REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 43 of 2006

NELSON YABESH BICHANGA ……..APPELLANT

AND
MARY B. OMARI

NATHAN M. NYANGARA *(suing as Joint administrator of the estate of*

MESHACK OMARI MOGIRE (DECEASED) ….…….. 1ST RESPONDENT

KISII BROADWAYS LIMITED ……. 2ND RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Kisumu (Warsame, J.) dated 25th July, 2005

in

H.C.C.S. NO. 122 OF 2002)

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JUDGMENT OF THE COURT

On 1st April, 2000, the records that were produced before the trial court in this appeal, namely the motor vehicle log book, the details of registered ownership held by the Kenya Reveneue Authority and evidence given by the only witness that was called for the defendants in the **High Court Civil Case No. 122 of 2002**, showed that the appellant ***Nelson Yabesh Bichanga*** and CFC Bank were the registered owners of the motor vehicle registration number KAH 891 and although their defence witness Reuben Nyabena, transport manager with Kisii Broadways Limited, the second defendant, now second respondent in this appeal, stated in evidence that the appellant sold the same motor vehicle to the second respondent in the month of February, 2000, and the vehicle was transferred to the second respondent immediately, the records held at the Kenya Revenue office were not affected by that alleged action until after April, 2000.

As that vehicle was travelling along Keroka – Kisii road, on 1st April, 2000, it had an accident at Keumbo and crashed. ***Meshack Omari Mogire*** (deceased) was a fare paying passenger in that vehicle at the time of the accident. As a result of the accident, he was fatally injured and died. The respondents, ***Mary B. Omari*** and ***Nathan M. Nyangara***, wife and father of the deceased respectively, took out Letters of Administration and having done so, sued the appellant. They sued as joint administrators of the estate of the deceased ***Meshack Omari Mogire*** in a plaint filed in the High Court at Kisumu on 12th April, 2002 but which was amended vide amended plaint filed on 18th April, 2002 in which they sought general and

special damages against the appellant. On the appellant being served with that amended plaint, he filed a Defence dated 2nd May, 2002 on 6th May, 2002 in which his main defence was at paragraph 3 thereof and was that: -

"The Defendant denies the contents of paragraph 3 of the plaint that he was the lawful owner of the motor vehicle registration No. KAH 891C and puts the plaintiff to strict proof thereof."

He concluded that defence by stating that he had been wrongly sued as a defendant in the matter and would move the court accordingly. He followed that up by saying that the amended plaint dated 16th of April, 2002 be struck off in Chamber Summons dated 28th May, 2002 and filed on 29th May, 2002. In the supporting affidavit and further affidavit, in support of that Chamber Summons, the appellant alleged that he had sold the subject motor vehicle to Kisii Broadways Limited and attached copy of Kenya Revenue Authority receipts. Following that defence and Chamber Summons, the respondent filed Chamber Summons and sought leave to file amended plaint to include Kisii Broadways Limited as second defendant. That application was allowed and second respondent was added in a further amended plaint dated 4th November, 2002 and filed on 11th November, 2002. In that further amended plaint the joint administrators prayed for judgment to be entered against the appellant and Kisii Broadways Limited, the alleged purchaser of the subject vehicle, jointly and severally for general damages and special damages which was Kshs. 65,150/=, costs of the suit and interest on the two at court rates. The persons for whom the suit was brought under Law Reform Act were the widow who is the first respondent; three sons of the deceased namely ***Fred Omari***, ***Bisera Omari*** *and* ***Nyag'awa Omari***, three daughters namely ***Carolyne Omari***, ***Cathelyne Omari*** and ***Mercelyne Omari*** and the deceased's father, Nathan Nyangara who is the second respondent.

After the pleadings were closed and the various applications disposed of, the suit was set down for hearing first before Gacheche J. who heard one witness, the father of the deceased whose evidence was *inter alia* that the certificate obtained from the Kenya Revenue offices demonstrated that the appellant was the owner of the vehicle at the time of the accident. He owned it together with CFC bank. That certificate of search was issued on 15th June, 2000, well over two weeks after the accident. The witness said the deceased was 44 years at the time of his death; was a businessman engaged in retail trade, welding; had a posho mill and was assisting the family, including the deceased's widow and children. He also gave evidence on special damages.

The widow gave evidence as PW2. She gave the names of her children with the deceased, dates of their birth and their then current status in life which was, on the main, that they were all still learning in various institutions at the time their father met his death. She further gave evidence on the deceased's occupation and produced various documents in support of those businesses. She also confirmed from copies of the motor vehicle records that the appellant was the owner of the vehicle at the time of the accident. On the part of the two defendants, one ***Reuben Nyabena***, a transport manager with Kisii Broadways, the second defendant gave evidence. He said in his evidence-in-chief that the second defendant purchased the subject motor vehicle from the appellant in the month of February, 2000 and it was transferred immediately to Kisii Broadways Limited. He produced a receipt for payment dated 18th February, 2000 showing that Kshs.52,125/= was paid to KRA for transfer. He said the logbook was given to KRA by Kisii Broadways Limited. In cross examination by the learned counsel for the first respondent i.e the administrators of the deceased's estate, this witness said:

"1.4.2000 the owner of the motor vehicle was the first defendant.

- *We dont have an agreement to show that the 2nd defendant purchased the motor vehicle from the 1st defendant.*

- *28.5.2002 payment was received from the 1st defendant. He transferred the motor vehicle to himself and later to the 2nd defendant.*

- *I am not aware that the 1st defendant is a director of the 2nd defendant."*

And in cross examination by the learned counsel for the second defendant Kisii Broadways Limited, the witness said:

" I know the directors of the 2nd defendant.

- *I do not wish to disclose the directors of the company as at 1.4.2000, the owners, the motor vehicle (sic) was Kisii Broadways on 18.4.2000.*

- *Before 18.4.2000 the motor vehicle was in the name of the 1st defendant (Nelson Yabesh).*

- *15.6.2000, the motor vehicle was owned by Nelson Yabesh and CFC bank.*

……

- *We did not enter into an agreement with the first owner."*

The record before us does not show that the appellant gave evidence. His learned counsel at the trial before the High Court called one witness and that was ***Reuben Nyabena*** whose evidence we have set out above, and who was in fact an employee of the second defendant, now second respondent in this appeal. Be that as it may, after the submissions by the learned counsel representing each party, the learned Judge, in a fairly lengthy judgment delivered on 27th July, 2005 found the appellant to be the owner of the subject motor vehicle at the time of the accident in April, 2000, and proceeded to find him 100% liable for the accident. He entered judgment for the respondent against the appellant as follows: -

"(a) loss of dependency …… Kshs. 1,200,000.00

(b) loss of expectation of life ……..Kshs. 100,000.00

(c) pain and suffering …… Kshs. 20,000.00

(d) special damages ……..Kshs. 20,000.00

TOTAL Kshs. 1,340,000.00

Plus costs and interest to be borne by the first defendant.

The 2nd defendant bears it own costs."

The appellant felt aggrieved by that judgment and hence this appeal premised on fifteen grounds of appeal, the brief summary of which are that the learned trial Judge erred in fact by finding that the subject motor vehicle registration number KAH 891C belonged to the appellant as at the 1st of April, 2000; that the Judge erred in finding that **Sections 8** and ***9 (1)*** and ***(2)*** of the Traffic Act Cap 403 were not complied with; that he erred in finding the sale of the subject motor vehicle null and void; that he erred in finding that insurance cover should have been taken out by the appellant notwithstanding that the purchaser had taken out the insurance cover; that he erred in finding that the appellant was solely liable for the death of the deceased and that the second respondent had no blame whatsoever; that he erred in admitting irrelevant evidence that the appellant and his wife were directors of the second respondent; that the learned Judge erred in seeking a written agreement notwithstanding that this was not a contract on immovable property; that there was no evidence to prove the finding by the court that the deceased was giving Kshs.10.000/- to his family; that he erred in finding that the deceased owned a posho mill business at Nyansiongo, a kerosene business and retail shop while there was no evidence to support the same; and that the learned Judge erred in fact and in law by awarding the first respondent special damages that was not pleaded and proved as required by law.

In his submissions before us, Mr. Makori, learned counsel for the appellant, stated that the appellant had sold the subject motor vehicle on 18th February, 2000 and the second respondent to which the vehicle was sold forwarded the relevant documents to the Registrar of Motor Vehicles but he conceded that the actual endorsement was made on 18th April, 2000 over two weeks after the accident. He submitted however that as at the time of the accident, the subject of the suit, the possession of the vehicle had changed hands and the appellant was no longer in possession of it. He further conceded that the appellant did not inform the motor vehicle department within seven days as is required in law, of the sale and that being so no form in respect of that sale exists in the record. He also conceded that the appellant did not tell anybody of that sale including his insurance company. In his view, at the time of the accident, the appellant did not have insurable interest in the vehicle as per the provisions ***of Section 4 (1)*** of Chapter 405, Laws of Kenya. His next point was that under the law of contract, written agreements are only required for sale of immovable properties and not for matters such as sale of motor vehicles. His further complaint was that special damages were awarded notwithstanding that they were not proved by documentary evidence as the law requires and lastly, Mr. Makori submitted that as the deceased was 44 years old at the time of his death a multiplier of 15 years was not in law proper as at the time the accident took place in the year 2000, the retirement age was 55 and thus to him a multiplier of 11 years would have been more appropriate.

Mr. Nyagaka, learned counsel for the respondent, was of a contrary view. He supported the judgment of the learned Judge of the High Court contending that as it was conceded that the motor vehicle which was at the time of the accident registered in the name of the appellant, provisions of ***Section 9*** of the Traffic Act had to be relied upon. The driver of the vehicle died in the accident. Burden was on the appellant to show that he had sold the vehicle to the second respondent and had complied with the legal provisions in doing so, such that by the time the accident took place, the vehicle was owned by the second respondent but he failed to discharge that burden. He submitted further that the receipts in respect of special damages were produced in court except in cases where receipts could not be obtained but oral evidence was given to meet the situation. Lastly, he stated that the multiplier arrived at by the court was proper in this case.

We think the main issue in this appeal is whether or not the learned Judge of the High Court was right in finding and holding as he did, that the appellant was the owner of the motor vehicle registration number KAH 89C as at 1st April, 2000, the date when the accident, the subject of this entire matter, occurred. We will of course address the other issues raised such as whether the multiplier of 15 years was appropriate in this case, and whether the court could award special damages in some cases where no documentary evidence could be availed; what we think the Judge meant when he touched on the absence of a written agreement for the alleged sale of the subject vehicle, together with whether or not the learned Judge was entitled to admit the piece of evidence that indicated that the appellant and his wife were directors of the second respondent.

On the question of ownership of the vehicle, the appellant's contention was that by the time the accident occurred, he was not the owner of the vehicle as he had sold the vehicle to the second respondent on 18th February, 2000. The first respondent on the other hand was of the view that as by the time the accident occurred the record at the Registrar of Motor Vehicles offices at the Kenya Revenue Authority showed that the appellant was the registered owner, it was his duty to satisfy the court that he had indeed sold the vehicle to the second respondent as in law, he was *prima facie* still the owner of the subject vehicle. The learned Judge considered the rival positions, the evidence that was before him and the law and having done so made the following findings on that issue to wit: -

"4. That on 1.4.2000 the motor vehicle which caused the death of the deceased solely and exclusively belonged to the 1st defendant.

5. I make a finding that section 8 and 9 of Cap 403 was not complied with if any transfer or sale took place.

6. That the purported sale of 18.2.2000 is null and void as section 9(1) and 9 (2) was not faithfully

complied with by the alleged seller and purported purchaser."

The only witness called by the defendants at the trial, was for some reasons the transport manager with the second respondent. The appellant did not give evidence. As a first appellate court, we note that the witness ***Reuben Nyabena*** was to some extent not candid with the court – particularly when he denied the allegation that the appellant was a director of the said respondent Kisii Broadways Limited and later in cross-examination by the appellant's counsel he agreed that he knew the directors of the second respondent only to decline to disclose the names of those directors as on 1st April, 2000. Clearly he had something to hide but we will revert to that later in this judgment. He admitted however that as at 1st April, 2000, the appellant was the registered owner of the subject motor vehicle and that the second respondent became its owner much later after the Kenya Revenue Authority endorsed the transfer documents. ***Section 8*** of the Traffic Act Chapter 403 states as follows: -

"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

The evidence availed by the production of other records from the motor vehicle department shows that the appellant was the registered owner of the subject vehicle as at the date of the accident. Thus the onus of proving the contrary was on him. He needed to prove that the ownership had actually passed on to the second respondent through a valid contract entered into between him and the second respondent under the provisions of ***Section 20 (a)*** of the sale of Goods Act ***Chapter 31***, cited by the learned Judge which states:

"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 postponed."*

In this case, Nyabena says the property in the subject vehicle passed to the second respondent in 18th February, 2000. The record shows that that is the date on which second hand Motor Vehicles Purchaser Tax was paid by the second respondent but that in itself is not evidence as to when the payment for the vehicle was made, nor is it evidence of how much money was paid for the vehicle by the second defendant if such sale indeed existed. This is the reason why the learned Judge rightly decried the absence of any sale agreement which would have established that indeed such a sale did exist notwithstanding that the registered owner still remained the appellant. In the absence of these aspects all there is is that some money was paid to Kenya Revenue Authority as Tax payable on the purchase of KAH 891 C but nothing more. Further and even of greater importance, ***Section 9 (2)*** of the Traffic Act ***Chapter 403*** states: -

"Upon the transfer of ownership of a motor vehicle or trailer, the registered owner thereof shall within seven days from the date of the transfer, inform the Registrar in the prescribed form of the name and address of the new owner and deliver to the new owner the registration both in respect of such vehicle; and the new owner shall, after inserting particulars of the change of ownership, forward the registration both with the prescribed fee to the Registrar, whereupon the vehicle shall be registered in the name of the new owner."

Mr. Makori, in his submissions before us readily conceded that the appellant did not inform the motor vehicle department of the alleged sale within seven days of the sale and that the form of such sale, described in the provision as the "*prescribed form*" is not in the record. As there is nothing such as an agreement to indicate the actual date of alleged sale by the appellant to the second respondent, it is not easy to ascertain when such information should have been made to the Registrar. Further, the accident took place on 1st April, 2000. The appellant through Mr. Nyabena, the employee of the second respondent says that the vehicle was purchased from him in February, 2000. He does not give any specific date as all he produced was what he called payment receipt dated 18th February, 2000, which might not have necessarily been the date of agreement to buy the vehicle nor could it be the date the vehicle was handed

over to the second respondent. All he says is that it was transferred to the second respondent immediately but avoided the exact date. Nonetheless even if one was to take 18th February, 2000 as the date of the alleged transfer, still by 1st April, 2000, when the accident took place, second respondent had not been registered as the new owner. ***Section 9 (1)*** of the Traffic Act states:-

"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."

If the subject vehicle was transferred to the second respondent on 18th February, 2000, one wonders what it was doing on the road on 1st April, 2000 before the new owner was registered. This was well over one month after the alleged transfer and in any case no action was taken by the appellant to ensure the vehicle did not remain in his name and if still in his name as it was, that it was not on the road.

We agree that as was held by the Court of Appeal of Uganda in the case of **Osapire vs. Kaddy (2000) EALA 187**, a registration card or logbook is only *prima facie* evidence of title to a motor vehicle and the person in whose name the vehicle is registered is presumed to be the owner unless proved otherwise as is clear in our ***Section 8*** of the Traffic Act. However, in this appeal that presumption in our view remains because the appellant had not proved to the satisfaction of the court the contrary position he alleged. In the case of **Francis Nzioka Ngao vs. Silas Thiauri Nkunga**, **Civil Appeal No. 92 of 1998**, a similar situation arose and this Court agreed with the High Court Judge in his relying on ***Sections 9(1)***, ***9 (2)*** of the Traffic Act and found that the ownership had not passed to the third party and therefore held the appellant as the owner of the vehicle and found him liable for the accident that had occurred involving the same vehicle.

We are not satisfied with the attempts made by the appellant through the second respondent's employee, which witness we have said was not candid in his evidence, to prove that he was not the owner of the motor vehicle on 1st April, 2000 when the same vehicle was involved in the accident resulting into the demise of the deceased. We see no reasons to persuade us to interfere with the learned Judge's findings and holding on that aspect. As the appellant is the one who was the registered owner of the motor vehicle, the learned Judge did find and we too have accepted, he could not escape being the one solely to blame. The appellant in his grounds of appeal stated that the learned Judge erred by taking evidence from the bar on issues that were not subject of the appeal to wit that the appellant and his wife were joint directors of the second respondent. In our view, the only witness for the defence, Mr. Nyabena was asked in cross-examination whether the appellant was a director of the second respondent. He denied it but when asked who the directors of the second respondent were, his answer was that he did not wish to disclose the names of the directors of the second respondent. Thereafter, Mr. Musumba, the learned counsel for the second respondent in his submissions stated:

"It is our submission the motor vehicle belonged to the defendant. The directors of the second defendant are the first defendant and his wife."

That statement came from the advocate of the second defendant to which the vehicle was allegedly sold. The matter had been canvassed at the hearing and the second defendant's advocate revealed it all. We do not see what was wrong in the learned Judge commenting on that aspect as indeed the fact adds to the credibility of Nyabena who would not reveal to court his directors while he was in such a senior position that he obviously knew the same directors' names and that evidence also throws some light as to whether the appellant in fact sold the vehicle to his own company or merely sought to transfer it to his company for nothing. We go no further on that aspect but it is indeed telling.

The next issue we need to discuss is that of damages and first is general damages. There was no dispute as to the amount the deceased was drawing from his business as a salary. The Memorandum of Appeal however claims at paragraph 14 that the Judge erred in finding that the deceased owned business of a posho mill at Nyansiongo, a kerosene business and a retail shop as these were not in evidence. His father PW1 said in evidence that the deceased was a businessman, engaged in retail trade and welding and

that he also had "*a trailing*" unit and a posho mill. Mary O. Onisi (PW2) was the deceased's wife. She said in evidence that her husband had a retail shop at home; he was selling kerosene in drums; he had a posho mill at his home village; he was doing welding; had a book show and was buying materials from hardware shops. Lastly he had a trailing project which he died before he could develop although he had bought machines for it. In her evidence he had been licensed for all these trades by Nyansiongo County Council. We think with respect that this claim is unfounded. The learned Judge was plainly right in finding as he did, that the deceased had those businesses. Evidence on record bears him out. The salary he was drawing from these businesses was Kshs.18,750/= per month. That was not disputed. He was aged 44 years at the time of his death. That is also undisputed. Again as concerns paragraph 13 of the Memorandum of Appeal where the appellant states the Judge erred in finding that the deceased was giving a sum of Kshs.10,000/= to his family while there was no such evidence, Mary says in her evidence-in-chief:

"He was responsible for the payment of fees and feeding the family. He assisted me by giving me some amount like Kshs.10,000/= for other accidental (sic) up keep for the family. He used also to assist my father-in-law."

That evidence the learned Judge relied on was adduced in court as cited above.

Mr. Makori also submitted that the multiplier of 15 years was not proper in law as the retirement age at the relevant time was 55. He then suggested a multiplier of 11 years. In our view, the retirement age of 55 was for Government employees and not for those in their own businesses. Indeed even at that time retirement age in most private sectors was 60 years and not 55. In our view the deceased was a man of 44 years; an active businessman who certainly could have continued in business actively for a period well beyond the 60 years retirement age. Mr. Makori did not refer us to any court decision stating that the Government retirement age must be the benchmark for calculating a multiplier and we have not put our hands on any such authority. We are of the view that as regards the award of general damages, we have no sound reasons for interfering with the award that was made. In our view the learned Judge considered all aspects fully as was required of him and arrived at an inevitable conclusion.

On the special damages, the learned Judge allowed a sum of Kshs.15,000/= as funeral expenses in place of Kshs.30,000/= which was pleaded. He rejected the other special damages pleaded as they were not strictly proved as required by law. This was notwithstanding that even funeral expenses was also not proved by way of documentary evidence but the learned Judge still allowed it at reduced amounts. He gave reasons for doing so. In respect of funeral expenses, he felt that such expenses do exist but cannot be proved by documentary evidence. We agree with him that not all special damages must be proved by way of documentary evidence. We must not be understood to be allowing such claims without any restrictions. We feel that in cases such as funeral expenses where everything purchased may not attract a receipt, and where some expenses result from cultural commitments such as at funerals, proper oral evidence detailing such expenses should suffice.

The learned Judge of the High Court has allowed Kshs.5000/= for coffin expenses against the amount of Kshs.10.000/= claimed and for which a receipt was produced. He has given reasons for the same. However, as there was no cross appeal against that, we will let it stand.

In conclusion, for all we have said above, this appeal lacks merit. It cannot stand. We dismiss it with costs of the appeal to the first respondent. Judgment accordingly.

Dated and delivered at Kisumu this 28th day of November, 2012.

J.W. ONYANGO OTIENO
……..
JUDGE OF APPEAL

ALNASHIR VISRAM
……

JUDGE OF APPEAL

R.N. NAMBUYE

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR