REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 128 OF 2014

ASHUR AHMED TRANSPORTERS LTD.....APPELLANT

-VERSUS-

ABDUSHAKOOR MAKHAN ANIL.....RESPONDENT

(An Appeal against the Judgment of Honourable M.A. Otindo Resident Magistrate

dated 19th August, 2014 in Nakuru CMCC Number 1038 of 2012

Abdushakoor Makkhan Anil -vs Ashur Ahmed Transporters Limited)

JUDGMENT

1. On the 3rd July 2012 motor vehicle registration No. KAB 899Z was involved in an accident along the Nakuru-Eldoret road with another registration number KBR 440 D 7948 Mercedez Benz Prime Mover, the property of the Appellant. The Respondent in his plaint described himself as the beneficial and/or ostensible owner of motor vehicle registration No. KAB 899Z. He blamed the appellant for the non injury accident but claimed damages for the material damage to his vehicle in the tune of Kshs.267,000/=. The trial court upon full hearing made findings that:

1. The respondent was the beneficial owner of motor vehicle KAB 899Z

2. That the defendants driver was to blame for the accident.

And awarded damages to the respondent as follows:

(1) Kshs.157,000/= being pre-accident assessment costs, less Kshs.60,000/= salvage value

(2) Costs and interest

2. The appeal before me is on the trial court's findings on two main grounds

(a) Ownership the accident motor vehicle Registration No. KAB 899Z as at 3rd July 2012, date of accident and

(b) Value and salvage value of the said vehicle.

3. **Issues for determination**

1. Ownership of motor vehicle registration No. KAB 899Z as at date of accident, 3rd July 2012

The Respondent testified before the trial court as **PW1**. He produced the log book (PExt 1) that showed the owner as **Tahir Khartum Altaf,** his aunt from whom he claimed to have bought the vehicle but not changed ownership. He did not produce any sale agreement or any document to confirm that he had indeed bought the vehicle and therefore the beneficial owner.

4. I have considered submissions by the parties.

The appellant's submission is that without a sale agreement of the vehicle to the respondent, and non-compliance with **Section 9 of the Traffic Act** – failure to register a transfer of motor vehicle within 14 days of the transfer – then the respondent cannot be held to have beneficial or any other interest in the vehicle, and therefore faults the trial Magistrate for the finding that the respondent was the beneficial owner-

The Respondent citing the case **HCCA No.133/2002 Superfoam Ltd & Another -vs- Gladys Nchororo Mbero.**

5. **Section 8 Traffic Act** states 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."***

6. Proof of ownership of a party who is not the registered owner must be adduced/demonstrated. This is ordinarily by way of a sale agreement, an instrument of a gift, an assignment or any other legally recognizable instrument bearing in mind that whoever asserts must prove - **Section 107, 108 ad 109 Evidence Act.**

7. From the evidence on record, other than that the respondent had parked the vehicle at the appellant's showroom, no other evidence was adduced as to his claim of ownership.

Undoubtedly, there are other ways of proving ownership of a motor vehicle in the absence of the above. A police abstract though on its own without collaboration cannot be sufficient may be one such methods – **Charles Nyambuto Mageto -vs- Peter Njuguna Nyathi Nku HCCA No.4/2009 (2013) e KLR.** A letter of authority to sell as produced cannot be said to be proof of ownership. Such letter only authorises an agent to sell the vehicle on behalf of the owner, and such owner must prove he is indeed the owner, registered or beneficial.

8. The basis upon which the trial court based its findings is upon what the magistrates terms as **"perceived Asian community nature**" - a doctrine not known in our legal system and jurisprudence. It cannot be said to be a judiciously noticed practice in our legal system.

9. The respondent failed in his duty to prove in any way either his beneficial or possessory interest in the accident vehicle. Without any further corroboration to his evidence, and upon re-evaluation of the evidence I find that the respondent was not the beneficial or *defacto* owner – **Charles Nyambuto Mageto** case **Supra** - of the accident vehicle.

10. **Section 107 and 109 of Evidence Act** places the evidential burden of proof upon the person who desires the court to give judgment as to his legal rights or liabilities. He has to prove existence of facts which he asserts must prove those facts – **Consolata Anyango Ouma -vs- South Nyanza Sugar Co. Ltd (2015) e KLR.**

In this aspect I cannot find any persuasive evidence, oral or documentary that the respondent was indeed the owner, or had any beneficial interest in the accident vehicle at the date of the accident.

11. **Pre-accident and salvage value of the accident motor vehicle.**

An assessment report of the damage and repair costs to the accident vehicle was produced by **PW3 Charles Karoi**, **a motor vehicle assessor** instructed by Diplomatic Accident Assessors, upon instructions by the respondent. The estimated repair costs were given as Kshs.183,048/= and pre-accident value of Kshs.210,000/=. It was his opinion that it would be uneconomical to repair, and wrote it off, with a salvage value of Kshs.60,000/=. In addition a sum of Kshs.7,000/= was paid to the assessor as his assessment charges.

12. The vehicle having been declared a write off, the owner would have been compensated as follows:

Pre-accident value - Kshs.210,000/=

Less salvage value - Kshs. 60,000/=

Kshs.150,000/=

Add-Assessment fees - 7,000/=

Kshs.157,000/=

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That appears to be the same figure the trial magistrate arrived at save that it was not so clearly tabulated.

13. Submission by the appellant that the pre-accident value was Kshs.170,000/= being the purchase price stated by the respondent is not entirely correct. Purchase price of a vehicle and the insured value for purposes of material damage compensation are completely different. The insured value is the sum that an insurer, upon valuation, gives as the value of the vehicle. An owner of a vehicle may disclose a lower or higher purchase price but an assessor, instructed by the insurer is more likely to come to a more realistic value of the vehicle than the purchase price which may be higher or lower.

For the foregoing, I uphold the trial magistrates finding on this issue.

14. Based on the above findings, as an appellate court and on the matter of ownership of the vehicle would then the respondent be entitled to compensation for the material damage claim?

Evidently, having found that the respondent did not prove his claim of ownership over the accident vehicle, it follows that no compensation can be granted to him as doing so would be legally and factually wrong and without basis. That compensation ought to go to the registered owner as stated in the log book, or to a proved beneficial owner, and not to the Respondent. Unfortunately, the registered owner is not a party to these proceedings and therefore not entitled to any compensation by way of damages or otherwise.

15. Accordingly, the appeal is allowed in part, in the matter of the ownership of the accident vehicle I find that the respondent is not the beneficial owner of the same. Had he succeeded in proving that he was the beneficial owner of the said vehicle, I would have ordered that the trial Magistrates compensatory award of Kshs.157,000/= be paid to him together with interest and costs.

16. Each party shall bear own costs of the appeal as well as costs of the primary suit.

Dated, signed and delivered this 27th Day of September 2018.

J.N. MULWA

JUDGE