REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 32 OF 2016

DAVID MUSAFIRI KULOVA .....APPELLANT

VERSUS

CHHABHADIYA ENTERPRISES LTD .....RESPONDENT

(from the judgment and decree of G. N. Sitati, RM, in Mumias SPMC Civil Suit No. 122 of 2013 dated 9/3/2016)

JUDGMENT

1. The appellant sued the respondent at the lower court claiming general and special damages after he was injured and his motor vehicle damaged in a road traffic accident involving his car registration number KBC 728V and the respondent's motor vehicle/trailer registration number KAZ 049 B/XB 3662. The appellant blamed the respondent's driver for occasioning the accident. After a full trial the learned trial magistrate apportioned liability on both drivers on a 50:50 basis. She held that the appellant had not proved that he was the owner of motor vehicle registration number KBC 728V and accordingly dismissed the claim for damage to the motor vehicle. The magistrate made an award on damages as follows:-

General damages (for pain and suffering)	-	Ksh. 100,000/=
Special damages	-	Ksh. 26,000/=
Sub-total	-	Ksh. 126,500/=
Less 50% liability	-	Ksh. 62,250/=

2. The appellant was dissatisfied with the decision of the learned magistrate and filed the instant appeal.

3. The grounds of appeal are that:-

(1) The learned magistrate erred in law and fact in holding the appellant 50% liable in light of the evidence placed before her.

(2) The learned magistrate misdirected herself in holding the appellant 50% liable when the appellant was knocked from behind and on his side of the road.

(3) The learned trial magistrate erred in law and fact in finding that the appellant had not proved ownership of the motor vehicle registration number KBC 728V Toyota Corolla when he had demonstrated that he was at the time of the accident a beneficial owner.

(4) The learned magistrate erred in law and fact in failing to appreciate that the appellant was in possession of the motor vehicle registration number KBL 728V at the time of the accident and as such the owner of the same.

(5) The learned magistrate erred in law and fact in failing to appreciate the fact that the accident was wholly caused by the respondent and that the appellant was not to blame in any way.

(6) The learned magistrate failed to appreciate the evidence and submissions before her that the appellant had proved his case on a balance of probability and the respondent be held 100% liable for the accident.

(7) The learned magistrate after considering all the evidence and submissions before her arrived at wrong and unjust decision.

(8) The learned magistrate erred in law and fact and failed to consider the evidence given by the appellant.

4. The appeal was opposed by the respondent through the written submissions of his advocates, L. G. Menezes & Co. Advocates.

Case for Appellant –

5. The case for the appellant was that on the 6th July, 2012 at around 5.45 p.m. he was driving his motor vehicle registration number KBC 128V Toyota Premio towards Mumias town from Kakamega town. That on passing Shianda market he overtook a tractor that was carrying sugarcane. A short distance away he saw a stationary trailer on the left side of the road. There was also an on-coming vehicle from the opposite direction. He slowed down and put on indicators to warn those behind him not to overtake. He was then hit from behind. He was pushed forwards and his vehicle rammed into the stationary trailer. He was helped out of his vehicle by some good Samaritans. He found that it is the sugarcane trailer that he had overtaken that had hit him. His vehicle was extensively damaged at the front and at the rear. He sustained some injuries. He left the scene and went for treatment at Kakamega County Hospital. Thereafter he engaged a motor vehicle assessor PW2 to value the damage on his vehicle. The costs of repair were estimated at Ksh. 482,560/=. The pre-accident value was estimated at Ksh. 650,000/= and salvage value of Ksh. 120,000/=. He sued.

6. The appellant further stated that he had bought the said motor vehicle from one Ongaro but that he had not yet transferred the log book into his name. During the hearing he produced the log book as exhibit, P.Ex 1. A police officer PW3 produced a police abstract as exhibit, P.Ex 11.

7. The respondent did not call any evidence in the case.

Findings of the Trial Magistrate –

8. The learned trial magistrate in her judgment stated that the police officer who testified in the case PW3 was not the investigating officer and therefore that he was not in a position to state as to who was to blame for the occurrence of the accident. That PW3 stated that the matter was still pending under investigation. That no inspection reports and sketch plans were produced in the case to enable the court draw its own conclusions as to who was to blame for the accident. That there was no independent evidence to corroborate the evidence of the appellant (PW1) as to how the accident occurred. That in the absence of such evidence she was unable to conclusively determine as to who was to blame for occasioning the accident. Guided by the authority in **Lakhamshi –Vs- Attorney General (1971) EA** she apportioned liability at the ratio of 50:50. She awarded Ksh. 100,000/= in general damages for the injuries suffered by the appellant.

9. The learned trial magistrate further found that the log book that was produced in the case was an uncertified copy. That it showed the registered owner of the motor vehicle as Auto Selection Kenya Ltd. However that the sale agreement was between the appellant and another person. That the person who sold the motor vehicle to him was not availed as a witness in the case. That the police abstract, P.Ex 11, indicated that the appellant was the driver of the motor vehicle and not the owner. That in view of the foregoing it was not proved on a balance of probabilities that the appellant was the actual/beneficial/registered owner of the vehicle. That without proof of the same the claim for damage on the vehicle could not stand and the same was dismissed accordingly.

Submissions –

10. The advocates for the appellant **C. M. Mwebi Advocate**, submitted that the learned trial magistrate erred in finding the appellant 50% liable for the accident. That the evidence that was adduced before the court indicated that the appellant's motor vehicle was damaged at the front and at the rear. That this corroborated the evidence of the appellant that he was hit from the rear and pushed forward, hence the damage on both the rear and at the front. That the evidence proved that it is the respondent's driver who was negligent. That no negligence was attributed to the appellant either by the police officer (PW3) or by the defendant itself. That the evidence indicated that it was the respondent's driver who was 100% liable for the accident.

11. It was further submitted that the appellant was in possession of the vehicle at the time of the accident. That he produced a log book to the motor vehicle. That the police abstract indicated that he was the driver of the motor vehicle. That the above showed that the appellant was a beneficial owner of the motor vehicle which at the time of the accident was under his possession and control. That the mere fact that the log book was in the name of a different person does not displace the fact that the appellant was a beneficial owner of the motor vehicle. That there was no evidence adduced to the contrary. Therefore that the appellant had proved ownership of the motor vehicle. Counsel urged the court to allow the appeal and award Ksh. 522,500/= for material damage to the motor vehicle and Ksh. 120,000/= in general damages for pain and suffering.

12. The advocates for the respondent on the other hand supported the finding of the trial magistrate on liability. They submitted that there was no evidence adduced to show who was liable for the accident. That the trial magistrate was correct in apportioning liability on the ratio of 50:50. They cited the case of **Mugoya Construction & Engineering Ltd –Vs- Simon Nzangi Mutuku (2005) eKLR** where both drivers were found to blame for the accident and liability was apportioned at 50:50.

13. On the issue of ownership of the motor vehicle, the advocates submitted that the copy of the log book was produced by consent of the parties. However that the log book did not bear the name of the appellant but that of Ongaro. That the said Ongaro was not called to substantiate the claim that he sold the motor vehicle to the appellant. Counsel referred to Section 8 of the Traffic Act that provides that:-

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

14. The advocates further submitted that the police abstract indicated the appellant as the driver of the motor vehicle and not the owner.

Counsel relied on the case of **Ashur Ahmed Transporters Ltd –Vs- Abdushakoor Makhan Anil Nakuru HCCA No.128 of 2014 (2018) eKLR** where the respondent as in this case had claimed material damage to his motor vehicle. During the hearing before the trial magistrate he produced a log book that indicated the owner of the motor vehicle to be his aunt from whom he claimed to have bought the vehicle. He had not changed ownership into his name. He did not produce a sale agreement to show that he had bought the motor vehicle and that he was the beneficial owner. On appeal Mulwa J. held that there was no proof of beneficial or possessory ownership of the motor vehicle.

The advocates urged the court to uphold the finding of the trial magistrate on liability.

Analysis and Determination –

15. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify – See **Siele –Vs- Associated Motor Boat Company Ltd & Others (1968) E.A 123**.

In **Kiruga –Vs- Kiruga & Another (1988) KLR 348** the Court of Appeal held that:-

> ***"an appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."***

16. The appeal herein is on liability and material damage to the motor vehicle. The issues for determination are:-

(1) Whether the trial magistrate was right in apportioning liability between the parties.

(2)Whether the appellant was a beneficial owner to the motor Vehicle.

