



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 303 OF 2013

BENARD MUIA KILOVOO.....APPELLANT

VERSUS

KENYA FRESH PRODUCE EXPORTERS..... RESPONDENT

JUDGEMENT:

1. The Appeal arises from a Judgment In Kerugoya Chief Magistrate's court Civil case No. 99 of 2011. The background of this case is that the appellant had filed a plaint in the Chief Magistrate's court dated 23rd April, 2011.

Claiming special damages of 7,239/-

general damages for pain and suffering,

cost of the suit and interest.

2. The appellant case was that on 27th April 2009 he was lawfully travelling In a motor-vehicle registration number KAU 561 Y along Sagana Makutano road when the defendants driver/ servant/agent drove the said motor vehicle so negligently and carelessly under the influence of alcohol and caused to crash to the rear of motor-vehicle registration number KAU751 D and as a result he sustained some serious bodily injuries which include: a deep cut on the forehead Cut wound on the shoulder, lacerations on the right hand.

3. At the material time the appellant was employed by the defendant as a packer and grader of green produce, IT was the claim by the plaintiff In the plaint that the respondent was the registered owner of motor-vehicle registration number KAU 561Y make Pick Up.

4. The respondent had filed a Statement of defence dated 30th of May, 2011 and denied that it was the registered owner of motor-vehicle number KAU 561Y and put the Plaintiff to strict proof. The defendant did not adduce evidence at the trial.

5. In the Judgment of the trial magistrate she found that the Appellant did not produce a search certificate by the registrar of motor-vehicles showing the registered owner of the vehicle as prove of ownership. Reliance on the content of the Police abstract is not sufficient prove of ownership.

6. That she dismissed the appellant's case with costs.

7. The Appellant was dissatisfied with the Judgment of the trial magistrate and filed this appeal, and in a memorandum of appeal dated 3rd May, 2013 raised the **following grounds of appeal**.

(i) The learned trial Senior Resident Magistrate erred in Law and in fact in holding that the Appellant had not established and/or proved the ownership of motor vehicle registration number KAU 561Y which motor-vehicle was for the Respondent who had employed the Appellant and was being driven by the drive of the Respondent.

(ii) The learned trial Senior Resident Magistrate erred in law and fact in disregarding the Appellants sufficient evidence regarding ownership of motor vehicle KAU 561Y by the Respondent and replying on case law which was not relevant to the particulars of the case that was before the said Magistrate

(iii) The learned trial Senior Resident Magistrate erred in law and in fact by failing to find liability on the part of the Respondent when the Appellant had tendered sufficient evidence to prove the same.

(iv) The learned trial Senior Resident Magistrate erred in law and in fact in dismissing the Appellants claim which claim had not been rebutted by the Respondent, thus raising the burden of proof above the balance of probabilities.

8. He prays that the appeal be allowed, the Judgment of the Trial magistrate be set aside and Judgment be entered in favour of the appellant on liability and quantum.

9. The Parties proceeded by way of written submissions.

10. The appellant submitted that the appellant produced a Police abstract and also produced evidence that he was employed by the respondents who had also employed the driver of motor-vehicle registration number KAU 561 Y a fact not denied by the respondent.

11. A police abstract showed that the respondent was the owner of motor vehicle and the appellant also produced a workman compensation **LD** form duly signed by the respondent indicating that the appellant was involved in an accident, involving the respondents motor vehicle. The respondent did not deny any of these facts nor did he produce any evidence to the Contrary.

12. He submits that the trial magistrate erred in law and in fact in holding that the appellant had not established or proved the ownership of motor-vehicle registration number KAU 561Y which motor-vehicle was for the respondent who had employed the appellant and was being driven by the respondents driver.

13. He submits that **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.”

14. He submits that the trial magistrate erred in law and fact by disregarding the appellants sufficient evidence regarding ownership of the motor-vehicle KAU 561 Y by the respondent and relying on case law which was not relevant to the particulars of the case that was before the said Magistrate.

15. He submits that it is now agreed upon that the certificate of search is only prima facie evidence and that the same can be reverted.

16. The respondent did not object to the production of the Police abstract and neither did they produce any evidence to contradict its content.

17. He further submitted that the trial magistrate erred in law and in fact by failing to find liability on the part of the respondent when the appellant had tendered sufficient evidence to prove the same.

18. He submits that the trial Magistrate ought to have found the appellant liable as he was only a passenger in the motor vehicle and there was no negligence on his part.

19. It is further submitted that the learned Magistrate raised the burden of proof. She disregarded the evidence produced in the trial court, being the police abstract, P3 form and workman’s compensation LD Form all of which could have been used to find in favour of the appellant.

20. The appellant urges the court to re-evaluate the evidence produced in the trial court by way of a police abstract, access it and conclude that the police abstract report supported by evidence of the appellant’s employment to the Respondent together with the workman’s compensation form proving that the appellant was involved in an accident in respondent motor vehicle is sufficient in proving ownership of the vehicle.

21. He also urges the court to award general damages of Kshs: 300,000/= and special damages of Kshs; 7,239/= with costs and interest at 12% from the date of filing the suit until payment in full.

22. For the respondent it is submitted that the gravament of this appeal is whether or not the appellant has proved that the respondent was the registered owner of motor-vehicle KAU 561Y and if not so would liability attach on the respondent without proof of ownership and they submit that the plaintiff failed to proof ownership of the motor-vehicle KAU 561Y and subsequently no liability could attach thereto.

23. That the respondent clearly denied ownership of the motor vehicle KAU 561 Y and it was therefore essential that the appellant proved ownership of the suit motor-vehicle and they submit that the burden of proof was on the appellant to proof that fact. He has relied on; Case of ; **Kirugi & Another -versus- Kabiya and 3 others (1987)KLR page 347** where the Court of Appeal stated that the burden was always on the plaintiff to proof his case on the balance of probabilities and such burden was not present even if the case was heard by way of formal proof.

24. That the appellant had both the legal and evidentiary burden of proof of any facts alleged to the standard required which is on balance of probabilities, and therefore the burden was upon the appellant in the 1st instance to prove ownership of the motor vehicle registration number KAU 561Y.

25. That it is trite law that the ownership of motor-vehicle is to be proved by the registration of a person as the owner of the motor vehicle unless proved otherwise.

26. He has relied on the case of; **Charles Nyanguto Mageto -versus- Peter Njuguna Njathi (2013) eKLR** where it was stated 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 proof on a balance of probability that there is ownership.

27. That this essentially means that registration of a motor-vehicle only provides prima facie evidence of ownership which can be dislodged by appropriate evidence.

28. That the appellant in this case only provided a police abstract which cannot prove ownership and failed to produce any other evidence to corroborate the same.

29. That it is their contention, that there was no evidence adduced by the appellant as regards the ownership of the said motor-vehicle and PW1 during cross-examination admitted that he did not conduct a motor-vehicle search with the registrar of motor vehicles and nor did he produce a certificate of the said motor-vehicles.

30. The respondent relies on the case of; **Thuranira Kaururi -vs- Agnes Mucheche (1997) eKLR** where the Court of appeal stated *“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”*

31. He has also relied on the case of; **Mumias Agricultural Transporters -vs – Harrison Namulanda (2011) eKLR.** and the Case of; **Phillip Mungai -vs- Kindaruma Limited (2010) eKLR.**

The respondents submits that the onus lay with the appellant to proof the ownership of the motor-vehicle by producing a police abstract, the appellant failed to reach the burden of proof placed upon it.

The abstract was merely proof that an accident had occurred.

32. That the appellant was bound by its pleadings that indeed prove that the respondent was the owner of the motor-vehicle and since the respondent had denied it and put the appellant to strict proof nothing would have been easier than to call evidence from the registrar of motor-vehicle showing that the respondent was the registered owner of the motor-vehicle at the time. This was not done and hence the appellant’s case was not proven on a balance of probabilities and he urges the court to dismiss the appeal with costs.

33. The respondent submit that in the unlikely event that the court should allow the appeal the award on damages should not be disturbed. The appellant did not raise any ground on appeal on quantum and he urges the court to maintain the award of **Kshs; 150,000/=** for General damages, and **Kshs; 4, 900/=** for Special damages as well as interest from the date of Judgment.

34. ANALYSIS AND DETERMINATION.

I have considered the appeal, the proceedings before the trial Magistrate, the pleadings and the submissions.

This being a 1st appeal the court has a duty to evaluate the evidence and come up with its own independent finding. In the case of: **Mwana Sokoni -vs- Kenya Bus Service Limited (1982 -1988) 1 KAR 278 and Kiruga -vs- Kiruga (1988) KLR Page 716** where it was stated;

“ on a first appeal it is now well settled that, the role of the court is to revisit the evidence on record, evaluate it and reach its own conclusion, however the court will not interfere with findings of facts by the Trial court unless they were based on no evidence at all or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching its findings.”

The only issue which arises for determination is the ownership for motor-vehicle.

