REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 76 "A" OF 2010

FRANCIS MUTITO MWANGI……..…….…..APPELLANT

VERSUS

F M (a Minor suing through

Her father and Next Friend M M).....RESPONDENT

(An Appeal arising out of the judgment of Hon. C. Obulutsa PM delivered on 13th May 2010 in Kangundo Principal Magistrate's Court Civil Case No. 203 of 2008)

JUDGMENT

Introduction

The Appellant was the original Defendant in Kangundo Principal Magistrate's Court Civil Case No. 203 of 2008, and has appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 13th May 2010. The Respondent was the original Plaintiff in the said suit and a minor, and sued through his father as next friend. The learned magistrate in his judgment found the Appellant fully liable for an accident that occurred on 2nd July 2008 involving motor vehicle registration number KAL 162 Y, and awarded the Respondent a total award of Kshs 103,200/= as general and special damages.

The Appellant subsequently moved this Court through a Memorandum of Appeal dated 7th June 2010 in appealing against the judgment and decree of the trial magistrate. The grounds of appeal raised by the Appellant are as follows:

- The learned trial magistrate erred in law in holding that the police abstract report giving the Defendant's name as the owner of the subject motor vehicle was enough proof that motor vehicle registration number KL 162 Y belonged to the Defendant.
- The learned trial magistrate erred in law and in fact in disregarding and failing to accord proper consideration to the Defendant's counsels submissions in respect of proof of ownership, and thereby holding the Defendant's liable when liability was not proved as per the required standard.
- The learned trial magistrate erred in law and in fact in not taking into account the submission of the Appellants.
- The learned trial magistrate erred in law and in fact in relying on an authority of the High Court in respect of proof of ownership produced by the Plaintiff's counsel, whereas the Defence Counsel had submitted a Court of Appeal authority in respect of the same matter.
- The learned trial magistrate erred in law and in fact in holding that the settlement by the Defendant of some matters in the series was a concession of liability on the part of the Defendant, and proof of ownership of the subject motor vehicle .

- The learned trial magistrate erred in law and in fact in holding that since the Defendant had settled other matters in the series, then he was automatically liable in the present suit.
- The learned trial magistrate having misapprehended and misunderstood the law as to proof of ownership of a motor vehicle arrived at the wrong decision in holding that the Plaintiff had proved ownership of the subject motor vehicle by producing the police abstract.

The Appellant is praying that the judgment delivered by the trial magistrate on 13th May 2010 be set aside, and for any other order which this Court may deem fit to grant. He also prayed that he be awarded the costs of this appeal.

The Facts and Evidence

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.**

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondent instituted a suit in the lower court by filling a Plaint dated 1st December 2008. She claimed therein that on or about 2nd July 2008, at about 4.30 pm along Nairobi- Kangundo Road at Kwa Muya, she was lawfully travelling as a fare paying passenger in motor vehicle registration number KAL 162Y, a Nissan Matatu owned by the Defendant, when the Defendant's driver and /or agent carelessly and negligently drove, managed and/or controlled the said motor vehicle, causing the vehicle to lose control and ram into the rear side of motor vehicle registration number KTS 970, an Isuzu lorry.

The Respondent detailed the particulars of negligence and/or carelessness on the part of the Defendant's driver and/or agent in her Plaint, and also relied on the doctrine of *res ipsa loquitor*. She also claimed that she suffered serious injuries as a result of the accident, the particulars of which were generalized body pains and multiple bruises on the forehead, as well as loss and damage. The Respondent sought general damages for pain, suffering and loss of amenities; special damages of Kshs 3,200/= for the police abstract and medical report; and costs of the suit.

The Appellant filed a defence dated 12th March 2009 wherein he denied ownership of motor vehicle registration number KAL 162Y, or that the Respondent was a passenger in the said motor vehicle. He also denied the occurrence of the alleged accident, and put the Appellant to strict proof. The Appellant averred that if any injury had been suffered by the Respondent, then it was substantially contributed to by her own negligence of which he gave particulars. In the alternative, that any occurrence as may be proved by the Respondent was substantially contributed to by the negligence of the driver of motor vehicle registration number KTS 970, and particulars thereof were also itemized by the Appellant.

From the record of the trial court proceedings, the suit proceeded to full hearing on 11th February 2010, when three witnesses gave evidence for the Respondent. The first witness (PW1) was Dr. Mwangi, a medical doctor who examined the Respondent and produced the medical reports and P3 form he filled as exhibits. P.C Karisa of Kangundo police station was PW2 and he produced the police abstract of the accident involving the Respondent as an exhibit.

M M, the father of the Respondent testified as the last witness (PW3), and his testimony was that the Respondent was at the time 4 years old, and he produced her birth notification as an exhibit. He also testified that he was travelling with the Respondent on 2nd July 2008 when she was involved in the accident and sustained an injury to the forehead. He produced the Respondent's treatment cards, police abstract of the report of the accident and demand letter sent to the owner of the motor vehicle as exhibits.

The Appellant did not call any witnesses or evidence during the trial in the lower court and relied on written submissions filed therein.

The Issues and Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Allan Odongo of Kairu & McCourt Advocates, filed submissions dated 10th June 2016. The Respondent's learned counsel, Mutunga & Company Advocates filed submissions dated 10th June 2016. The issue before the Court for determination arising from a perusal of the grounds of appeal and the submissions thereon, is whether there was adequate proof that the Appellant was the owner of motor vehicle registration number KAL 162 Y, to hold him liable for the accident that occurred on 2nd July 2008 involving the said motor vehicle .

The Appellant submitted in this regard that no evidence was led by the Respondent as regards the ownership of the said motor vehicle, and that PW3 during cross- examination admitted that he did not conduct a motor vehicle search or have a search certificate of the said motor vehicle. Further, that the Appellant in his submissions in the lower court disputed ownership of the motor vehicle registration number KAL 162Y. The Appellant cited various decisions of the Court of Appeal on proof of ownership of a motor vehicle by way of registration documents including the decision in **Thuranira Karauri vs Agnes Ncheche (1997) e KLR** and **Ignatius Makau Mutisya vs Reuben Musyoki Muli (2015) eKLR.**

The Respondent's counsel submitted in this regard that the pleading in the Plaint was that the Appellant was legal owner of the motor vehicle registration number KAL 162Y and not registered owner of the same, and that PW3 adduced evidence of a police abstract showing the Appellant as being the registered owner of the said vehicle. Further, that the Appellant did not call any witnesses to rebut this evidence or support the averments in his defence. The Respondent relied on various decisions of the High Court in this respect including **Justo Makadiani Sunguti vs United Millers Ltd & Anor, Eldoret HCCA No 80 of 2006, Charles Nyambuto Mageto vs Peter Njuguna Njathi Nakuru HCCA No 4 of 2008** and **Samuel Mukunya Kamunge vs John Mwangi Kamuru, Nyeri HCCA 34 of 2002.**

The legal burden of proof is set out in sections 107**(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya),* which provides as follows:

> ***"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."***

In addition, the evidential burden is cast upon a party to prove any particular fact which he desires the court to believe in its existence under **sections 109** of the Evidence *Act* as follows:

> ***"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.***

The position as to proof in civil cases was reiterated in the case of **Kirugi & Anor vs Kabiya & 3 Others [1987] KLR 347** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof. The Respondent had both the legal and evidentiary burden of proof of any facts alleged to the standard required which is on a balance of probabilities. Therefore, the burden was upon the Respondent in the first instance to prove the ownership of motor vehicle registration number KAL 162 Y.

The Respondent has argued that she discharged this burden by production of a police abstract which showed that the Appellant was the registered owner of the said motor vehicle. I have perused the police abstract produced as an exhibit in the trial Court, and as explained in note 2 of the memorandum to the said abstract, the abstract gives the salient facts of a vehicle accident as ascertained by the police from their own observation, including the names and addresses of witnesses, on the understanding that the abstract is not an actual copy of a police report, and is not a guarantee of the accuracy of the names and addresses tendered by the parties and witnesses.

On the other hand, section 8 of the Traffic Act (Chapter 403 of the Laws of Kenya) which provides for registration of motor vehicles provides as follows:

> *"**The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle"***

It is therefore the position that a logbook or certificate of search is not conclusive proof of ownership, and though such document may purport to show the registered owner, it may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out that the contrary can be proved.

In the case **of Samwel Mukunya Kamunge vs John Mwangi Kamuru Civil Application No.34 of 2002**. Okwengu, J (as she then was) stated as follows in this regard:-

> ***"It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time's vehicles change hands but the records are not amended.***
>
> ***I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent."***

Specifically on the evidentiary value of a police abstract as regards proof of ownership of a motor vehicle, the Court of Appeal sitting at Kisumu held as follows in the case of **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another,(2010) e KLR**:

> ***"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"***

Likewise, in **Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003** the Court of Appeal expressed itself as follows:

> **"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."**

Lastly, I associate myself with the decision of Warsame J. (as he then was) in **Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001** where the learned Judge held as follows:

> **"Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle**

which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence."

Therefore, to the extent that evidence of a police abstract showing the Appellant to be the owner of motor vehicle registration number KAL 162Y was produced by the Respondent during the trial, and was not disproved during cross-examination, I find that the Respondent did discharge her burden of proof in this respect.

However, as regards the proceedings of various suits arising from the same accident as the one in the present appeal, in which the Appellant is alleged to have settled and thereby admitted to ownership, I find that the trial magistrate erred in the finding in his judgment that the settlement confirmed that the Appellant was owner of the said motor vehicle as there was no record of any such proceedings having been produced in evidence, and no basis on which such a finding could be made.

The Appellant's appeal is therefore found not to be merited for the foregoing reasons, and the Appellant shall bear the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 29TH AUGUST 2016.

P. NYAMWEYA

JUDGE