



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 50 OF 2016**

**ANN THOGORA KABIRU.....APPELLANT**

**VERSUS**

**CHARLES MAINA MUTAHL.....RESPONDENT**

*(Appeal from judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 423 of 2006 (Hon. Onyiego, J. Chief Magistrate (as he then was) delivered on 31<sup>st</sup> August, 2016)*

**JUDGMENT**

Sometimes in March, 2006, the appellant filed a suit against the respondent in the magistrates' court mainly for special and general damages. The cause of action arose out of a road traffic accident that is said to have occurred on or about the 13<sup>th</sup> day of September, 2003 along Karatina-Nyeri road. The accident involved a public service vehicle registered as No. KAM 066K in which the appellant was travelling as a fare-paying passenger and motor vehicle registration No. KAP 360 R.

The respondent disputed the appellant's claim and filed a statement of defence in that regard; of particular interest in the appellant's case and in this appeal, the appellant denied, among other things, ownership of the vehicle registration No. KAM 066K and accordingly put the appellant to strict proof.

It would appear from the appellant's testimony on record that the two vehicles collided head-on and as a result she sustained serious bodily injuries hence her claim for damages. In her estimation, the driver of the vehicle in which she was travelling was solely to blame for the accident and it is for this reason that she singled him out for her claim in damages. Her initial suit against the respondent was dismissed on 30<sup>th</sup> September, 2013. She successfully appealed against the dismissal apparently because the advocate who conducted the defence case was not qualified to act as such; this Court therefore ordered that the suit be heard afresh.

At the conclusion of the second trial, the trial magistrate incidentally came to the same conclusion as the magistrate who initially heard the appellant's suit. He dismissed it on the ground that the appellant did not prove that the respondent was the owner of the vehicle which she had boarded; this is the same ground upon which the suit was dismissed. Being dissatisfied with the decision of the learned magistrate, the appellant has appealed against that decision on eight grounds; these grounds are as follows:

1. The learned trial magistrate erred in fact and in law in finding that the appellant had not proved on a balance of probabilities that the respondent was not the owner of motor vehicle registration number KAM 066K.
2. The learned trial magistrate erred in law in failing to assess damages he would otherwise have awarded the appellant.
3. The learned trial magistrate erred in law and in fact in failing to take into account the appellant's evidence and submissions.
4. The learned trial magistrate erred in law and in fact in failing to consider the appellant had joined issues in the reply to the defence.
5. The learned trial magistrate erred in law and in fact in declining the production in evidence of the court file in the Chief Magistrates Court Civil Case No. 109 of 2006 between Esther Wambui Kimaru versus Charles Maina Mutahi which case arose from the same road traffic accident as the accident in issue in the appellant's suit.
6. The learned trial magistrate erred in law in arriving at a decision different from other decisions by the same court apparently on similar facts.
7. The learned trial magistrate erred in law and in fact in dismissing the appellant's claim without addressing the evidence adduced by the appellant and in view of the fact that the respondent did not offer any evidence.

8. The learned trial magistrate erred in fact and in law in failing to consider all the evidence, pleadings, the facts and the law before him.

As always first appeals to this Honourable Court, it is necessary to consider the evidence on record and evaluate it afresh; in doing so, this court may very well come to conclusions that are different from those arrived at by the magistrates' court and if that be the case this court has to bear in mind and be cautious that the trial court had the advantage of hearing and seeing the witnesses. (**Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) E.A. 123**).

The appellant's case was relatively short; she testified that at the time of the accident she was seated on a seat immediately behind the driver's and was therefore better positioned to see the traffic ahead. The accident occurred when the driver attempted to overtake the vehicle ahead of him; in the process his vehicle collided with a bus that was coming from the opposite direction. The injuries she sustained as a result of the accident were so severe that one of her legs had to be amputated.

She identified the owner of the motor vehicle as Robert Mutahi Maina; she testified that he died though it was not clear from her testimony whether he died in the same accident. Later in her testimony, she said the owner of the motor vehicle was the respondent. She, however, did not produce any document in proof of the fact of ownership of the vehicle.

The only document which made reference to the ownership of this vehicle was a police abstract issued by Karatina police station on 19<sup>th</sup> February, 2004. It was presented in court by David Kibende, a police officer who then held the rank of a senior superintendent of police. According to the police officer the owner of the vehicle was Charles Maina, the respondent in the present appeal; he admitted, however, that the abstract showed that the motor vehicle was owned by Robert Mutahi.

In the course of the proceedings, counsel for the appellant sought to introduce the record in Chief Magistrates' Court Civil Case No. 109 of 2009 which, apparently, was based on the same facts as the appellant's case. According to the learned counsel, that case had been determined and since it arose from the set of facts as the appellant's, it would have been worthwhile for the trial court to take judicial notice of the outcome of that particular suit.

The trial magistrate rejected the appellant's application because, in his respectable view, he was not bound by the decision in that suit, ostensibly because it was a decision from a court of coordinate jurisdiction.

The primary question in the appellant's suit, as it is in this appeal, is proof of ownership of motor vehicle registration number KAM 066K. By now, it should be apparent that it is not clear from the appellant's testimony who the owner of the accident vehicle was. The pertinent part of her testimony in this respect was this:

***I do recall the name of the driver. He was known as Charles Gitari. The owner of the motor vehicle died. He was known as Robert Mutahi Maina.***

Later, she somehow changed her testimony to say that:

***The owner of the motor vehicle was Charles Maina Mutai.***

In the midst of these contradictions, the appellant did not provide any proof, documentary or otherwise, of ownership of the accident vehicle. The police abstract produced by the police officer could not be taken as conclusive proof of this aspect of the appellant's case because while the officer insisted in his evidence in chief that the owner was the respondent, the police abstract which he, himself produced indicated the owner to be Robert Mutahi Maina.

No evidence was led to show, and the appellant did not even suggest, that Charles Maina Mutai and Robert Mutahi Maina were one and the same person. If anything, she testified that the owner of the motor vehicle died; if that is the case, the question of who Charles Maina Mutai was and in what capacity he was sued was not answered. It must not be forgotten the appellant named the driver as one Charles Gitari and therefore Charles Maina Mutai could not possibly have been the driver of the vehicle.

I am minded that in appropriate circumstances the court need not look beyond the police abstract to establish ownership of a vehicle particularly where the ownership is not disputed and the police abstract itself is not contested. In **Kisumu Civil Appeal No. 333 of 2003 Ibrahim Wandera versus P.N. Mashru Ltd**, the Court of Appeal held that this Court was in error in dismissing the appellant's appeal on the ground that a police abstract was not satisfactory proof of ownership. The Court held that the police abstract which was admitted in evidence provided sufficient particulars of the motor vehicle and the owner. It also noted that the question of ownership had not been contested at the first instance and could not have been a point for determination particularly when it was not raised in the appeal.

In **Kisumu Civil Appeal No. 309 of 2010 Joel Muga Opija versus East African Seafoods Ltd** the same question of proof of ownership of a motor vehicle was in focus. Here the subordinate court found for the claimant and awarded him both special and general damages but subject to contribution.

When the defendant appealed to this Court, the learned judge overturned the subordinate court's decision on, amongst other grounds, that the ownership of the accident vehicle was not proved since all that the plaintiff produced to prove this fact was a police abstract.

The Court of Appeal overruled this Court and found the High Court decision in **Collins Ochung Ondiek versus Walter Ochieng Ogunde Civil Appeal No. 67 of 2008** persuasive on this point. The Court quoted Ali Aroni, J. in that case in which she held:

***"In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did***

*not take the issue of ownership seriously”*

The court held the evidence by a police abstract that defendant was the owner of the accident vehicle was **“not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence.”** In allowing the appeal, the court concluded that:

***“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 later be denied.”***

I would have been prepared to find that the police abstract which the police produced was sufficient proof of ownership of the vehicle in light of the foregoing decisions but even without the respondent’s rebuttal the appellant’s testimony together with that of her witness were not only inconsistent in themselves but were also contrary to the particulars in the abstract. The person who was sued was not the same person identified in the abstract as the owner of the vehicle. A certificate of official search from the registrar of motor vehicles would perhaps have shed some light on this question.

Going by the contradictory nature of the appellant’s testimony together with that of the police officer, I am inclined to agree with the learned magistrate that the ownership of the accident vehicle was not proved on a balance of probabilities. Without proof of ownership of the vehicle there was no certainty that the respondent was a proper or necessary party and thus the question of whether the respondent was liable or not did not arise.

One other ground of appeal that deserves mention is the appellant’s contention that the trial court ought to have taken judicial notice a decision by a different court in case involving the same set of facts. All I need to say here is that the learned trial magistrate was not bound by a decision given by a court of co-ordinate jurisdiction. Assuming the two suits arose from the accident, it was open to the parties to invoke Order 38 Rule 1 of the Civil Procedure Rules and make the appropriate application to have one suit determined as a test suit in which case the determination of that suit would have applied to the other suit, particularly on liability. That rule says:

***Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.***

Without having made the appropriate application and obtained the necessary order, the learned magistrate cannot be faulted for declining to follow the decision in civil suit No. 109 of 2006; the two suits had to be determined separately and on their own merits.

Despite the inadequacies in the appellant’s suit, the learned trial magistrate ought to have proceeded to assess the damages payable to the appellant had her suit succeeded. Such assessment is always necessary whenever the option of appealing against the decision to dismiss the suit in a claim for damages is open to either party, in this case the appellant. The trial court has to bear in mind the possibility of its decision being overturned on appeal in which case the claimant would be entitled to his award which ought to have been assessed at the very first instance. For this reason, I will partly allow the appellant’s appeal and refer the appellant’s case back to the trial court for assessment of damages she would have been awarded had her suit succeeded. Each party will bear its own costs. It is so ordered.

**Signed, dated and delivered in open court this 21<sup>st</sup> day of September, 2018**

**Ngaah Jairus**

**JUDGE**