17. The standard of proof in civil cases is on a balance of probability. Section 107 of the Evidence Act provides that:-

> ***"Whoever desires any court to give judgment as to the legal right or liability dependent on the existence of facts which he asserts must prove those facts."***

18. In **Treadsetters Tryes Ltd –Vs- John Wekesa Wepukhulu (2010) eKLR** Ibrahim J. (as he then was) considered the issue of burden of proof in a case of negligence and quoted **Charlesworth& Percy on Negligence**, 9th Edition at P.387 thus:-

> ***"In an action for negligence as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior (?) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."***

Liability –

19. The evidence of the appellant was that he was knocked from behind, pushed forwards wherein he hit the motor vehicle that was stationary ahead of him. The trial magistrate apportioned liability between the appellant and the respondent. The basis of apportioning liability between two drivers is because the court cannot determine as to who between the drivers is to blame for the accident. This was explained at length in the case of **Platinum Car Hire and Tours Limited –Vs- Samuel Arasa Nyamesa & Another (2019) eKLR** where the court stated that:-

> ***"Given that there were two versions that the emerged from the testimony of PW1 and PW2 that left open the possibility that either party was to blame, neither the appellant nor 2nd respondent took the opportunity to call any evidence to support its case. No doubt in coming to the conclusion that both parties were to blame the trial magistrate had in mind the decision of the Court of Appeal in Berkley Steward Limited V. Waiyaki [1982-1988] 1 KAR where it cited with approval the decision in Baker V. Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472, 1476 where Denning LJl, observed inter alia as follows:-***
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> > ***'Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them …'***
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> ***In other cases, where the court is unable to determine who is to blame it has apportioned liability equally as illustrated by the Court of Appeal in Hussein Omar Farah –Vs- Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR where it observed that:-***
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> > ***"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who***

is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

20. It is then evident that the court results to apportioning liability between drivers where there is no evidence to determine as to which driver is to blame. The question in this case was whether there was no evidence on which the court could determine as to which of the drivers was liable for the accident in the failure of which it would consider whether both were equally liable.

21. The motor vehicle assessor PW2 produced photographs of the appellant's vehicle that showed that the vehicle was damaged both at the front and at the rear. The damages on the front and the rear corroborated the evidence of the appellant as to how the accident occurred. The respondent did not controvert this evidence. They did not give any explanation as to why their driver hit the appellant's motor vehicle from behind.

22. The trial magistrate held that police inspection reports and sketch maps were not produced to assist the court in determining liability. True this would have been important evidence in the case. However the police inspection reports would only have shown where the damages on the appellant's motor vehicle were. The damages on the motor vehicle were proved by the photographs produced by the motor vehicle assessor. The appellant stated that he was hit when he was on his correct lane which evidence was not controverted. Failure to produce sketch maps to prove this uncontroverted evidence was not fatal to the appellant's case.

23. The respondents in their written statement of defence denied liability to the accident and in the alternative alleged contributory negligence on the part of the appellant. As the respondents did not adduce evidence in the case their pleadings remained mere statements of fact that were not substantiated. See **Trust Bank Limited –Vs- Paramount Universal Bank Limited, Nrb (Milimani) HCCC No. 1243 of 2001** as cited in **Shaneebal Limited –Vs- County Government of Machakos (2018) eKLR**. In the premises I hold that the respondent did not show that the appellant contributed to the occurrence of the accident. There was thereby no basis of holding that the appellant contributed to the occurrence of the accident. The manner in which the accident occurred does not lead to an inference of negligence on the part of the appellant.

24. It is my finding that the trial magistrate was wrong in apportioning liability between the appellant and the respondent when there was no evidence that the appellant contributed to the occurrence of the accident. The uncontroverted evidence of the appellant led to the conclusion that the respondent's driver was the one who was entirely to blame for occasioning the accident. I find the respondent 100% liable for the accident.

Ownership of the Motor Vehicle –

25. The learned trial magistrate held that there was no sufficient evidence to prove that the appellant was the owner of motor vehicle registration No. KBC 728V. A photocopy of the log book of the vehicle was produced by consent of the parties. That being the case there was no reason for the trial court to question why the original was not produced.

26. The log book indicates that the subject vehicle is registered in the name of Auto Selection Kenya Ltd. The appellant however stated that he had bought the vehicle from one Ongaro. Though he referred to a sale agreement between him and Ongaro the same was not produced in court as exhibit. The advocate for the appellant all the same submitted that the appellant was a beneficial owner of the vehicle.

27. As stated above, Section 8 of the Traffic Act provides that the person in whose name a motor vehicle is registered is unless the contrary is proved to be deemed to be the owner of the vehicle. The principle envisaged in this section is that there can be actual, possessory and beneficial ownership of a motor vehicle which exists independently of registration. In **Samuel Mukunya Kamunge –Vs- John Mwnagi Kamuru, Nyeri H.C. Civil Appeal No. 34 of 2002,** Okwengu J. (as she then was) held that:-

"It is true that a certificate of search from the Registrar of Motor vehicles would have shown who was the registered owner of motor vehicle according to the records. That however, is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is the recognition of the fact that often times motor vehicles change hands but the records are not amended. I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of Motor Vehicles could prove ownership of the motor vehicle. I find (that) a police abstract report having been produced showing the respondent as the owner of the motor vehicle No. KAH 204A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle and the respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle No. KAH 204A was owned by the respondent."

28. On the same issue Ojwang J. (as he then was) in **Nancy Ayemba Ngaira –Vs- Abdi Ali, Msa HCCA No. 107 of 2008 (2010) eKLR** held that:-

"There is no doubt that the registration certificate obtained from the registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership, possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the police Abstract, showed on a balance of probabilities, the 1st defendant was one of the owners of the matatu in question."

29. In **Jared Magwaro Bundi & Another –Vs- Primarosa Flowers Limited (2018) eKLR** the Court of Appeal reviewed previous cases on beneficiary ownership of motor vehicle and held that:-

> ***"It was therefore held in Muhambi Koja (supra) that section 8 of the Traffic Act recognizes registration book or the Registrar's extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle 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.***
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> ***The position taken by the court in Jael Muga Opija (supra) and Mohamed Koja (supra appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case …"***

30. In the latter case the court held the respondent liable as a beneficial owner on the mere fact of possession and usage. In the case under consideration the appellant was in possession and usage of the motor vehicle. It is my considered view that he was a beneficial owner of the vehicle. If he was not such an owner the issue was between him and the registered owner, if any. The respondent could not escape liability on the basis that the appellant was not the registered owner of the motor vehicle. The trial magistrate was therefore wrong in holding that the appellant was not a beneficial owner of the vehicle. The fact that he did not produce the sale agreement did not displace the fact that he was in possessory ownership of the vehicle. In the premises the appellant had proved that he was the owner of the motor vehicle.

Damages –

31. The appellant claimed material damage to the motor vehicle in the sum of Ksh. 510,000/=. It was the evidence of the motor vehicle assessor PW2 that he assessed the damage on the vehicle and estimated the cost of repair at Ksh. 482,560/=. That the pre-accident value was Ksh. 650,000/= and the salvage value Ksh. 120,000/=. That it was uneconomical to repair the motor vehicle and he declared it a constructive loss.

32. The trial magistrate held that had the appellant proved the case she would have awarded Ksh. 530,000/= being the pre-accident value less the salvage value. She further suggested special damages as follows:-

Towing charges	-	Ksh. 16,500/=
Motor vehicle assessment fees	-	Kshs. 6,000/=
Medical report	-	Ksh. 4,000/=
Total	-	**Ksh. 26,500/=**

33. The motor vehicle assessor proved that the motor vehicle was a write off. He proved that the motor vehicle had a pre-accident value of Ksh. 650,000/= and a salvage value of Ksh. 120,000/=. The appellant did prove that he was entitled to compensation to the sum of Ksh. 530,000/=being material damage to the motor.

34. Receipts for Ksh. 16,500/= for towing charges, Ksh. 6,000/= being motor vehicle assessment fees and Ksh. 4,000/= for fees paid to the doctor who prepared the appellant's medical report were produced. The same proved a total award of Ksh. 26,500/= in special damages.

35. There was no appeal on the award on general damages for pain and suffering. The same therefore remains undisturbed.

36. The upshot is that the appeal is upheld. The finding on liability by the trial court is set aside and the respondent found 100% liable for the accident. The finding dismissing the appellant's claim on material damage to his vehicle is set aside and the respondent found liable for the damage. I enter judgment for the appellant as follows:-

Liability	-	100% against the respondent
General damages for pain and suffering (as awarded by lower court)	-	Ksh. 100,000/=
Material damage to the motor vehicle	-	Kshs. 530,000/=
Special damages	-	Ksh. 26,500/=
Total	-	**Ksh. 656,500/=**

with interest at court rates. The appellant to have the costs of the appeal.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mwebi for Appellant – has consented through e-mail

No appearance for Respondent

Appellant - absent

Respondent - absent

Court Assistant - Polycap

30 days right of appeal.