



**China Civil Engineering Construction Corporation Kenya
Limited v Mwanzo Mpya Trading Co Ltd & 2 others (Civil Appeal
E058 of 2022) [2023] KEHC 18020 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E058 OF 2022
SM GITHINJI, J
MAY 23, 2023**

BETWEEN

**CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION KENYA
LIMITED APPELLANT**

AND

MWANZO MPYA TRADING CO LTD 1ST RESPONDENT

RICHARD MUIA MASIKA 2ND RESPONDENT

MUSIMI DANSON 3RD RESPONDENT

*(Being an Appeal from the Judgment of Hon S.K Ngii – PM
dated 11th May 2022 in Mariakani Civil Suit No. E011 of 2020)*

JUDGMENT

Hon. Justice S. M. Githinji

Mr Gor Advocates for the Appellant

Mr Ngigi Advocates for the Respondents

1. This appeal arises from the decision of Hon. S.K Ngii on a trial in which the Appellant had sued the respondents for damages arising out of acts of negligence in a road traffic accident of 29.9.2017 along Mombasa- Nairobi Road. After a full trial and consideration of the evidence, the learned magistrate on 11.05.2022 dismissed the claim for failure to meet the burden and standard of proof on a balance of probabilities. That decision triggered the present appeal as seen in the memorandum of appeal dated 7.06.2022, tailored as follows: -



1. That the learned magistrate erred in law and fact in holding that the Appellant had not proved its case on a balance of probabilities as required by law against the overwhelming weight of the evidence that was tendered in support of the Appellant's case.
 2. That the learned trial magistrate erred in law and in fact in holding that the Appellant had failed to prove the motor vehicle Reg No KBU 403Q/ZE 223S was owned by the Respondents against the weight of the evidence before him.
 3. That the learned trial magistrate erred in law and fact in failing appreciate that PW2 the IP Mohamed Hassan had testified in court to the effect that Motor Vehicle Registration No KBU 403Q/ZE 223S was owned by Mwanzo Mpya Trading Limited the 1st Respondent herein and was driven by Musimi Danson the 3rd Respondent which proves on a balance of probabilities that Motor Vehicle Reg No KBU 403Q/ZE 223S was owned by the 1st Respondent and was being driven by the 3rd Respondent herein.
 4. That the learned trial magistrate erred in law and in fact in failing to appreciate that PW2 the IP Mohamed Hassan had testified in court on the causation and clearly narrated what transpired on the material date and blamed the driver of Motor Vehicle Reg No KBU 403Q/ZE 223S for ramming into the rear of Motor Vehicle Reg No KCD 144A owned by the Appellant thus the issue of causation was proved to the required standard.
 5. That the learned trial magistrate erred in law and fact in imposing a higher standard of proof in civil cases contrary to what is provided for under the law by requiring the Appellant to produce a copy of records to prove ownership and for the Appellant's driver to testify on causation.
 6. That the learned trial magistrate erred in law and in fact in failing to appreciate that the suit before him was a subrogation claim that emanated from a breach of duty of care by the Respondents which was duly proved by the Appellant to the required standard.
 7. That the learned magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the Appellant.
 8. That the learned magistrate erred in law and in fact by failing to consider all the material facts that had been placed before the court and thereby failed to consider or to properly consider all the evidence before him and as a result arrived at a completely erroneous decision.
2. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

3. Counsel for the Appellant submitted that the evidence produced by PW2 at the trial was sufficient to prove their case and since their evidence was uncontroverted, the doctrine of *res ipsa loquitur* was applicable. Counsel argued that the trial magistrate placed a higher burden of proof on the Appellant contrary to what was defined in *JRS Group Limited v Kennedy Odhiambo Andak* [2016] eKLR. Counsel further submitted that it is the duty of a trial court to assess damage that could otherwise have been awarded, something the trial court failed to do. Counsel therefore urged this court to award the sum of Kshs 710,933/- as prayed for in the Plaint.

The Respondents' Submissions

4. Quoting Kimaru J in *William Kabogo Gitau v George Thuo and 2 others* [2010] 1 KLR 526 on what amounts to proof on a balance of probability; *Evans Nyakwama v Cleophas Bwana Ongaro* [1025] eKLR and sections 107, 109 and 112 of the *Evidence Act*, counsel submitted that the Appellant failed to



prove ownership, liability as well as negligence on the part of the Respondent. On consequences of the Appellant's failure to prove ownership of the motor vehicle said to be registered in the Respondent's name, counsel relied on the case of *Thuranira Karauri v Agnes Nchebe* [1997] eKLR.

