We are satisfied, like the learned Judge, that an award of Kshs. 2500/= daily for 21 days for loss of earnings was reasonable and that the same was proved through the evidence presented before the court.

Nothing lies with the 4th ground of appeal. The learned Judge analyzed the material before him and did not shift the burden of proof as alleged by the appellant.

On the claim at ground 5 that the judge erred in holding that the respondent had not proved negligence we have already pronounced ourselves on the evidence where the respondents evidence was not rebutted or controverted and was proved as required by law. Provisions of the Evidence Act in respect of such proof were satisfied and we need not go further on this.

Did the respondent have locus standi to institute the suit? This forms the complaint at ground 6 of the Memorandum of Appeal. The respondent produced in evidence a sale agreement in respect of the motor vehicle subject of the suit. We have perused the said agreement. It provides inter alia that the motor vehicle, sold on a "... as is where is basis..", was sold at the price of Kshs. 750,000/=; the respondent was to take possession of it immediately and use it from the date of the agreement given as 27th August, 1999. The seller had received the purchase price save for a sum of Kshs. 103, 000/= which was to be paid upon the seller producing a log book and a duly executed transfer form and the said balance was to be paid within two (2) months of the date of the agreement in any event. Counsel for the respondent urged us to find that ownership of the motor vehicle had been established because the respondent had ostensible authority through the said agreement to take possession of the motor vehicle and to use the same. He cited Section 8 of the Traffic Act which states that the particulars of ownership of a motor vehicle are prima facie evidence of ownership unless the contrary is proved to fortify his submission that the agreement of sale established that the respondent was the owner of the motor vehicle.

Section 20 (a) of the Sale of Goods Act Cap 31 Laws of Kenya provides in respect of a matter like the one we are dealing with:

“Unless a different intention appears, the following rules apply for ascertaining the intention 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 the 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 post-poned; ”

The agreement of sale made by the respondent with a 3rd party gave the respondent immediate possession and use of the motor vehicle subject of the suit. A log book and an executed transfer form were to be delivered to the respondent who would simultaneously pay balance of purchase price to the 3rd party. The learned Judge analyzed the facts and the law on the issue of locus standi and reached the conclusion that the respondent was entitled to bring and maintain the suit.

It is clear that the respondent and the said 3rd party intended the property of the motor vehicle to pass to the respondent on execution of the agreement. The respondent not only paid a substantial part of the purchase price but also took immediate possession of the motor vehicle which she immediately deployed on the road to do business in the transport sector. Retention of log book and transfer form was to act as security for the unpaid balance. The learned judge held:

“The property in the matatu having passed to the plaintiff prior to the accident, the plaintiff was entitled to claim its loss as she did. I observe that, as at 11.9.99 when the accident occurred, the matatu was lawfully on the road and section 9 (1) of the Traffic Act had not been breached. And even if it were to be argued that it was breached, nevertheless in circumstances such as these, such breach would not undermine the claim although it might give rise to a violation which would result in a traffic offence.”

We are satisfied, like the learned judge, that property in the motor vehicle had, indeed, passed to the respondent who in the event was entitled to institute and continue the suit.

The last ground of appeal concerns the learned Judges' alleged failure to find that the respondent substantially contributed to the accident. How could this claim be made or maintained where the appellant did not choose or bother to call evidence either to rebut the plaintiffs case or prove the particulars of negligence set out in the statement of defence? The learned Judge was right to find that the appellant was vicariously liable for the accident and was duty bound to make good the respondents claim.

We now turn to the cross appeal. The respondent filed a Notice of Appeal against part of the

judgement. Before us counsel for the respondent urged us to hold that the learned Judge was wrong in awarding interest from the date of judgement. Counsel for the appellant submitted that award of interest and effective date for the same were matters at the discretion of the trial court.

Section 26 Civil Procedure Act which speaks to the issue of interest provides:

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
”

The suit before the judge was for a liquidated sum. The learned judge awarded interest from the date of judgement but did not assign any reason for departing from the usual practice in such suits where interest is awarded from the date of the suit.

In the premises we are satisfied that the respondent has demonstrated that the learned judge misdirected himself when he awarded interest to take effect as ordered. We are entitled to interfere with that aspect of the judges findings which we hereby do and set aside the order for interest to be from the date of judgement substituting thereof an order that interest be and is hereby awarded from the date of the suit.

The net effect of our findings is that the appeal has no merit and is accordingly dismissed with costs . The cross -appeal succeeds to the extent that we set aside that part of the judgement awarding interest to the respondent from the date of judgment and substitute thereof an order that interest do take effect from the date of filing suit until payment in full. The respondent will also have costs of the cross-appeal.

These, then, are our orders.

Dated and Delivered at Kisumu this 11th day of October 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR