



REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL NO. 22 OF 2018

FREDRICK ODONGO OTIENO.....APPELLANT

VERSUS

AL-HUSNAIN MOTORS LIMITED.....RESPONDENT

(Appeal arising from the judgment and decree of Hon. G Adhiambo, Senior Resident Magistrate at Ukwala in Ukwala SRMCC 1 of 2010 delivered on 20/7/2018.)

JUDGMENT

Introduction

1. This is an appeal from the judgment of Hon. G Adhiambo, Senior Resident Magistrate at Ukwala in Ukwala SRMCC 1 of 2010 in which the appellant claimed general and special damages for injuries sustained as a pedal cyclist along Kisumu Busia Road when he was hit by motor vehicle registration No. SR 400049046 alleged to belong to the respondent driven by one Kennedy Kadaji Lumwaji who never appeared before court.

2. The respondent filed a defence denying the allegations made by the appellant whilst stating that they did not know the aforementioned driver and neither did they own motor vehicle registration No. SR 400049046. The respondent adduced documentary evidence of the ownership of the said motor vehicle. The trial magistrate found that the appellant failed to prove the respondent's ownership of the subject motor vehicle and despite finding in favour of the appellant on general damages of Kshs. 400,000, the same could not be recovered against the respondent but against Kennedy Kadaji Lumwaji who was the 2nd defendant in the trial court, but against whom the appellant withdrew suit.

3. The appellant was dissatisfied with the trial court's judgement and filed a memorandum of appeal dated 7th August 2018 setting out six grounds as follows;

- a) That the learned magistrate erred in finding the driver of the suit motor vehicle negligent and absolving the 1st defendant from blame.*
- b) That the learned magistrate erred in finding the 2nd defendant liable for the blame and yet he was not a party to the suit, as the suit against him was withdrawn by consent of both parties on 9/5/2012.*
- c) That the 2nd defendant having been found negligent, by dint of doctrine of Res Ipsa Loquitor, the 1st defendant ought to have been liable.*
- d) That the learned magistrate erred in relying on evidence that departed from pleadings on record.*
- e) That the learned magistrate erred in ignoring facts admitted in pleadings on record that the plaintiff had no burden of proving at the time of close of the plaintiff's case.*
- f) That the finding occasioned grave injustice on the appellant.*

4. The appeal was canvassed by way of written submissions.

Appellant's Submissions

5. It was submitted that in its Defence filed on 20.05.2010, the respondent admitted that it was the owner of the suit motor vehicle as at 20.03.2009 and further stated that it sold the suit motor vehicle on that day but did not give particulars of whom the vehicle was sold to.

6. The appellant further submitted that on the 09.05.2012, the respondent absolved the 2nd Defendant, the driver of the suit vehicle, from any liability whatsoever when it consented to having him removed from these proceedings, in effect assuming his responsibility for negligence. It was submitted that the issue of ownership of the suit motor vehicle ought to have been resolved against the respondent.

7. The appellant submitted that the 2nd Defendant having been found negligent, by dint of the doctrine of *Res Ipsa Loquitur*, the respondent ought to have been found automatically liable as the accident occurred in the course of the 2nd defendant's employment with the respondent.

Respondent's Submissions

8. The respondent submitted that the appellant failed to discharge the burden of proof with regard to the respondent's ownership of the suit motor vehicle. It was submitted that based on the evidence tendered in the trial court, the learned magistrate was right to find that the appellant had not proved that the suit vehicle belonged to the respondent whereas the respondent produced documentation showing that the said motor vehicle belonged to Odhaya Trading.

9. It was submitted that the case against the respondent having not been proven they could not be required to settle the damages awarded to the respondent, against a party who had been discharged from the proceedings.

Analysis & Determination

10. The role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**.

11. I have carefully considered the evidence adduced before the trial court, the judgement, the grounds of appeal as a whole including the parties' written submissions. The issue main issue for determination are ***whether the evidence adduced by the Appellant was sufficient to prove ownership of the motor vehicle and hence liability of the Respondent.***

12. It is not disputed that the appellant was involved in an accident on or about the 20/3/2009 as he was a pedal cyclist along the Kisumu Busia road at Nyaamwanga Primary School area with motor vehicle registration No. SR 400049046 leading him to sustain severe bodily injuries. It was the appellant's case that as per the police abstract, the aforementioned motor vehicle was owned by the respondent herein. The appellant reiterated his claim in cross-examination and further stated that at the time of the accident he was not drunk. He further stated that as a result of the accident he was admitted to hospital for 3 days that is from the 20/3/2009 to 23/3/2009.

