



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 20 OF 2011**

**MOSES MURIITHI NJAGI ..... APPELLANT**

**VERSUS**

**JOSEPH NJUGUNA MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**ABDALLA MOHAMED ALI ..... 2<sup>ND</sup> RESPONDENT**

**THOMAS MWAVISWA ..... 3<sup>RD</sup> RESPONDENT**

**(Being an appeal from the judgement delivered by the Hon. Mr. Ondieki (Senior Resident Magistrate) on 24<sup>th</sup> may, 2011)**

**JUDGEMENT**

The 1<sup>st</sup> respondent was involved in a road traffic accident on 6<sup>th</sup> August, 2009 along the Mombasa – Kilifi Road. The 1<sup>st</sup> respondent was travelling in motor vehicle registration number KBB 936K Nissan matatu which vehicle collided with motor vehicle registration number KAT 973W Mitsubishi Fighter Fuso lorry. The appellant enjoined the two other respondents as third parties in the suit before the trial court. The trial court held the appellant 100% liable and awarded damages of Kshs.200,000/= to the 1<sup>st</sup> respondent. The appellant claim against the 3<sup>rd</sup> party was dismissed.

Being dissatisfied with the judgement of the trial court, the appellant preferred this appeal. The two grounds of appeal are that the 1<sup>st</sup> respondent did not prove the ownership of the accident vehicle and that the trial court erred in law and fact by holding the appellant 100% liable. Parties agreed to determine the appeal by way of written submissions.

M/s Kairu & McCourt, counsels for the appellant submit that the 1<sup>st</sup> respondent did not prove that the appellant owned the accident vehicle. Counsels rely on the case of **THURANIRA KARAUARI V AGNES NCHECHE [1997] eKLR** where the Court of Appeal held that ownership of a vehicle is proved by way of producing a certificate of search signed by the registrar of motor vehicles. It is submitted that the trial magistrate relied on the police abstract which indicated that the appellant was the owner of the accident vehicle. The source of information for the police abstract is not revealed. The police abstract can only be relied upon as corroborative evidence to other superior evidence of ownership. It was incumbent upon the 1<sup>st</sup> respondent to prove ownership of the vehicle even if the appellant did not call any evidence.

With regard to the issue of liability, counsel for the appellant submit that PW1 testified that the 3<sup>rd</sup> party vehicle was inspected and found to be defective. One of the most crucial defects was a fading indicator at the rear of the vehicle. Such a vehicle could not have been held to have clearly indicated to other motorists of its intention to turn. The driver of the lorry was charged and convicted of driving a defective vehicle. It is contended that it is the defective lorry which caused the accident.

It is also submitted that PW1, a police officer, testified for the 1<sup>st</sup> respondent. He was not present at the scene of the accident and his evidence amounts to hearsay. Further, the evidence of PW2 and PW3 does not corroborate each other. The two witnesses did not have a clear view of what happened as there were other vehicles ahead of the accident vehicle. These other vehicles blocked the view of both PW2 and PW3. PW2 stated that he saw four vehicles ahead of the accident vehicle before the lorry while PW3 testified that he saw two vehicles. Both witnesses were in the accident vehicle.

It is further contended by the appellant that the evidence on record shows that the lorry was hit on the rear part by the matatu. If the matatu was overtaking other vehicles and the lorry was turning, the only logical conclusion would be that the lorry would be hit in the middle or its side. It is submitted that the 1<sup>st</sup> respondent did not prove his case on a balance of probabilities. The burden of proof was not discharged.

M/s Njoroge Mwangi & Co. Advocates, counsel for the 1<sup>st</sup> respondent, opposed the appeal. Counsels maintain that the appellant is contesting the finding of the trial court on liability yet the 3<sup>rd</sup> parties were not served with the appeal. Further, the evidence for the 1<sup>st</sup> respondent was not controverted by any other evidence. Counsel also submit that the accident occurred at 5.45 pm and PW2 and PW3 clearly saw how the accident occurred. The Nissan matatu left its lane in order to overtake other vehicles thereby causing the accident. PW1 was a police officer and his evidence was based on police investigations on the accident. The lorry's indicators were working and the lorry did not cause the accident. Further, ownership of the accident vehicle was proved through the production of the police abstract. Counsels rely on the case of **JOEL MUGA OPIJA V EAST AFRICAN SEA FOOD LIMITED (C.A.), Civil Appeal No. 309 of 2010 (Kisumu)**. Lastly, it is submitted that the appellant does not allege that the trial magistrate acted on the wrong legal principles or took into account matters which he ought not to have considered.

The record of the trial court show that three witnesses testified for the 1<sup>st</sup> respondent. The appellant and the 3<sup>rd</sup> parties did not call any evidence. PW1 IBRAHIM WAHOME was a police officer attached to Mtwapa police station, traffic department. His evidence was that motor vehicle registration number KBB 936K, Nissan matatu, started to overtake other vehicles and in the process hit the lorry registration number KAT 973W that was turning towards Amkeni Petrol Station. Both vehicles were coming from Mombasa side heading towards Kilifi. The petrol station is on the right hand side of the road as one heads towards Kilifi. The matatu hit the lorry on the rear. Other vehicles ahead of the matatu stopped to wait for the lorry to turn but the matatu overtook them and hit the lorry and overturned. The lorry had substantially turned to the right and the lorry driver did indicate that he was turning. It is PW1's evidence that the lorry driver was charged with driving a defective vehicle as the indicators had faded. The matatu driver went underground and was to be charged with reckless driving. According to PW1 the lorry did not cause the accident. The impact was at the middle of the road. The defects on the lorry did not cause the accident.

The 1<sup>st</sup> respondent testified as PW2. He was a passenger in the Nissan matatu heading to Kilifi. He testified that there were about four vehicles between the accident matatu and the lorry. All those vehicles stopped as the lorry indicated to turn to the petrol station. The matatu overtook all the other vehicles, hit the lorry and overturned. The matatu driver was driving too fast in the circumstances.

PW3 PRISCILLA LEWA was also a passenger in the Nissan matatu. She testified that on 6<sup>th</sup> August, 2009 she was from Mombasa heading to Kilifi. The matatu overtook other vehicles, hit the lorry that had indicated that it was turning and overturned. According to her, there were two other vehicles ahead of them and they both stopped to give way to the lorry to turn to the right.

The first issue being raised by this appeal relates to the ownership of motor vehicle registration number KBB 936K. It is submitted that the police abstract was not sufficient proof of ownership of the vehicle by the appellant. My view on this issue is that a police abstract is a government document. The police officer who fills in the police abstract does not extract the information out of the blues. The information is required by the police and is willingly given by those concerned. The police abstract indicate that the Nissan matatu was insured by Directline Insurance Co. Ltd. It turned out that that information is true as I will return to that herein below. The police did not pick the appellant's name out of nowhere. It is common knowledge that once an accident occur, the motor vehicle(s) involved are taken to the nearest police station. The owners of the vehicles or their agents will go to the police station and give the police the relevant information. Such information include names of the drivers of the vehicles, owners of the vehicles and the use of the vehicle. The details of the Insurance Company can easily be obtained from the insurance policy affixed to the windscreen of the vehicle.

The appellant contends that an official search from the Registrar of Motor Vehicles is the only conclusive proof of ownership. This is a civil suit which requires no proof beyond reasonable doubt. The evidence contained in the police abstract that the appellant is the owner of motor vehicle registration number KBB 936KI Nissan matatu is reasonable and true on a balance of probabilities unless controverted by the production of a log book or official search. The ground of appeal is merely a denial. The appellant had the opportunity to testify and inform the court that indeed he is not the owner of the vehicle. Reliance of the principle that he who asserts must prove cannot help the appellant. The 1<sup>st</sup> respondent asserted that the appellant was the owner of the accident vehicle and proved that assertion through the production of the police abstract. A police officer testified to the effect that the appellant was the owner of the accident vehicle. That was sufficient evidence.

Reliance has been placed on the **THURANIRA** case (supra). This is a 1997 case. The case of **JOEL MUGA OPIJA** (supra) was decided on 24<sup>th</sup> October, 2013. The latter case even discussed the Thurania case. The Judges in the Joel Muga case stated the following in reference to the issue of proof of ownership: -

**We observe that in that case the defendant did not give evidence in his defence, and we further note that the learned Judges of Appeal in that case had settled for allowing the appeal on other grounds they considered more serious so that the finding above remained orbiter. Hear them at the end of their judgment: -**

**“In the final analysis, the appeal succeeds and is allowed. We set aside the judgement and decree of the Superior Court and in view of our finding that the claim was time barred, which rendered the suit incompetent, we substitute an order striking out the plaintiff's suit with costs to the defendant. The defendant will also have the costs of this appeal.”**

The court further states as follows: -

**In the more recent case of Ibrahim Wandera vs PN. Mashru Limited, [Civil Appeal No. 333 of 2003] (unreported) this court, again differently constituted considered a similar scenario. In that case only the appellant testified and on appeal the issue of whether ownership was proved was raised. Coincidentally, the advocate for the appellant was the same as is in this case and some of the grounds advanced in the Memorandum of Appeal were very close to the grounds raised in this appeal. This court states as follows: -**

**“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 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. The appellant was not cross-examined on it. It means the respondent was satisfied with that evidence.”**

Apart from the above, the record shows that the appellant filed an application for stay of execution before the trial court as well as before the High Court. There are two affidavits sworn by EVERLYNE ONZERE on 27<sup>th</sup> June, 2011 and EZEKIEL GITHINJI on 12<sup>th</sup> July, 2011 respectively. Both deponents are legal managers with Directline Insurance Co. Ltd. They deponed that the company is the insurer of motor vehicle registration number KBB 936K and that they instructed the advocate on record for the appellant to defend the company's interest. If indeed Directline Insurance Company Ltd did not insure the appellant, nothing would have been easy than to state so in those affidavits. If indeed the appellant is not the registered owner of the accident vehicle, the two legal managers could have put the record straight. I am alive to the fact that a statutory notice is required under chapter 405 of the Laws of Kenya. The notice is sent to the Insurance Company which insured an accident vehicle before the suit is instituted. There is no contention by the insurer that the appellant is a stranger to them. Indeed the appeal is brought in the name of the appellant while the insurer keenly follows behind and is interested in the outcome.

The upshot is that this ground of appeal is misplaced. A police abstract proves ownership of a motor vehicle unless the contrary is proved. The appellant did not adduce any evidence and it was established that he owned the accident vehicle.

The next issue relates to liability. The trial court found the appellant 100% liable. The evidence of PW2 and PW3 is that there were other vehicles ahead of the Nissan matatu. Whether there were two or four vehicles ahead of the matatu does not matter. That cannot be contradictory evidence. The bottom line is that the matatu was overtaking meaning that there was another vehicle ahead of it. The matatu was not overtaking the lorry. It was overtaking other vehicles.

The appellant contends that if the lorry was turning to the right, why it was hit on the rear. This can only be logically true if it can be established that the lorry made a 90 degrees right turn. PW1 testified that the rear part of the lorry was still on the road. The lorry driver could have seen the petrol station at a distance. The driver did indicate to turn as per the evidence of PW2 and PW3. Other vehicles ahead of the matatu stopped. Definitely, the matatu driver did not know what was happening ahead of him. He opted to overtake. It was around 5.45 pm and therefore not dark. Had the matatu driver been careful, he could have waited behind the other vehicles or overtake them carefully. Upon seeing the lorry ahead of him, he could have stopped. This gives credence to the evidence of PW2 that the matatu was over speeding. It went off the road and overturned upon hitting the lorry. It is possible that the rear part of the lorry was hit. It is possible that the lorry made a diagonal turn and not a 90 degrees right turn. The point of impact cannot absolve the appellant from blame. The matatu driver drove from behind and hit the lorry. Even if the lorry was stationary, it was incumbent upon the matatu driver to see other vehicles on the road. The driver's decision to overtake other vehicles which had given the lorry the opportunity to turn was reckless.

There is the issue of the defects of the lorry. According to PW1, the defects of the lorry did not cause the accident. I do agree with that contention. Not every defect on a vehicle causes an accident. The defect has to correlate with the cause of the accident. A defective wiper cannot be the cause of an accident if that vehicle is hit from behind on a sunny day. Even malfunctioning seat belts amount to defects on a motor vehicle. Such a defect cannot cause an accident. The lorry had faded indicators. According to PW2 and PW3, they saw the lorry indicating. The other vehicles ahead of the matatu also saw the lorry indicating and turning to the right. It is clear that the defects on the lorry did not cause the accident.

The trial magistrate did not solely rely on the evidence of PW1. Indeed PW1 relied on the statement of PW2 and PW3 and observation of the scene. The evidence of PW1 cannot be held to be hearsay. Any police officer who investigates a case relies on what he is told by the witnesses. He also observes the circumstances of the incident and forms his own opinion. Such an officer takes his own line of thought. He can decide to disagree with the statements given to him by the witnesses if he is satisfied that that evidence is insufficient or false. When testifying in court, such an officer will be telling the court his own perception of the matter in dispute. That evidence cannot be dismissed as hearsay.

The appeal is against liability and ownership of the accident vehicle. The appellant seems to be satisfied with the assessed damages. On both issues of ownership of the vehicle and liability I do find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered in Malindi this 15<sup>th</sup> day of August, 2016.**

**S.J. CHITEMBWE**

**JUDGE**