



**Rosslyn Academy v Muturi & another (Civil Appeal 669 of 2019)
[2024] KEHC 2129 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2129 (KLR)

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

CIVIL

CIVIL APPEAL 669 OF 2019

JN MULWA, J

FEBRUARY 29, 2024

BETWEEN

ROSSLYN ACADEMY APPELLANT

AND

PETER HESTON MUTURI 1ST RESPONDENT

CEASAR IBRAHIM OUSA 2ND RESPONDENT

JUDGMENT

1. On 28/02/2012 while walking along Thika Road the 1st Respondent was hit by motor vehicle registration number KAP 932Y upon which he suffered serious injuries. He instituted Civil Case No.4566 of 2013 at the Chief Magistrates Court at Milimani where he sought general and special damages together with costs and interest. Both the Appellant and 2nd Respondent entered appearance and filed their statement of defences denying liability. The Court upon considering the parties cases entered Judgment in favour of the 1st Respondent against the Appellant and 2nd Respondent jointly and severally in the sum of Kshs. 1,500,000/= as general damages and Kshs. 2,000/= as special damages plus costs of the suit and interest at court rates.
2. Dissatisfied with the judgment the Appellant lodged an Appeal by a Memorandum of Appeal dated 15/11/2019 upon the following grounds;
 1. The Honourable Magistrate erred in law and in fact by holding that title in the subject motor vehicle had not passed to the second defendant despite the overwhelming evidence rebutting ownership as envisioned by Section 8 of the Traffic Act which included;
 - a. Testimony by the appellant's witness that he handed over the vehicle to the second respondent together with the original logbook following the sale of the vehicle.



- b. Receipts issued to the second respondent by the Appellant evidencing payment by installments in respect of the vehicle.
 - c. Transfer form duly executed by the Appellant.
 - d. The second respondent did not deny nor rebut the assertion that the vehicle had been sold to him by the Appellant.
 - e. The second respondent's witness confirmed being in possession of the vehicle on the instructions of a party not being the Appellant.
2. The Honourable Magistrate erred in law and in fact in holding that the Appellant is vicariously liable for the accident and injuries sustained by the Plaintiff when;
- a. She had already held that the second respondent was wholly liable for causing the accident and the plaintiffs injuries.
 - b. No employment relationship or any master/ servant relationship has been proved between the respondents.
 - c. The second respondent's witness who was driving the vehicle confirmed that he was not an employee of the Appellant.
 - d. No basis whatsoever arose to give rise to vicarious liability as against the Appellant.
 - 1. The Honourable Magistrate erred in law and in fact in entering judgment against the respondents' jointly and severally despite having found the second respondent wholly liable for the accident and the injuries sustained by the Plaintiff.
 - 2. The award of general damages of Kshs. 1,500,000/- awarded to the first respondent is manifestly excessive in the circumstances of this case considering the injuries sustained and the Appellants submissions on quantum

The Appellant prays that the Appeal be allowed with costs and the Judgment dated 22/10/2019 be set aside and substituted with an order dismissing the suit against the Appellant with costs.

3. The 1st Respondent's case was urged through the evidence of PW1 Dr. Titus Ndeti, PW2 Peter Heston Muturi and PW 3 PC Ronald Ombati.

PW1 in his evidence testified that he examined the 1st Respondent who was hit in 2012 and established that he had suffered bruises on the forehead, fracture of the cheek bone, fracture base of skull-fracture left radius, swollen right knee joint, fracture head of right fibula bone and chest injuries. He also testified that the 1st Respondent was taken to Neema Hospital then Coptic Hospital where an x-ray was done, medication given and discharged. PW1 also testified that the 1st Respondent complained of headache and pain on the left joint and right knee joint, he was also of sound mind with scars on the forehead and tenderness on the right knee joint. It was also PW1's testimony that at the time of examination the 1st Respondent's injuries had healed but he was at risk of suffering from epilepsy due to the injury on the head. Further that in preparing his medical report which he charged Kshs. 2000/= he relied on treatment notes. He also testified that he was paid Kshs. 10,000/= for court attendance. He produced Plaintiff Exhibit (1) (2) and (3). Upon cross examination he testified that he had done the examination 1 year after the accident and that the 1st Respondent had never gone to him for review to confirm whether or not he had developed epilepsy.



PW2 testified after the accident he reported to Pangani Police Station where he was issued with a Police form and Abstract produced as Plaintiff Exhibit 7 & 8. He also stated that he undertook an official search and paid Kshs.500/= where he confirmed that the vehicle in question belonged to the Appellant. He produced the search and receipt of payment as Plaintiff Exhibit 9 & 10. PW2 also produced a demand letter written to the Appellant and 2nd Respondent. He went ahead to testify that he could not walk fast and produced a case summary from Neema Uhai Hospital. Upon cross examination he testified that he often felt dizzy since the accident.

PW3 testified that he was attached to Pangani Police Station and that the accident in question occurred on 28/2/2012 at 7.00 hours and that the same happened at the Station. The witness also testified that the 1st Respondent had been hit by motor vehicle KAP 932Y Nissan Sullivan and that there were no eyewitnesses. PW3 also testified that a police abstract had been issued and it was produced before court as Plaintiff Exhibit 8. Upon cross examination it was established that at the time of the accident PW3 was not attached to Pangani Police Station and that the officer who visited the scene has since been transferred.

4. The Appellant's case was urged through DW1 Francis Kimani and DW2 Joseph Olwande Okech.

DW1 in his testimony adopted his witness statement as part of his exam in chief. He also testified that he was the transport manager of the Appellant and that the motor vehicle in question used to belong to the school but on 20/09/2010 the school entered into an agreement with the 2nd Respondent for its sale. It was also his testimony that the 2nd Respondent paid a sum totaling to Kshs. 550,000/= and a duly signed Transfer document was issued together with the original logbook to the 2nd Respondent. He produced the receipts for payment as Defence Exhibit 1,2 & 3. DW1's testimony that it was the 2nd Respondent's responsibility to transfer the motor vehicle to his name. Further, the accident occurred one and a half year after the vehicle had been sold. During cross examination DW1 testified that he was not aware if the Appellant was registered as a limited company or not and that he had not produced any resolution from management authorizing sale of the motor vehicle in question. He also testified that no sale agreement had been produced. Upon re-examination he confirmed that he was present during the sale and that the Appellant was a public school and that the agreement had been done orally.

DW2 testified that he was a bus driver and that on the day of the accident he was picking children along Thika Road when the 1st Respondent emerged from the main road and hit the vehicle he was driving. He testified that he was driving at a speed of 30-40 KPH. He went on to testify that he took the 1st Respondent to hospital after which they reported the matter to the Police. DW2 testimony was that he was never sued for a traffic offence neither was he blamed for the accident.

Upon cross examination DW2 also testified that the schools name he was working for was known as Super kid and that he did not know the 2nd Respondent or the owner of the school. He also testified that he did not go to the Appellant nor was he aware of the owner of the motor vehicle he was driving.

Analysis and Determination

5. I have considered the Memorandum of Appeal filed before this Court, the written submissions in support and against the Appeal and the evidence adduced before me. Two issues fall for determination;
- i. Whether the Appellant was in possession and control of Motor vehicle registration KAP 932Y at the time of the accident?
 - ii. Whether the Appellant was vicariously liable for the negligence of the driver of the motor vehicle at the time of the accident?
 - iii. Whether the award of damages to the 1st Respondent was excessive in the circumstances?



6. The Appellate Court's primary responsibility is to thoroughly review all the evidence afresh considering that it did not directly witness or hear the witnesses, and to arrive at its own judgment and conclusion, as articulated in the case of *Selle & another v Motor Boat Co. Ltd & others* 1968 EA123. However, in carrying out this task, the court is not obliged to adopt the factual determinations or conclusions of the trial court.
7. The Appeal was canvassed by way of written submissions.

The Appellant filed written submissions dated 12/07/2023. In the submissions it is urged that the duty of the Court is set out under section 78 of the *Civil Procedure Act* see *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. The appellant it is submitted produced evidence rebutting ownership of Motor vehicle KAP 932Y as envisioned by section 8 of the *Traffic Act*. It produced a KRA Transfer of Ownership of Motor Vehicle form indicating the new owner dated 21/09/2010 and Receipts of payment. The 2nd Respondent acknowledged in his defence that the Appellant was not the registered owner and that he was the non-registered owner of the motor vehicle. It was also submitted that no evidence was given by the 2nd Respondent to prove that it was not the beneficial owner of the motor vehicle. DW2'S testimony corroborated the fact that the Appellant had sold the motor vehicle to the 2nd Respondent. There was also no evidence that there was an employment relationship between Appellant and the 2nd Respondent or DW2. see *Halsbury's Laws of England and Beatrice William Muthoka & another (Both Suing as Legal Representatives of the Estate of the Late William Muthoka Yumbia(Deceased)) vs Agility Logistics Limited* [2020] eKLR.
8. The 1st Respondent's written submissions are dated 11/08/2023. It is submitted that the 2nd Respondent and the Appellant were both beneficial owners of the said motor vehicle, relying on the police abstract. I have perused the police abstract. The driver is indicated as Joseph Okech and ownership is not indicated. However, the motor vehicle search certificate shows that the registered owner at the time of the accident was the Appellant. The 1st Respondent relied on Civil Appeal No.91 of 2016 *Nicholas King'oo Kithuka vs. Jap Quality Motors & Others* for the proposition that for the motor vehicle to move from one owner to another it had to be through a sale which could only be evidenced through a sale agreement. Failure on the part of the Appellant to produce the Sale Agreement according to the 1st Respondent amounted to concealment of facts which cannot be excused by the Court.
9. Additionally, it is submitted that the unsigned transfer form does not confirm transfer and it cannot be admitted as evidence as was held in the case of *Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others* [2019] eKLR and also that only one of the receipts that have been produced was in regard to motor vehicle KAP 932Y. Section 8 of The *Traffic Act* provides that the registered owner is presumed to be the owner of a motor vehicle unless otherwise proven. See *Nancy Ayemba Ngaira vs. Abdi Ali* [2010] eKLR.
10. The Appellant before this Court urges that by the time the accident occurred motor vehicle KAP 932Y had already been sold to the 2nd Respondent. The 2nd Respondent on the other hand argues that the vehicle still remained registered in the Appellant's and therefore it belonged to the Appellant. The burden is upon the Appellant to prove on a balance of probabilities that although the vehicle at the time of the accident was still registered under its name it had already sold the same to the 2nd Respondent.
11. Sections 107 and 108 of *Evidence Act* (Cap 80 Laws of Kenya) which assign burden of proof in a case provide as follows;
 107. Burden of proof



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

12. Section 8 of the *Traffic Act* provides 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.” (emphasis supplied).

The above section has been construed to mean that the registration of a motor vehicle is not conclusive proof of ownership as held by the Court of Appeal in Uganda in the case of *Osapil vs Kaddy* [2000] 1 EALA 187 that a logbook is only prima-facie evidence of title to a motor vehicle and that the person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

13. Similarly, the Court of Appeal in Kenya in the case of *Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O’Kubasu’ Deverell JJ. A)* held that;

“Our holding finds support in the decision in *Osapil Vs. Kaddy* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

14. This position was restated by the Court in the case of *Joel Muga Opinja v. East Africa Sea Food Ltd* [2013] eKLR as follows: -

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied”

15. The Court in the case of *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR held as follows;

“All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of *Francis Nzioka Ngao vs Silas Thiani Nkunga*, Civil Appeal No.92 of 1998;

“Whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.”



16. In the case before this Court the Appellant produced before the trial court a Transfer of Ownership form which evidenced the transfer of motor vehicle KAP 932Y on 21/9/2010 to the 2nd Respondent. In its defence the Appellant stated that it had given the 2nd Respondent the said transfer to complete and follow up with the Registrar of Motor Vehicles. No adverse inference therefore ought to be made against the appellant for the sole reason that he did not follow up the 2nd respondent to ensure that the transfer had been effected by the Registrar of Motor Vehicles. See Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR.
17. Contrary to the 2nd Respondent's argument that two of the receipts produced by the Appellant were not in regards to sale of the said motor vehicle as they referred to a parent's name this court upon examination of the three receipts notes that they all refer to "Sale of Vehicle" as reason for the payments of Kshs. 99,000, Kshs. 330,000 and Kshs. 121,000. The so-called parent's name is that of Ceasar Ibrahim Ousa the 2nd Respondent before this Court and that is not merely a coincidence but confirmation that a transaction of sale of a motor vehicle had taken place between the Appellant and the 2nd Respondent. The 2nd Respondent never testified before the trial court and therefore his defence is of no evidential value. The Court therefore finds that the payment receipts which were produced by the Appellant proved that Appellant indeed sold the said motor vehicle to the 2nd Respondent. Had the 2nd Respondent testified to the contrary then the burden of proof would have shifted to the 2nd Respondent to show what the payment was made for if not for the sale of the motor vehicle.
18. The Respondent's also raised the issue of there being no sale agreement exhibited before the court to prove that indeed the vehicle had been sold to the 2nd Respondent. It should be noted that not all sale agreements ought to be in writing; it could be oral or by implication save for sale of land where it is mandatory to have the sale agreement in writing.
19. The 2nd Respondent proceeded to defend the manner of driving of the said motor vehicle and the actions of the driver whereas he was not the driver or in the vehicle at the time of the accident. Such a defence can only be mounted by a person who is in possession of the said motor vehicle and authorized the person driving the motor vehicle. That kind of defence is but a sham and the trial magistrate erred in relying on such a defence to find that the Appellant was vicariously liable for the negligence of the driver of the vehicle.
20. The motor vehicle in this court's opinion was in the 2nd Respondent's possession and control and therefore the beneficial owner. This position is also supported by the testimony of DW2 who confirmed that the children he was ferrying belonged to Super kid School and not to the Appellant's school.
21. Having considered the evidence, the Court is satisfied that the Appellant proved before the trial court that it had sold motor vehicle KAP 932Y to the 2nd respondent long before the accident occurred. The Appellant sufficiently rebutted the presumption that it was still the owner of the motor by virtue of the Certificate of Registration. The Court is satisfied that the appellant discharged the burden of proof as required in law. In light of the above it is this court's finding that the learned magistrate erred in finding that the Appellant was vicariously liable for the accident in question.
22. On the matter of quantum of damages the Appellant and 2nd Respondent argued that the award by the trial court was excessive and that the reasonable amount ought to have been Kshs. 500,000/-. The 1st respondent pleaded that he suffered the following injuries:
 - a) Bruises on the forehead
 - b) Fracture of the left mastoid bone.



- c) Fracture of the left radius bone
 - d) Swollen right knee joint
 - e) Fractured head of right fibula bone.
 - f) Blunt Chest injury
23. The nature of the injuries sustained by the respondent as pleaded was corroborated in the discharge summary produced as P. Ex 5, the X Ray report produced as P. Ex 6, the Medical Report produced as P. Ex 2 and P3 form dated 25/04/2012 produced as PEx7 which all reiterated the injuries suffered by the 1st respondent as those pleaded in the Amended plaint.
24. I have considered the submissions made by the parties on the quantum of damages, the authorities cited in their submissions for and against this appeal including the medical report by Dr. Titus Ndeti Nzina. The Court notes that the trial court in reaching its decision on quantum considered the injuries suffered in the authority quoted by the Plaintiff and found that they were more severe as compared to the injuries suffered by the Plaintiff. The learned magistrate went ahead to award the sum of Kshs. 1,500,000/=.
25. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case of *Khambi & Another v Mahitu & Another* (supra). Further the Court of Appeal in the case *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 Of 1992 Stated:
- “Those principles were well stated by Law, J.A in *Bashir Ahmed Butt vs. Uwais Ahmed Khan*,
By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-
- ‘An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded “on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”
26. This Court has looked at the case of *Zachary Karithi vs. Jashon Otieno Ochola* Civil Appeal No.153 of 2012 cited by the 2nd Respondent and it finds that as the injuries suffered therein are comparable to the ones suffered by the Plaintiff, the sum of Kshs. 1,500,000/- is reasonable compensation. This court therefore finds no reason to interfere with the trial court’s decision on quantum. It is upheld.
27. For the foregoing the Appeal succeeds partially in the following manner:
- a. On liability: The 2nd Respondent, Caesar Ibrahim Ousa is found to be wholly liable for the negligence of the driver of the motor vehicle, KAP 932Y one Joseph Olwande Okech on the material date of the accident.
 - b. On damages: The award of Kshs. 1,500,000/- general damages and Kshs. 2,000/- special damages is upheld with interest and costs as found by the trial magistrate.
 - c. The 2nd Respondent shall bear costs of this appeal to the Appellant.

DATED DELIVERED AND SIGNED IN NAIROBI THIS 29TH DAY OF FEBRUARY 2024

J. N. MULWA

JUDGE