35. The appellant did not produce a certificate issued by the Registrar of motor-vehicles to prove that the respondent is the registered owner of motor-vehicle. **Section 8 of The Traffic Act** (supra) provides that a person who is registered shall be deemed to be the owner of the motor-vehicle unless the contrary is proved. This means that the registration of a person as a registered owner of the motor-vehicle is a prima facie evidence of ownership. However this evidence can be controverted as the Act provides, ***‘unless the Contrary is proved.’***

36. The appellant chose to rely on a Police abstract which he produced in court as P. Exhibit. 4. The appellant had the burden to prove that the defendant was the registered owner of the motor-vehicle. A party is said to bear the burden of proof, if he would lose if he failed to discharge that burden. In the case of; **Miller-vs- Minister of Pensions (1947) 2ALL. ER 372** as quoted in the Court of Appeal in the case of; **Ignatius Makau Mutisya -vs- Reuben Musyoki Muli (2015) eKLR** where the court stated;

“ That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not.’ Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

He who alleges must prove Section 107, 108 and 109 of The Evidence Act provides for the instance of burden of proof.

Section 107, 108 and 109 of The Evidence Act Cap 80 Provide as follows;

Evidence Act provides;

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.

. 109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

37. Party is bound by his pleadings, and what the appellant pleaded is that the respondent is the registered owner of the motor-vehicle registration number KAU 561Y.

38. The appellant was therefore supposed to adduce evidence in support of that allegation to prove that indeed the defendant is the registered owner of the motor-vehicle.

39. The Court of Appeal in the case of; Ignatius Makau Mutisya -vs- Reuben Musyoki Muia stated that; **Section 8 of the Traffic Act** has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership and cited the case of : OSAPIL -vs- KADDY (2000) 1 EALA 187 The Court of Appeal of Uganda held that;

“Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.” And that the Court of Appeal adopted this interpretation in the case of;

Securicor Kenya limited -vs-Kyumba holdings Civil Appeal No. 73 of 2002.

The appellant in this case sought to prove ownership of the motor-vehicle by the defendant by the production of the police abstract.

The question is;

- Whether the police abstract is sufficient to proof ownership.

The Court of Appeal in the case of; Joel Muga Opinja -vs- East African Sea food limited (2013) eKLR quoted in the case of; Ignatius Makau Mutisya -vs- Reuben Musyoki Muli stated that *‘we agree that the best way to proof ownership would be to produce to the court a document from the Registrar of Motor-vehicle to show 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.’*

40. It would seem in view of this authority that the appellant would find solace in the above decision. However, this court was also referred to the decision of: Thuranira Karauri -vs- Agnes Mocheche (1997) eKLR. (*supra*) where the court stated that; where *ownership is denied it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicle showing the registered owner of the lorry.*

41. The Court of Appeal in these binding decisions is clearly stating:

(i) **That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is**

rebuttable.

(ii) 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 logbook.

(iii) Each case must however be considered in its own peculiar facts.

42. In this case the appellant did not produce a search from the Registrar of Motor-vehicle as proof of ownership. He relied on a Police abstract which was not challenged by the respondent and the respondent cannot deny the contents in the police abstract See the case of ; **Joel Muga Opinja -vs- East Africa Sea food Limited (2013) eKLR (supra).**

43. That the appellant also proved that the respondent compensated him under Workman compensation for the injuries sustained which is proof that he was an employee of the defendant who was injured in the cause of employment in the said motor-vehicle owned by the respondent.

44. The respondent did not challenge the Police abstract, the police abstract indicated that the respondent was the owner of the motor-vehicle and had insured the motor-vehicle, and the particulars of the Insurance are stated. This abstract contained all the relevant information including the name and address of the owner, and the name of the Insurance company.

45. This is information that must have been gathered by the police from motor-vehicle. These information is prove on a balance of probabilities that the vehicle was owned by the defendant. It has been stated that ***'a copy of the log book is only prima facie evidence of ownership and it can be rebutted.'***

46. The information in the police abstract is compelling evidence of proof that the respondent was the registered owner of the motor-vehicle.

47. In the circumstances of this case the evidence tendered by the appellant proved on a balance of probabilities that the respondent was the owner of the motor-vehicle at the time of the accident. The appellant has discharged the burden to proof that the respondent was the owner of the said motor-vehicle at the time of the accident.

48. The trial Magistrate erred by stating that reliance on the content of a police abstract is not sufficient proof of ownership.

49. **I find that;**

o The appellant had proved his case on a balance of probabilities before the trial Magistrate and I therefore set aside the Judgment of the trial Magistrate.

o On the issue of quantum of damages, the appellant had not raised a ground of Appeal on the award and the court would therefore have no basis of interfering with the award of damages.

50. I **therefore order as follows;**

(i) The Judgment of the trial Magistrate is substituted with an order allowing the plaintiff's claim as prayed in the plaint as follows;

(ii) Special damages: **Kshs; 7,239.00/=**

(iii) General damages; for pain & suffering; **Kshs; 150,000/=**

(iv) Costs of the suit in the lower court and in this appeal awarded to the appellant.

(v) Interest at Court rates from the date of Judgment until payment in full.

Dated, signed at Kerugoya this 29th day of May 2020

L.W. GITARI

JUDGE