



**Car and General (Trading) Limited v Wairire & another (Civil Appeal
78 of 2019) [2024] KEHC 502 (KLR) (Appeals) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL 78 OF 2019

DAS MAJANJA, J

JANUARY 31, 2024

BETWEEN

CAR AND GENERAL (TRADING) LIMITED APPELLANT

AND

PETER MAINA WAIRIRE 1ST RESPONDENT

FRANCIS OUMA MUGERE 2ND RESPONDENT

*(Being appeals from the Judgement and Decree of Hon. E.A. Nyaloti, CM dated 16th
January 2019 at the Magistrates Court at Milimani in Civil Case No.1198 of 2016)*

JUDGMENT

Introduction and Background

1. Before the court for determination are appeals by the Appellant and the 1st Respondent stemming from the judgment of Subordinate Court dated 16.01.2019 where it was found that the 1st Respondent had proved his case against the Appellant and the 2nd Respondent and held them liable on a 50:50 basis for an accident that occurred on 04.06.2014 along Jogoo Road where the 1st Respondent was hit by a motorcycle registration KMCYS (“the motorcycle”). The court awarded the 1st Respondent Kshs. 800,000.00 and Kshs. 300,000 as general damages and cost for future medical expenses respectively, Kshs. 2,500.00 as special damages, costs of the suit and interest at court rates from the date of the judgment.
2. In his case before the trial court, the 1st Respondent stated that at the time, the 2nd Respondent was the beneficial owner and/or rider of the motorcycle while the Appellant was its registered owner. He claimed that he was a lawful pedestrian standing at a stage way off the road along Jogoo road when the motorcycle was carelessly and negligently driven thereby hitting him and occasioning him serious losses



and damages. He averred that he sustained a fracture of the bimalleolar left ankle joint with dislocation, a fracture of the lower 3rd left tibia/ fibula and compound fracture to the left tibia/ fibula. He thus sought general damages, special damages, costs of the suit and interest.

3. In response, the Appellant denied that it was the registered owner of the motorcycle. It averred that it was in the business of selling and distribution of the motorcycles and that any registration of the motorcycle was only for the purpose of compliance with statutory requirements to enable it transact its business of selling the motorcycle. That the motorcycle had already been disposed of to A.M Tailor-Kisii and the said customer had taken physical occupation of the motorcycle. It denied that it authorized its agent/servant or employee to use the motorcycle at the time of the accident. It also denied any negligence as alleged in the Plaint. It further denied the claim for damages and injuries and denied any liability whatsoever and stated that the 1st Respondent lacked any cause of action against it.
4. At the hearing, the 1st Respondent (PW 1) testified. The Appellant called its Logistics Co-ordinator, Joseph Mulwa Mwambi (DW 1). In its judgment rendered on 16.01.2019, the trial court confirmed that the accident occurred on 04.06.2014 and that the copy of records indicated that as at 21.01.2016, the motorcycle was registered in the name of the Appellant. That the Appellant in their defence produced evidence that they had sold the motorcycle to A.M Tailor but that there is no evidence apart from the receipts produced that the motorcycle had been sold at the time of the accident. The lower court held that the Appellant ought to have joined the said AM Tailor as a third party to the case.
5. On the issue of quantum of damages, the trial court held that the 1st Respondent suffered a fracture of the compound tibia as per the medical report by Dr. Wandugu and that he would require Kshs. 300,000.00 to remove the metal implant. The trial magistrate was guided by *Stanley Maore v Geoffrey Mwenda* Nyr CA Civil Appeal No. 147 of 2002 [2004] eKLR to award Kshs. 800,000.00 as general damages and Kshs. 300,000.00 for costs of future medical expenses. Further and as stated, the 1st Respondent was also awarded Kshs. 2,500.00 as special damages, costs of the suit and interest at court rates from the date of judgment. The Appellant was also to bear 50% of liability.
6. The judgment triggered appeals from the Appellant and the 1st Respondent. The Appellant challenges the trial court's findings on ownership of the motorcycle and its liability while the 1st Respondent challenges the findings on liability. The appeals have been canvassed by way of written submissions. I will make the relevant references to those submissions in my analysis and determination below.

Analysis and Determination

7. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the [Civil Procedure Act](#) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion as to whether to uphold the judgment of the trial court (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
8. With the above in hindsight, I will now proceed to determine the issues raised by the parties in their submissions. The Appellant submits that the trial court failed to consider the evidence it tendered showing that it was not the owner of the motorcycle. The 1st Respondent produced a copy of records dated 21.01.2016 which indicated that the Appellant was the registered owner of the motorcycle. As submitted by the Appellant, section 8 of the [Traffic Act](#) (Chapter 403 of the Laws of Kenya) provides that,

“ [T]he person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”.



9. In its rebuttal, the Appellant produced a receipt dated 10.01.2013, a motorcycle sales agreement dated 11.01.2013 and a receipt dated 11.01.2013. The Appellant further makes reference to section 9(1) of the Traffic Act which provides that,

“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.”

It submits that having sold and transferred the motorcycle, ownership of the motorcycle changed hands after the sale and the Appellant was not the owner neither did it have control and/or derive any benefit after 10.01.2013. It relies on Muhambi Kojia v Said Mbwana Abdi [2015] eKLR where the Court of Appeal expounded on section 9(1) above as follows:

Two scenarios are presented under this provision. There are two steps to be satisfied within fourteen days before the vehicle can be registered in the name of the new owner. As this process is in motion the new owner, though not registered, can use the vehicle on the road for a period of fourteen (14) days. If the vehicle was to be involved in an accident in this intervening period the registration book will be in the name of the seller yet the motor vehicle will have been transferred and ownership vested in the new owner only pending registration. That new owner will be liable if evidence of transfer is led. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms..... In Nelson Yabesh Bichanga v Mary Omari Ksm Civil Appeal No.43 of 2006 (UR) it is the sale agreement that was used in rebuttal..... These decisions confirm that, by dint of Section 8 of the Traffic Act the registration book or the Registrar’s extract of the record are only prima facie evidence of title to a vehicle and the person in whose name it is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities it is shown that as a matter of fact the vehicle had been transferred but not yet registered to a de facto owner, a beneficial owner or a possessory owner. Such an owner, though not registered, for practical purposes may be more relevant than that in whose name the vehicle is registered as was found in the Securicor Kenya case (supra). [Emphasis mine]

10. Having reviewed the evidence produced by the Appellant, I hold that though it was the registered owner of the motorcycle at the time, it had been sold to a third party, A.M Tailor and that this third party was the de facto, beneficial and possessory owner of the motorcycle. Although the 1st Respondent submits that the motorcycle sales agreement did not form part of the record at the trial, I note that it is on record and bears the stamp of the trial court dated 13.09.2017, which indicates that it was filed in the court and also bears the receiving stamp of the 1st Respondent’s advocates indicating that it was received by them on 14.09.2017. The record of proceedings also indicates that DW 1 stated that the agreement existed. From the judgment, it is evident that the trial magistrate did not consider all the evidence produced by the Appellant in rebuttal as it only made reference to the receipt no. KSM042168 which on its face I would agree is not clear as to whether the same related to the sale of the motorcycle. However, the motorcycle sales agreement and the receipt issued by the A.M Tailor sufficiently demonstrates, on a balance of probability that the motorcycle had already been sold to the latter at least by 11.01.2013. It was therefore an error for the lower court to find that the Appellant had not discharged its burden of proving that it was no longer the beneficial or possessory owner of the motorcycle.
11. I also note that in the judgment, the trial magistrate stated that the Appellant ought to have joined A. M. Tailor as a third party. The Appellant submits that there was no triable determination between



it and A.M Tailor hence there was no need to join it. It further submits that the 1st Respondent had pleaded in its plaint stated that the 2nd Respondent was the beneficial owner of the motorcycle which averment was also supported by the police abstract. I agree. Indeed, it is true that the person who pleads liability on the part of another is the one to join the party alleged to be at fault and that a defendant can only join those owners it feels contributed to the accident (see [John Kibicho Thirima v Emmanuel Parsmei Mkoitiko](#) [2017] eKLR). As the Appellant did not blame A.M. Tailor for the accident and the 1st Respondent stated in his pleadings that the 2nd Respondent was the beneficial owner of the motorcycle and in light of the finding that the Appellant was not the beneficial owner of the motorcycle, it follows that his cause of action was against the 2nd Respondent only.

12. From the findings above, it then follows that the 1st Respondent cannot claim the Appellant and the 2nd Respondent ought to have been held jointly and severally liable for the accident. Since his cause of action was proved against the 2nd Respondent who did not challenge the evidence that he was the beneficial owner of the motorcycle, he is thus entirely liable for the accident.

Disposition

13. For the reasons I have outlined above, I hold that the Appellant's appeal succeeds to the extent that the 1st Respondent failed to prove that the Appellant was liable for the accident as there was evidence produced by the Appellant that rebutted the position that he was the owner of the motorcycle. The 1st Respondent's appeal fails since there was no liability on the part of the Appellant. Since his case against the 2nd Respondent was not challenged, it remains that he had proved that the 2nd Respondent was 100% liable for the accident.
14. In conclusion, I therefore allow the appeal on the following terms:
 - a. The judgment of the Subordinate Court dated 16.01.2019 be and is hereby set aside and substituted with a judgment dismissing the suit against the Appellant and entering judgment for the 1st Respondent against the 2nd Respondent with liability set at 100%.
 - b. The Appellant is awarded costs of the suit and of this appeal. The costs of this appeal are assessed to Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

D. S. MAJANJA

JUDGE

Mr Muthee instructed by Kabiru and Company Advocates for the Appellant.

Mr Mutuku instructed by Mutuku Wambua and Associates Advocates for the Respondent.

