REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 128 OF 2010.

ROBERT OPALA OMUHINDA ::::::::::::::::::::::::::::::::::APPELLANT.

VERSUS

SIMON GITHURE MARONGO ::::::::::::::::::::::::::::::: RESPONDENT.

(*Being an appeal from Judgment and Decree of Vihiga Senior Resident Magistrate's Court in Vihiga SRMC NO. 11 of 2009 delivered on the 7th day of September, 2010 by L. Onyina, SRM*.)

JUDGMENT.

INTRODUCTION.

1. The appeal herein arises out of the judgment and decree of the Vihiga Senior Resident Magistrate's Court in Vihiga SRMC No. 11 of 2009 delivered on the 7th of September, 2010 by L. Onyina, SRM. The trial court in its judgment found that ownership of the motor vehicle registration number KAW 409V Isuzu Bus had not been proved as required and hence vicarious liability on the part of the respondent also had not been proved. The trial court went ahead and found the respondent not liable for the accident and dismissed the suit.

The Appeal.

2. Being aggrieved by the said finding of the trial court at Vihiga, the appellant filed this appeal based on the following grounds:-

(i) The learned trial magistrate erred in fact and in law i8n holding that ownership of the accident motor vehicle was not proved up to the required standard;

(ii) The learned trial magistrate erred by failing to critically analyse the evidence on record and thereby arrived at a decision that there was no evidence of ownership of the accident motor vehicle when there was abundance of such evidence;

(iii) The learned trial magistrate misdirected himself by holding that the only acceptable evidence of ownership of a motor vehicle is a certificate of official search from the Registrar of Motor Vehicles and failed to interrogate the probative value of other evidence on record;

(iv) The learned trial magistrate failed to appreciate that the appellant's case remained uncontroverted in all material particulars, the respondent having failed to attend court despite

service of hearing notice;

(v) The learned trial magistrate erred in fact and in law by dismissing the appellant's case allegedly on the basis of the fact that the said court is bound by the decision of the court of appeal in a similar matter when infact the said decision has been distinguished by later decisions of the court of appeal;

(vi) The learned trial magistrate erred in law and in fact by failing to appreciate that though ownership of the accident motor vehicle was denied vide the statement of defence, the said defence remained hollow and of no consequence for failure by the defence to adduce any evidence in support of the averments contained herein.

Submissions.

3. The appeal was canvassed by way of written submissions. On record, it is the counsel for the appellant who has filed written submissions. Counsel condensed the six (6) grounds herein above into one, that the learned trial magistrate erred in law in finding and holding that the appellant did not prove ownership of the accident motor vehicle because a certificate of official search was not produced.

4. He submitted that the ratio *decidendi* of the Court of Appeal case which the trial court had relied on to make its finding had changed as at the date of the judgment, the subject matter of this appeal. He cited Civil Appeal No. 210 of 2010 **LAKE FLOWERS VS. CILA FRANCKIYA ONYANGO NGONGA & ANOTHER** where the Court of Appeal held that it is incumbent upon the defendant to produce evidence to rebut the evidence of a police abstract if he/she wishes to dispute ownership of a motor vehicle as indicated in a police abstract.

5. He maintained that the appellant produced a police abstract which clearly named the respondent as the owner of the motor vehicle KAW 409V that caused the accident on or about the 8th July, 2008. He claims that no evidence was led in rebuttal of that point, the respondent did not even attend court during the hearing of this case. The evidence as placed y the appellant remained uncontroverted in all material particulars. He submits that they have discharged and proved their case to the required standards.

Determination.

6. This being a first appeal this courts duty is to re-evaluate the evidence on record, assess it and draw its own conclusions though it should always be on the courts mind that it never heard the witnesses and therefore an allowance should be make in that respect. The responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence.

7. The evidence on record shows that it is only the appellant and the doctor who testified as PW1 and PW2 respectively. Their evidence was not challenged. It remained uncontroverted in the circumstances. It is on record that the appellant produced an abstract of police which detailed amongst other things when the accident occurred and the ownership of motor vehicle. The appellant did not produce the certificate of ownership from the registrar of motor vehicles to show ownership of the motor vehicle. It was because of this that the trial court found that ownership had not been proved thus liability had not be established against the respondent.

8. The Court of Appeal has on several occasions dealt with the issue of ownership of motor vehicle in Road Traffic Cases. Section 8 of the Traffic Act Cap 405 provides:-

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

9. This provision is not restrictive to proof of ownership by the name in the copy of records or in the log book. It leaves room for proof of ownership by other evidence.

10. In the case of **CHARLES NYAMBUTO MAGETO VS. PETER NJUGUNA NJATHI [2013] e KLR** the court held:-

> ***"From the interpretation of section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say actual possession, and/or beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report ...."***

11. In the case of **JOEL MUNA OPIJA VS. EAST AFRICAN SEA FOOD LIMITED 2013 eKLR,** the Court of Appeal held that the best way to prove ownership of motor vehicle would be to produce a document from the registrar of motor vehicles showing the registered owner. However, if a police abstract is produced in court without any objection its contents cannot be denied. Also in the case of **LAKE FLOWERS VS. CILA FRANCKLYN ONYANGO NGONGA & ANOTHER 2008 [eKLR],** the Court of Appeal held that without the appellant adducing evidence at the trial to counter what the 1st respondent beamed its driver for it was difficult for if to contest the liability, beamed against it. It was also not possible to deny ownership of the motor vehicle without any evidence to counter the contents of the police abstract.

12. What the 1st respondents blamed its driver for it was difficult for it to contest the liability blamed against it. It was also not possible to deny ownership of the motor vehicle without any evidence to counter the contents of the police abstract produced by the 1st respondent. Similarly in the case of **NANCY AYEMBA NGAIRA VS. ABDI ALI [2010] eKLR** the court held that:-

> ***"And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership; beneficial ownership; possessory ownership. A person who enjoys such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration."***

13. The trial magistrate ought to have been cautious when he found that ownership of the motor vehicle KAW 409V Isuzu Bus had not been proved. The appellant produced the police abstract which was not challenged by the respondent herein. If the same was challenged then the trial magistrate's findings could stand.

14. It is my considered opinion therefore that the learned magistrate erred in finding that the ownership of the motor vehicle had not been established and that the appellant had not proved his case against the respondent. The appellant established on a balance of probability that the respondent was vicariously liable for the negligence of the driver of the respondent.

15. This court therefore sets aside the trials court judgment and substitute it with one of full liability. The appeal succeeds in its entirety. On the issue of quantum, the trial court dwelt on the issue of damages and it was of the view that a global award of Ksh. 200,000/= would adequately compensate the appellant for the injuries sustained. The trial court was guided by the cases cited by the appellant i.e. **FANNY ESKAKO VS. DOROTHY MUCHARE NI H.C.C.C. NO. 642 OF 1999 and HARRISON PETER ODEK VS. H. LYONS & CO. LTD – NBI H.C.C.C. NO. 3736 OF 1989** where the plaintiff had been awarded Ksh. 150,000/- in the year 1993.

16. The estimation by the trial court of Ksh. 200,000/= as general damages is in order considering the injuries suffered by the appellant were soft tissue injuries special damages were not pleaded and therefore they ought not to be awarded. The appellant shall have costs of this suit.

SIGNED, DATED and **DELIVERED** at **KAKAMEGA** this **12TH** day of **OCTOBER**, 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

..for the Appellant.

.. for the Respondent.

.. Court Assistant.