



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**HIGH COURT CIVIL APPEAL NO. 204 OF 2012**

**DANCAN KISIVO.....APPELLANT**

**-VERSUS-**

**MARTIN MULALA KYANIA.....1<sup>ST</sup> RESPONDENT**

**WEGULO THOMAS.....2<sup>ND</sup> RESPONDENT**

**(Being (Appeal from the judgment of the Senior Principal Magistrate Hon. P.N. Gesora  
delivered on 30/10/2012 in MACHAKOS C.M.C.C. 247 OF 2011))**

**BETWEEN**

**MARTIN MULALA KYANIA.....PLAINTIFF**

**=VERSUS=**

**WEGULO THOMAS.....1<sup>ST</sup> DEFENDANT**

**DANCAN KISIVO.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The 1<sup>st</sup> Respondent herein by a plaint dated 27<sup>th</sup> April, 2011, by which he sought special and general damages costs and interests in respect of a road traffic accident which occurred on 23<sup>rd</sup> January, 2011. According to the plaint, on that day, he was driving Motor Vehicle Registration No. KAJ 480W along Machakos/Nairobi Road, when near Katelembo Area, Motor Vehicle Registration No. KBH 740W was so negligently driven that it left its lane veered off to the 1<sup>st</sup> Respondent's lane thereby colliding with the 1<sup>st</sup> Respondent's said vehicle leading to severe bodily injuries by the 1<sup>st</sup> Respondent. The particulars of negligence, injuries and special damages were set out in the plaint.

2. It was pleaded that the 2<sup>nd</sup> Respondent was the registered owner of motor vehicle registration number KBH 740W while the Appellant was the beneficial owner thereof.

3. The Appellant entered appearance and filed a defence denying the 1<sup>st</sup> Respondent's allegations and putting him to strict proof thereof and in the alternative pleaded whole or contribution on the part of the 1<sup>st</sup> Respondent for the accident particulars whereof were given. While the appellant herein filed his defence, the 2<sup>nd</sup> Respondent did not do so and an interlocutory judgement was entered against the said Respondent.

4. In his evidence, the 1<sup>st</sup> Respondent testified that he was a nurse in Machakos Level 5 Hospital. On 23<sup>rd</sup> January, 2011 around 7.00pm he was driving along Nairobi to Machakos road in her motor vehicle reg. no. KAT 480W Pajero. As he was getting to Katelembo while on his left side, Motor Vehicle Registration No. Subaru KBH 740W which was being driven from Machakos and which was overtaking other vehicles veered off its lane and went to the 1<sup>st</sup> Respondent's lane hitting the 1<sup>st</sup> Respondent's said vehicle on the right pumper and tore it to

the rear.

5. As a result of the said accident, the 1<sup>st</sup> Respondent was injured on the right shoulder, right side of the neck and right cheek.

6. It was the 1<sup>st</sup> Respondent's evidence that the driver of vehicle of the Subaru was to blame for the accident for moving speedily and overtaking when the road was not clear. According to the 1<sup>st</sup> Respondent, the said vehicle was registered in the name of the 2<sup>nd</sup> Respondent and she exhibited a copy of the records. The police abstract however, indicated that the same belonged to the Appellant.

7. It was his evidence that she was treated and discharged and that he reported the matter to the police and was issued with a P3 form which was filled in. He was also examined by **Dr. Kimuyu** and **Dr Ashwin** both of whom prepared medical reports for her. He was also issued with a police abstract and incurred expenses. He exhibited treatment documents, the medical reports, P3 form, police abstract and receipts. He denied that she was over-speeding and insisted that it was the Subaru driver who went to his lane. As a result, he sought both special and general damages, costs and interests.

8. In cross-examination, he insisted that her motor vehicle was in a sound mechanical condition although he did not have an expert report. According to him the collision was on the tarmac and because it was so sudden, he never had the opportunity to swerve off the road or stop before the accident.

9. According to him, from the information received from the police, the Appellant was the owner of the said motor vehicle and though the driver was to be charged, he failed to appear in court and a Warrant of Arrest was issued.

10. The Appellant did not adduce any evidence.

11. In his judgement, the Learned Trial Magistrate found that there was no doubt that the said accident did occur at Katelelmo area along Nairobi – Machakos road and that the averment that the driver of motor vehicle registration KBH 740 W attempted to overtake a vehicle in front of it when approaching from Machakos direction was not challenged. The Court therefore found that this was a negligent act as the said driver should have ensured that all was clear before attempting to overtake.

12. As regards the ownership of the motor vehicle registration no KBH 740W, the Court found that evidence was led that while the 2<sup>nd</sup> Respondent was the registered owner the Appellant was the beneficial owner as thereof as captured in the police records contained in the police abstract produced in the suit which was not challenged.

13. He accordingly found and hold that both defendants were vicariously liable for the acts of their driver, servant and or agent and he entered judgement on liability and 100%.

14. The Learned Trial Magistrate proceeded to assess general damages for pain and suffering in the sum of Kshs.140, 000/= and special damages in the sum of Kshs. 5,000/=are also awarded with costs and interest.

15. Aggrieved by the said decision the Appellant has preferred this appeal based on the following grounds:

**1) The Learned Magistrate erred in law and fact by failing to make a finding on who was at the material time the owner of Motor Vehicle Reg. No. KBH 740W which was a critical fact in issue in the suit.**

**2) The Learned Magistrate erred in law and fact when he based his decision and/or judgment on conjecture and/or speculation in finding that the 2<sup>nd</sup> Defendant/Appellant was liable was to pay Damages to the Plaintiff/Respondent when indeed the record by the Registrar of Motor Vehicles clearly shows that Motor Vehicle Reg. No. KBH 740W was registered in the name of the 1<sup>st</sup> Defendant/2<sup>nd</sup> Respondent.**

**3) The Learned Magistrate erred in law and fact when he failed to find that the suit against the Appellant/2<sup>nd</sup> Defendant was not proved on a balance of probability.**

**4) The Learned Magistrate erred in law and fact when he found that the 2<sup>nd</sup> Defendant/Appellant was a beneficial owner of Motor Vehicle Reg. No. KBH 740W in the absence of evidence.**

16. Consequently, the Appellant prays that:

**1) That the judgment on liability against the 2<sup>nd</sup> Defendant/Appellant be set aside and the honourable court make its own finding on liability.**

**2) The costs of the Appeal be borne by the Respondent.**

17. In his submissions the Appellant contends that at the hearing, the Plaintiff/1<sup>st</sup> Respondent stated that upon conducting search he found out that Motor Vehicle Reg. No. KBH 740W was registered in the name Wegulo Thomas (2<sup>nd</sup> Respondent herein). He produced a copy of records from the registrar of motor vehicles to prove the same. While he also produced a policy abstract which showed that the said motor vehicle belonged to the Appellant herein, there was no evidence tendered by the Plaintiff to show how police came to the conclusion that the Appellant/2<sup>nd</sup> Defendant was the owner of Motor Vehicle Reg. No. KBH 740W. No Police Officer was called to testify to clarify on this

issue as the copy of records from the registrar of motor vehicles indicated a different owner of the said motor vehicle. The Plaintiff only stated that he was informed by a police officer that the Appellant herein is the owner of Motor Vehicle Reg. No. KBH 740W. This evidence by the Plaintiff amounts to hearsay and cannot be relied upon in a court of law.

18. According to the Appellant, the fact that the motor vehicle was registered in the names of the 2<sup>nd</sup> Respondent/1<sup>st</sup> Defendant, there cannot be another owner without evidence that there was a change of ownership and the burden of proof that there was change of ownership of the said motor vehicle was with the Plaintiff/1<sup>st</sup> Respondent and did not shift to the Appellant/2<sup>nd</sup> Defendant at any time. It was submitted that though the Plaintiff pleaded that the 1<sup>st</sup> Defendant/ 2<sup>nd</sup> Respondent (Wegulo Thomas) is the registered owner of Motor Vehicle Reg. No. KBH 740W while the 2<sup>nd</sup> Defendant/Appellant is the beneficial owner, the burden of proving that the Appellant is the beneficial owner of the said motor vehicle remained with the Plaintiff/1<sup>st</sup> Respondent, a burden he did not discharge that burden as no police officer came to court to testify as to how they concluded that the 2<sup>nd</sup> Defendant/Appellant is the beneficial owner of the said motor vehicle. In support of this submission the Appellant relied on Sections 107(1) and 109 of the **Evidence Act** and Section 8 of the **Traffic Act** which provides that a registered owner of a motor vehicle is deemed to be the owner unless proved otherwise. According to the Appellant, the Plaintiff did not prove that the Appellant is the owner of Motor Vehicle Reg. No. KBH 740W apart from the hearsay evidence from police. He produced a copy of records from the registrar of motor vehicles which showed that the owner of Motor Vehicle Reg. No. KBH 740W was one **Wegulo Thomas**.