5. Regarding the said testimony of PW2, Counsel submitted that since he was not the investigating officer and had nothing else to produce except the abstract, the evidence on record was unreliable and marred with inconsistencies. According to counsel, the evidence was all hearsay as it was stated in *Simion Mwangi Mureithi v Martin O. Shikuku* [2005] eKLR. Counsel argued that there was no evidence showing negligence or placing liability upon the Respondents as is required. To buttress this point, counsel relied on the case of *Florence Rebecca Kalume v Coastline Safaris and another* [1996] eKLR; *Kiema Muthuku v Kenya Cargo Handling Services Ltd*; and *Nzoia Sugar Company Limited v David Nalyanya* [2008] eKLR.
6. This being a first appeal, it is the duty of this court as the first appellate court to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion, bearing in mind that it did not see the witnesses testify and give due allowance for that. See *PIL Kenya Limited v Oppong* [2009] KLR 442.
7. During the trial, the Appellant called two witnesses. The Respondents on the other hand filed a joint statement of defence denying the claim, and participated in the hearing of the Appellant's case but failed to call any witnesses.
8. Mutai Kipkorir- PW1 an underwriter at Metropolitan Canon Insurance Company adopted his written statement dated 21.9.2020 and produced documents in a list of documents filed on 23.9.2020. He testified on cross-examination that none of their representatives was present at the accident scene. According to their investigations, the impact on the motor vehicle KCD 144A was on the front part. That the Appellant's driver stated that their vehicle was rammed from behind causing him [the appellant's driver] to ram into another unidentified vehicle that was ahead. The witness confirmed that (they) insurer paid the Appellant for the loss.
9. Inspector Mohamed Hassan –PW2, of Mariakani Police Station, narrated that on the material date, the investigating officer, one Douglas Nyamweya visited the accident scene where three vehicles KBT 057H/ZD 6048, KCD 144A, and KBU 403Q/ZE 223S all headed towards Nairobi in that order, were involved in an accident. The vehicles were being driven by one Tayari Juma Mgani, Charo Suma Komo and Musyimi Danson respectively. He narrated that an unknown vehicle made a stop causing the KBT to stop and in turn causing the KCD to also stop. Resultantly, the KBU rammed into the back rear of the KCD. The KBU was extensively damaged on the front bumper.
10. On cross examination, the witness told the court that the police did not take any photographs of the accident scene. That the only vehicle that was extensively damaged was the KBU as was stated in the OB entry. He stated that the KBU driver was not charged with any offence even though he was blamed for failure to keep a safe distance.

Analysis and Determination

11. The import of Section 107 of the *Evidence Act* is to the effect that:
 1. Whoever desires any Court to give Judgment as to any legal right dependent on the existence 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.



12. It is settled in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.
13. It must also be noted that the Respondents did not call any witnesses to produce evidence in support of their case. This failure however does not necessarily mean that the claimant's allegations will be taken as conclusive proof of facts and allowed for that reason alone. Unless there is sufficient evidence to prove their claim, the court has no obligation to automatically allow such an uncontroverted claim. The Court must interrogate the evidence and ensure that the prayers sought are justified.
14. Having said that, I find that the main issues for determination in this appeal are;
 1. Whether the Appellant proved ownership of the vehicle KBU 405Q/ZD 223S.
 2. Whether the Appellant proved negligence on the part of the Respondents.
 3. Whether the trial magistrate erred in failing to assess damages.

Whether the Appellant proved ownership of the motor vehicle Registration No KBU 405Q/ZD 223S.

15. The Appellant submitted that the trial magistrate erred by holding the Appellant had failed to prove the ownership of the motor vehicle registration No KBU 405Q/ZD 2235 yet the police officer who testified as PW2 told the Court that the said vehicle was owned by the 1st Respondent.
16. Proof of ownership of a motor vehicle is not just by way of a registration of such ownership in the logbook. Other forms of ownership of motor vehicles are recognized in law. Section 8 of the [Traffic Act](#) leaves room for proof of ownership by other evidence as was stated by Emukule J in [Charles Nyambuto Mageto v Peter Njuguna Njathi](#) NKU HCCA No 4 of 2009 [2013] eKLR thus:

“From the interpretation of Section 8 of the [Traffic Act](#) as elucidated above, a person claiming or asserting ownership need not to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thurania and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof of ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership.”

17. Further, the Court in [Jotham Mugalo v Telkom \(K\) Ltd](#) Kisumu HCCC No 166 of 2001[2005] eKLR held:

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation



by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the *Evidence Act*.”

18. In the present case, regarding ownership of the vehicle Registration No KBU 403Q/ZE 223S there is captured in the police abstract issued on 30.9.2017, the following words;

KBU 403Q/ZE 223S

C/o Mwanzo Mpya

BOX 164 MASII

19. I agree with the trial magistrate, that the name Mwanzo Mpya is clearly not exactly the same as Mwanzo Mpya Trading Company Limited. However, it must be considered that in civil cases such as this one, the standard of proof is on a balance of probabilities. Given that the Respondents did not give any oral or documentary evidence to the contrary or even challenge the police abstract on cross-examination, I hold the view that it is more probable than not that the motor vehicle KBU 403Q/ZE 223S was at the time of the accident owned by the 1st Respondent.

Whether the Appellant proved negligence on the part of the Respondents.

20. As already established, the burden of proof of any fact or allegation is on a Plaintiff and therefore the Plaintiff, herein the Appellant, must establish a causal link between the Respondents’ negligence and the damage or loss suffered. A perusal of the evidence on record, shows vividly that the accident involved three motor vehicles. Apart from PW2, there was no testimony from an eye witness from the accident scene to shed light on how the accident happened. The testimonies of the drivers listed on the police abstract would have gone a long way to ascertain negligence on the part of each driver involved. In the absence of such evidence, I am in agreement with the learned trial magistrate that negligence of the driver of the said motor vehicle Registration No KBU 403Q/ZE 223S was not proved to the required standard.

Whether the trial magistrate erred in failing to assess quantum of damages.

21. A perusal of the Plaintiff filed in the primary suit shows the Appellant had sought special damages under the doctrine of subrogation, to the sum of Kshs 710,933/- being the amounts indemnified by its Insurance for the loss. I see no basis in the Appellant’s argument that the trial court ought to have assessed damages that it would otherwise have awarded. This is because, what was pleaded was special damages. The court having found that the claim was unsubstantiated, had no obligation to assess special damages. In the circumstances, the learned magistrate did not err in failing to assess quantum of damages.
22. The upshot is that the appeal lacks merit and is hereby dismissed.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the presence of;

1. Miss Mwangeno holding brief for Mr Gor for the Appellant



2. Ngigi John was for the Respondent – Miss Matuku is present for them.

