



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 121 OF 2019**

**JOSHUA KAMONDO NUNGO.....APPELLANT**

**=VRS=**

**GEORGE GIKANGA MWANIKI.....RESPONDENT**

*{Being an appeal against the Judgement of Hon. E Olwande – SPM Limuru*

*dated and delivered on the 11<sup>th</sup> day of July 2019 in the original Limuru*

*Principal Magistrate's Court Civil Case No. 164 of 2016}*

**JUDGEMENT**

By a plaint dated 27<sup>th</sup> June 2016 filed in Limuru SPM's Court on 30<sup>th</sup> August 2016 the appellant brought a material damage claim against the respondent following a collision that occurred at Kamirithu area along Limuru - Naivasha Road on 4<sup>th</sup> March 2016 between his motor vehicle Registration No. KBC 067W and motor vehicle Registration No. KZY 097 which he alleged belonged to the respondent. The particulars of damages sought were: -

**“(a) Repair of motor vehicle - Kshs. 593,340/=**

**(b) Towing charges - Kshs. 40,500/=**

**(c) Motor vehicle assessors fee - Kshs. 5,500/=**

**(d) Fees for copy of record for KZY 097 - Kshs. 550/=**

**In addition to the above the appellant also craved a sum of Kshs. 150,000/= for loss of user, costs of the suit and interest.”**

On 30<sup>th</sup> August 2016 the respondent filed a statement of defence in which he denied ownership of the motor vehicle and put the appellant to strict proof thereof. He also denied the particulars of negligence attributed to him in the plaint.

The matter then went to full hearing where the appellant testified and called four witnesses but the respondent did not adduce any evidence.

After considering the evidence and rival submissions before her the trial Magistrate came to the conclusion that the appellant had not proved his case against the respondent on a balance of probabilities. To be more specific she found that whereas the appellant had proved negligence against the owner of motor vehicle KZY 097 and had also substantially proved the sums claimed he did not prove that motor vehicle Registration No. KZY 097 belonged to the respondent. She therefore dismissed his suit with costs to the respondent.

Being aggrieved by the judgement the appellant preferred this appeal. The grounds thereof are: -

**“1. The trial magistrate erred in law in holding that the ownership of motor vehicle registration No. KZY 097 Mitsubishi Pick Up was not proved to the required standard.**

2. The trial magistrate erred in law and the fact is disregarding the express admission of ownership of the accident motor vehicle by the defendant's driver in his witness statement filed in court.
3. The trial magistrate erred in law in making ownership of the accident motor vehicle registration No. KZY 097 Mitsubishi Pick Up an issue for determination yet there was sufficient admission in the pleadings filed.
4. The trial court erred in law and fact in disregarding the documentary and oral evidence adduced the traffic officer who investigated the Accident."

By this appeal it is urged that: -

**"(a) The Judgement of the trial court be set aside.**

**(b) That judgment be entered for the plaintiff/Appellant against the defendant/Respondent for Kshs. 789,890/= together with costs of the suit in the lower court.**

**(c) The plaintiff/appellant be awarded interest on the judgement sum from the date of filing suit in the lower court."**

The appeal which is vehemently opposed proceeded by way of written submissions.

I have carefully considered the rival submissions and cases cited therein. However, as an appeal is in the nature of a retrial I have a duty to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses (*See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123*).

The gravamen of this appeal is the trial Magistrate's finding that **"..... the plaintiff has not proved that the defendant is the owner of motor vehicle Registration No. KZY 097. Consequently, I dismiss the plaintiff's claim with costs."** Her finding emanated from her reasoning that: -

**"The defendant denied ownership of the vehicle. The cause of action of the plaintiff against the defendant is based on the defendant's alleged ownership of motor vehicle Registration No. KZY 097 whose driver the plaintiff blames for the accident without proof of ownership, liability cannot attach to the defendant.**

**Pw3 produced a police abstract which showed that the owner of the vehicle is the defendant. However, in her evidence she did not address herself to the issue of ownership of the said vehicle and from where she got the information of ownership of the same. The court cannot speculate on those facts.**

**Further a police abstract is not a document of title and cannot be used to prove ownership."**

It is trite that an appellate court will not normally interfere with a trial court's finding of fact unless it is based on no evidence, or on a misapprehension of the evidence, or the trial Magistrate is shown demonstrably to have acted on wrong principles in arriving at the finding (*See the case of Kamau v Mungai & another [2006] 1KLR 150*.)

It is my finding that in arriving at her decision to dismiss the appellant's claim the trial Magistrate not only misapprehended the evidence but she also acted on a wrong principle. Firstly, the respondent had together with the statement of defence filed a witness statement of one Michael Mungai. That statement is dated 19<sup>th</sup> January 2017 and in it the witness stated inter alia: -

**".....That I am employed by the defendant as a professional driver.**

**On 4<sup>th</sup> March, 2016 at around 7.30pm I was driving the defendant's motor vehicle registration number KZY 097 along Nairobi – Naivasha Road.**

**At Kamirithu area I stopped and turned on my right hand signal as I wanted to join a road to the right. I ensured there was no oncoming traffic before making the turn. As I was driving across the road so as to join the feeder road, suddenly motor vehicle registration number KCB 067W rammed into the left rear of my motor vehicle.**

**The matter was reported at Tigoni Police Station....."**

Although this witness was not called to testify at the hearing (it was alleged he had become mentally ill) this admission was carried into the submissions of the advocate for the respondent and I find that taken together they amount to an admission that the vehicle belonged to the appellant. I say so because from the said submissions Counsel went straight into the issue of liability (negligence/causation or the manner in which the accident occurred) and the quantum of damages but did not raise the issue of ownership of the vehicle. Counsel clearly proceeded as if ownership was a non-issue or as if it was not contested. In his submissions Counsel's contention that the claim was not proved was not hinged on ownership of the vehicle but on the ground that the evidence adduced did not prove negligence against the driver of motor vehicle KZY 097.

While I am alive to the provisions of **Section 24 of the Evidence Act** that:

**“Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained”** it is my finding that had the trial Magistrate considered the statement and the submissions of Counsel for the respondent together she most certainly would have realized that ownership of motor vehicle KZY 097 was not being disputed. I also find that had she considered those submissions in light of the evidence tendered by the appellant she would have arrived at a different finding. Moreover, her finding that the police abstract tendered by the appellant did not prove ownership was also based on a misdirection. This is because in the case of **Wellington Nganga Muthiaro v Akamba Public Road Services Ltd & another [2010] eKLR** the Court of Appeal itself held that: -

*“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the stands of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”*

In the case of **Ibrahim Wandera v P N Mashru Civil Appela No. 333 of 2003** the same court stated: -

*“The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence..... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent.”*

Indeed, even in the case of **Charles Nyabuto Mageto v Peter Njuguna Njathi [2013] eKLR** cited by Counsel for the respondent Emukule J held the view that a police abstract was also a means of proving ownership of a motor vehicle. The correct position would however be that held in the two Court of Appeal cases. It is instructive that in the instant case the ownership of motor vehicle KZY did not arise at all in cross examination which again means that it was not disputed. In the upshot the trial Magistrate’s finding that the appellant’s case was not proved on a balance of probabilities is untenable and the same is set aside and substituted with a finding that the case was proved on a balance of probabilities.

This court has been urged to enter judgement for the appellant for a sum of Kshs. 789,890/= as prayed in the plaint. However, in her judgement the trial Magistrate stated that she would have entered judgement for the appellant as follows: -

- “1. Kshs. 593,340/= - **Cost of repairs.**
  2. Kshs. 40,500/= - **Towing charges**
  3. Kshs. 5,500/= - **Assessors fees**
  4. Kshs. 27,853/= - **Loss of earnings**
- Total - Kshs. 667,193/=”**

As the trial Magistrate’s findings on the quantum of damages was not challenged either by the appeal or by way of a cross appeal the same shall stand. Accordingly, judgement is entered for the appellant against the respondent as follows: -

1. **Liability 100%**
2. **Damages Kshs. 667,193/=**
3. **Interest at court rates**
4. **Costs of the suit/appeal in the court below and in this court.**

It is so ordered.

Signed and dated at Nyamira this 16<sup>th</sup> day of December 2020.

**E. N. MAINA**

**JUDGE**

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18<sup>th</sup> day of December 2020.

**MARY KASANGO**

**JUDGE**