19. According to the Appellant, production of a Police Abstract as proof of ownership of a motor vehicle is not a sufficient evidence. The same must be corroborated. In this regard the Appellant relied on the authority of **Wigot Construction Co Ltd v Erick Oduor Oyio [2004] eKLR** where the Honourable stated that;

**“It is correct that the respondent’s averment that at the material time the motor vehicle reg No. KAJ 997 H belonged to the appellant was denied by the appellant in the defence. During the trial of the case all the respondent did on this issue was to produce a police abstract of the accident. It has been held that this is not sufficient proof of ownership of the vehicle. It was incumbent upon the respondent to put in as an exhibit a search certificate from the Registrar of the motor vehicles, so as to prove that the vehicle belonged to the appellant. As this was not done the respondent did not prove its case on the balance of probabilities.”**

20. He also relied on the case of **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another, (2010) eKLR** cited in **Francis Mutito Mwangi vs. M M [2016] eKLR** 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 standards 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.”**

21. According to the Appellant, as the ownership of Motor Vehicle Reg. No. KBH 740W was challenged by the Appellant in his defence and during cross-examination of the Plaintiff at trial the Appellant herein was not the owner of Motor Vehicle Reg. No. KBH 740W and thus cannot be held liable for any accident emanating from the said motor vehicle.

22. Accordingly, it was submitted that from the foregoing this Appeal is merited and should be allowed as prayed.

23. On his part the Appellant submitted that not only was it pleaded that the Subaru was registered in the 2<sup>nd</sup> Respondent ‘s name and beneficially owned by the Appellant but evidence was adduced to support the same. According to the Appellant the police abstract clearly showed that the Appellant was the beneficial owner of the said vehicle. It was submitted that though the Appellant denied ownership in his statement of defence, he never gave any evidence to support that fact. Consequently, the 1<sup>st</sup> Respondent’s evidence remained unchallenged.

24. It was submitted that pleadings alone do not constitute evidence and the Appellant was under a duty to demonstrate to the Court by adducing evidence that indeed the subject vehicle was not owned by him and he was not to blame for the accident.

25. It was therefore submitted that the appeal has no merit and should be dismissed with costs.

### **Determination**

26. I have considered the foregoing. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

27. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court,

analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

28. However, in Peters vs. Sunday Post Limited [1958] EA 424, it was held that:

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

29. Nevertheless, in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

30. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved her case. In a nutshell, the Appellant disputes the fact that he was the owner of Motor Vehicle Reg. No. KBH 740W and thus should not be held liable for the accident subject suit at the trial court.

31. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

***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.***

32. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

***109. 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.***

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

33. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

**“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”**

34. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

35. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

**“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

36. I agree that the Court of Appeal’s position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** espouses the correct legal position that:

**“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”**

37. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

**“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

38. Similarly, **Lord Nicholls** of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that:

**“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”**

39. In **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

**“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-**

***“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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.***

***This, burden 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”***

40. What then is the position where a party testifies on oath and the other party does not adduce any evidence? As stated in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** (supra) where the evidence adduced by the plaintiff fall far short of what is expected in a civil suit, in that the plaintiff’s evidence does not meet the 51% threshold, the plaintiff’s case will fail notwithstanding the failure by the Defendant to adduce evidence.

41. It was therefore held in **Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through Stanely Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997** that:

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”**

42. In this case, the 1<sup>st</sup> Respondent was obliged to prove that the Appellant was either the registered owner or the beneficial owner of Motor Vehicle Registration No. KBH 740W. In attempting to do so the 1<sup>st</sup> Respondent relied on the police abstract report in which it was indicated that the said vehicle was owned by the Appellant.

43. In **Wigot Construction Co Ltd v Erick Oduor Oyio [2004] eKLR** it was held that:

**“It is correct that the respondent’s averment that at the material time the motor vehicle reg No. KAJ 997 H belonged to the**

appellant was denied by the appellant in the defence. During the trial of the case all the respondent did on this issue was to produce a police abstract of the accident. It has been held that this is not sufficient proof of ownership of the vehicle. It was incumbent upon the respondent to put in as an exhibit a search certificate from the Registrar of the motor vehicles, so as to prove that the vehicle belonged to the appellant. As this was not done the respondent did not prove its case on the balance of probabilities.”

44. Similarly, in Thuranira Karauri vs. Agnes Ncheche Civil Appeal No. 192 of 1996 [1995-1998] 1 EA 87 it was held by the Court of Appeal that if a defendant denies ownership of a motor vehicle the plaintiff must prove the same (i.e. by search) as police abstract is not sufficient. According to authorities, the submission that the information in the police abstract that the vehicle belonged to the defendant was sufficient proof of ownership cannot be a serious submission.

45. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Appellant chose to remain silent. In other words, the failure by the Defendant to adduce evidence cannot be a basis for propping up an otherwise hopeless case by the plaintiff.

46. However, where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the plaintiff has attained the standard prescribed in civil proceedings. It was therefore held in Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003 that:

“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 issue of the ownership was first raised on behalf of the respondent by its counsel in his submissions in the Superior Court...The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent.”

47. Similarly, in the case of Wellington Nganga Muthiora vs. Akamba Public Road Services Ltd & Another, (2010) eKLR it was held that:

“However, in the case before the court all that prewarning was only in the pleadings and not carried out at the time of the hearing. The appellant produced a police abstract which stated that the first respondent was the owner of the vehicle and that was prima facie evidence. The first respondent did not challenge the production of the police abstract by the appellant on the basis either that he was not the maker of it or that the contents were not admissible or were not correct. The first respondent let it be produced without raising a finger. In cross-examination by the learned Counsel for the first respondent, the allegation in the police abstract that the first respondent was the owner was not challenged, though the other contents of the abstract such as whether indeed the appellant was a passenger in the same bus were challenged by clear questions as to whether the appellant’s name was in the passenger manifest and whether he had a ticket as evidence that he was in the passenger bus. In such a situation where the police abstract’s contents pertaining to ownership of the vehicle was not challenged, it remained prima facie evidence and when the respondents offered no evidence in their defence, such prima facie evidence was not rebutted and it remained valid, unrebutted evidence before the court...Thus had the issue whether proof of ownership of the subject vehicle through police abstract in this case been the only issue before the court, the court would have faulted the decisions of the two courts below and the court is of the view that where police abstract is produced and there is no evidence adduced by a defendant to rebut it and not even cross-examination challenges it as was the case here, the police abstract being a prima facie evidence not rebutted can be relied on as proof of ownership in the absence of anything else as proof in civil cases is within the standards of probability and not beyond reasonable doubt as in criminal cases. However, where it is 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 evidence to the contrary.”

48. In Samuel Gikuru Ndun’gu vs. Coast Bus Co. Ltd. Civil Appeal No. 177 of 1999 [2000] 2 EA 462 the Court held that a police abstract together with the plaintiff’s oral testimony can establish that the Appellant was a passenger in the accident bus on the date and time of the subject accident.

49. What I understand by the aforesaid authorities is that there is no hard and fast rule that ownership of a motor vehicle can only be proved by producing the records from the Registrar. In fact, as appreciated under Section 8 of the *Traffic Act*, a registered owner of a motor vehicle is deemed to be the owner unless proved otherwise. It was therefore held in Ernest Orwa Mwayi vs. Victoria Enterprises Ltd Civil Appeal No. 14 of 1991 that the registration of a person in the registration book (log book) is only *prima facie* evidence of ownership and therefore where the objector puts forward a claim to ownership it is incumbent on the trial court to investigate the claim fairly and justly.

50. Similarly, in Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 Others Civil Appeal No. 46 of 1996 it was held that *Traffic Act* is an Act of Parliament to consolidate the law relating to traffic on the roads; it is not an Act which decides *de facto* or *de jure* ownership of vehicles and ownership of vehicles passes by sale and delivery and registration books are only evidence of title since property passes in accordance with the *Sale of Goods Act* when the contract of sale is made.

51. It follows that where no challenge is taken as to the ownership of a motor vehicle the entries in the police abstract as to the ownership of a motor vehicle coupled with oral evidence may well suffice for the purpose of proof of ownership. However, where a challenge is taken in the statement of defence as well as in either defence evidence or in cross-examination, it is incumbent upon the Plaintiff to adduce evidence on the basis of which the entries in the police abstract may be relied upon by the Court. In this case the Appellant denied ownership of the said vehicle and in cross-examination challenged the allegation that the vehicle was owned by him. The Plaintiff did not expound as to the facts which gave rise to the said entry. It would have been prudent for the Plaintiff to call the police officers to shed light on the circumstances that led them to believe that the vehicle was beneficially owned by the Appellant such as that the insurance policy cover was

in the name of the Appellant. In the absence of such evidence, the Plaintiff's claim fell short of the threshold required in such cases.

52. It follows that the Appellant ought not to have been held liable for the accident. Accordingly, I find merit in this appeal, set aside the finding of liability against the Appellant as well as the award of damages against him.

53. As the Appellant did not adduce evidence before the trial court, there will be no order as to costs.

54. Orders accordingly.

**Judgement read, signed and delivered in open Court at Machakos this 14<sup>th</sup> December, 2020.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Munguti for Mr Mulwa for the Appellant**

**Mr Mutua for A. K Mutua for the Respondent**

**CA Geoffrey**