13. PW2 No. 64758 PC Rodgers Simiyu of Ugunja Police Station traffic department testified for the appellant and produced a police abstract for the accident involving the appellant and the suit motor vehicle herein. It was his testimony that the driver of the said vehicle one Kennedy Kodayi was charged with causing death by dangerous driving and that the motor vehicle belonged to the respondent. On cross-examination, he stated that he was not the maker of the police abstract and further that the information as to the investigation was provided by the driver of the suit motor vehicle. He further stated that though the driver was charged with causing death by dangerous driving in criminal case No. 221 of 2009, he could not tell who was killed and further that the abstract did not indicate when the said driver was charged.

14. The respondent gave testimony through DW1, Mohammed Musa Abdalla who introduced himself as an employee of the respondent for the past seven years. It was his testimony that the respondent was not the owner of motor vehicle registration No. SR 400049046 and to this effect he produced importation documents from the port that showed that the vehicle belonged to Odhaya Trading Company Limited. In cross-examination, he stated that there was no stamp showing that the importation documents were certified copy of the original. He further stated that the said importation document was dated a day before the accident occurred that is on the 19/3/2009.

15. Under Sections 107 and 108 of the Evidence Act ***Cap 80 Laws of Kenya***, the person who alleges is under a duty to prove all allegations as contained in his claim against the Defendant, on a balance of probabilities, as was held in **Kirugi & Another Vs Kabiya & 3 Others [1987] KLR 347** where the Court of Appeal held:

"The burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof." {Emphasis added}.

16. It was therefore incumbent upon the appellant to prove the occurrence of the material pleaded accident as well as the ownership of the accident motor vehicle.

17. In this case, the appellant sought to rely on the contents of the police abstract produced by PW2 on the ownership of the suit motor vehicle.

18. It is important first to consider the circumstances under which a court considers a Police Abstract sufficient proof of ownership. The position taken by various courts as conceded by both parties in this appeal is that a Police Abstract when produced as evidence can be sufficient proof of ownership save where it is successfully challenged. In the case quoted by the Respondents herein, **Joel Muga Opija v East African Sea Foods Ltd [2013] eKLR** the court in affirming this position held:

"in our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea

Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the 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, its contents cannot be later denied.”

19. The same court before arriving at the above finding had quoted with approval another Court of Appeal decision in the case of **Ibrahim Wandera v P.N. Mashru Ltd. (Ksm C.A. Civil Appeal No. 333 Of 2003** (unreported) where the court made the following observations:

“The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J., proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned judge with respect to him, did not at all make any reference to the police abstract report which the appellant had tendered in evidence. In that document the accident bus is shown as KAJ 968W with Mashiru of P. O. Box 98728 Mombasa as owner. This fact was not challenged.....”

20. The court found that the contents of a Police Abstract is sufficient to establish ownership of a motor vehicle.

21. It is also important to note that in civil cases, the standard of proof is that of balance of probabilities. When an issue of ownership of a subject matter in a suit arises, a plaintiff or a party alleging it is required by law to prove the fact on a balance of probabilities. This is unlike the position in criminal cases where the standard is higher to beyond reasonable doubt.

22. In my view forcing a litigant in civil cases to produce a certificate of ownership of a motor vehicle from Registrar of Motor Vehicles is, unless circumstances so demand, unnecessary and elevates the standard of proof to unnecessarily high levels of proof. In the case of **Superfoam Ltd & Anor v Gladys Nchororo Mbero [2014] eKLR** Makau J sitting at Meru High Court cited with approval a Court of Appeal decision in **Wellington Nganga Mathiora v Akamba Public Road Services Ltd & Anor [2010]eKLR** where it was held:

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even..... challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as a proof of ownership in the absence of anything else as proof in civil cases was within the standard of probability and not beyond reasonable doubt as in criminal cases.....”

23. 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.”

24. In **Kirugi & Another -versus- Kabiya and 3 others (1987)KLR page 347** the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities and such burden was present even if the case was heard by way of formal proof.

25. In **Thuranira Kaururi v Agnes Mucheche [1997] KLR** 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.”

26. In the instant case, in my humble view, appellant was bound by his pleadings and indeed prove that the respondent was the owner of the motor-vehicle and since the respondent had denied such ownership claim and put the appellant to strict proof, nothing would have been easier than to call evidence from the Registrar of Motor-vehicles showing that the respondent was the registered or beneficial owner of the motor-vehicle at the time of the material accident. This was not done and therefore in my humble view, the appellant’s case was not proven on a balance of probabilities.

27. I reiterate that the appellant had the burden to prove that the defendant was the registered owner or beneficial owner of the accident motor-vehicle. A party is said to bear the burden of proof, if he would lose if he failed to discharge that burden. In **Miller-vs- Minister of Pensions (1947) 2ALL. ER 372** as cited in the Court of Appeal in the case of; **Ignatius Makau Mutisya -vs- Reuben Musyoki Muli (2015) eKLR** 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.”

28. 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:**

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.

29. A Party is bound by his pleadings, and what the appellant pleaded is that the respondent is the registered owner of the motor-vehicle in question. The appellant was therefore expected to adduce evidence in support of that allegation to prove that indeed the defendant is the registered owner of the accident motor-vehicle.

30. 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** where 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.**

31. 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 prove ownership.

32. 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 prove 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.’*

33. It would seem in view of this authority that the appellant found solace in the above decision. However, in the **Thuranira Karauri - vs- Agnes Mocheche (1997) eKLR. (supra) case**, the Court of Appeal stated that: where *ownership is denied it was incumbent upon 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.*

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.

34. In this case the appellant did not produce a search from the Registrar of Motor-vehicle as proof of ownership. He neither produced in evidence an agreement showing that the accident motor vehicle was beneficially owned by the Respondent. Instead, he relied on a Police abstract which production was not challenged by the respondent” but the respondent produced documents showing that as at the time of the material accident the vehicle was beneficially owned by Odhaya Trading Company as the importer. The question therefore is whether the respondent can deny the contents in the police abstract See the case of **Joel Muga Opinja -vs- East Africa Sea food Limited (2013) eKLR (supra).**

35. I find no evidence on record to show that the police abstract was produced with the sole purpose of proving ownership of the accident motor vehicle. It was in my humble view, produced to show that an accident occurred as alleged and that the police were made aware and they carried out investigations. The police did not adduce evidence that the particulars contained in the police abstract were accurate as far as ownership of the accident motor vehicle was concerned

36. In my humble view, the authorities stating that a police abstract is sufficient evidence of ownership of an accident motor vehicle are distinguishable from DW1 testified that the suit motor vehicle did not belong to the respondent but to Odhaya Trading Company. He provided importation documents from the port evidencing this fact. The respondent thus shifted the burden of proof back to the appellant who in my opinion failed to dislodge the said burden.

37. In the case of Z O S & C A O (Suing as the Legal Representatives in the Estate of S A O (Deceased) v Amollo Stephen [2019] eKLR the court expressed itself as follows:

“The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred. The police abstract produced as PEx. 3 dated 21/8/2018 only provides particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereof.....That being the case, it was incumbent upon the appellant, at the time of hearing, to either call an eye witness who saw the accident take place to prove any of the listed particulars of negligence attributed to the Respondent, or to call the police from Bondo Police Station, who investigated the accident to shed light on the results of the investigations; and as to who was to blame for the subject accident wherein the deceased lost his life.”

38. In this case, I find that the appellant failed to controvert the testimony of DW1 and to prove that the aforesaid motor vehicle was property of the respondent.

39. The appellant further submitted that the parties consented to withdraw the case against the 2nd defendant, Kennedy Kadayi Lumwaji on the 09.05.2012 which signalled that the respondent absolved the 2nd Defendant, the driver of the suit vehicle, from any liability whatsoever and in effect assuming his responsibility for negligence. I have had the opportunity to review the trial court record and it is clear that the appellant withdrew the case against the 2nd defendant on his own motion. There was no record of a consent entered between the appellant and respondent authorising the said action.

40. For the reasons cited above, I find and hold that the appellant failed to prove his case against the respondent on a balance of probabilities and as such his claim against the respondent fails. The appellant can therefore not seek to enforce judgement that he gained in the trial court against the respondent as he never proved that the respondent owned the accident motor vehicle at the material time of the accident. The upshot of all the above is that the appeal herein is found to be devoid of any merit and is hereby dismissed. Each party to bear their own costs of the appeal.

41. File closed.

42. Orders accordingly.

Dated, Signed and Delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE