



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 180 OF 2010

BETWEEN

JRS GROUP LIMITED APPELLANT

AND

KENNEDY ODHIAMBO ANDWAK RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.P.C. Biwott, PM in the Principal Magistrates Court at Winam in Civil Case No. 412 of 2006 dated 12th October 2010)

JUDGMENT

1. In the subordinate court, the respondent herein filed suit against the appellant seeking damages for injuries sustained in a road traffic accident. The respondent contended in his plaint that the appellant's motor vehicle registration number KAL 698C was so recklessly driven that it hit him while he cycling along Dunga Beach road. The appellant denied liability and ownership of the said motor vehicle. The trial court found that the appellant was the owner of the vehicle and apportioned liability at 80% to 20% in favour of the respondent. It awarded the respondent Kshs. 120,000/- and Kshs. 1,500/- as general and special damages respectively.

2. What precipitated this appeal is the finding that the appellant owned the motor vehicle. The thrust of the appellant's case contained in the memorandum of appeal dated 10th November, 2010 is that the learned magistrate failed to consider the fact that the respondent failed to prove that the appellant was the owner or in possession of the motor vehicle thereby arriving at an erroneous conclusion. Mr Omondi, counsel for the appellant, submitted that the respondent relied on a police abstract to prove ownership of the motor vehicle which the appellant denied. Counsel further argued that the respondent failed to prove ownership of the motor vehicle to the required standard. He drew the court's attention to **section 8** of the **Traffic Act (Chapter 405 of the Laws of Kenya)** which provides 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. Mr Omondi was of the view that the respondent should have sued the registered owner of the motor vehicle who would then explain his relation to the appellant if any.

3. Ms Nabiffo, counsel for the respondent, opposed the appeal and submitted that a police abstract is sufficient proof of ownership notwithstanding the provision of **section 8** of the **Traffic Act** which only raises a presumption that may be rebutted. Counsel further submitted that the copy of records produced by the appellant showed the ownership as at 29th July 2009 and not as at the date of the accident on 31st July 2005. Both parties relied on several cases which I shall refer to in my analysis.

4. As this is a first appeal, the court must be guided by the principle that the duty of the first appellate

court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it is the trial court that saw and heard the parties. (See ***Selle v Associated Motor Boat Co.*** [1968] EA 123). It is therefore necessary to set out the case presented by both parties during trial.

5. P.C Samson Chakali (PW 1) produced the police abstract filled on 16th March 2006 and which indicated that the appellant was the owner of the motor vehicle that knocked down the respondent. The respondent (PW 2) testified that on the material date he was cycling along Dunga beach with a pillion passenger when motor vehicle registration number KAL 698 C hit him from behind causing him to lose balance and he fell thereby sustaining injuries to the head, shoulders, back and right leg. PW 2 told the court that he was not able to identify driver and he was only able to capture the registration number of the motor vehicle.

6. The appellant's Administration Manager, Hardley Kaiga Adere (DW 1), testified that he was responsible for all the appellant's records and that the vehicle KAL 698 C did not belong to the appellant. He produced a copy of records from the Registrar of Motor Vehicles dated 29th July 2009 to show that the motor vehicle registration number KAL 698 C belonged to Issak Abdi Habashon.

7. As alluded to earlier, the key issue arising in this appeal is whether the appellant was the actual owner of the motor vehicle. The resolution of this issue resolves around the burden and standard of proof. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, which provides:

107. (1) 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.

8. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See ***Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016]eKLR*** and ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR***).

9. It is well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable. In ***Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR***, the Court of Appeal adopted the dictum of Denning J., in ***Miller v Minister of Pensions [1947] 2 All ER 372*** discussing that burden of proof as follows;

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

10. When a court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. I now turn to consider the substance of the appeal in light of the principles I have cited.

11. It has been held in several cases that **section 8** of the ***Traffic Act***, which is couched in terms of a rebuttable presumption, does not restrict a party from proving ownership of the motor vehicle by means other than by the copy of records or log book. It 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.

12. The provision leaves room for proof of ownership by other evidence as was stated by Emukule J., in **Charles Nyambuto Mageto v Peter Njuguna Njathi NKU HCCA No. 4 of 2009 [2013] eKLR** thus:

*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, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the **Thuranira and Mageto** cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership.*

13. When faced with a similar situation, Warsame J., (as he then was) in **Jotham Mugalo v Telkom (K) Ltd Kisumu HCCC No. 166 of 2001[2005]eKLR** 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.

14. Similarly, Okwengu J., (as she then was) in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru Nyeri HCCA No. 34 of 2002[2005]eKLR** expressed the view that:

It is true that a certificate of search from registrar of motor vehicles would have shown who was 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 as vehicles often times change hands but the records are not amended.

15. The Police Abstract in this appeal contained all the relevant information including the name and address of the owner as at the date of the accident. Although the appellant objected to the production of the abstract on the basis that it was not being produced by the maker thereof, the objection was overruled and the abstract produced. The appellant was called upon to rebut this evidence. The appellant produced a copy of records from the Registrar of Motor Vehicle which showed that the owner of the vehicle, **“as at 29th July 2009 was Issak Abdi Habashon.”** I find that the learned magistrate correctly held that this was insufficient to displace the evidence of ownership on the date of the accident which was on 31st July 2005. I hold that it is more probable, based on the police abstract, that the appellant was the owner of the vehicle on the date of the accident.

16. The appeal is dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 30th day of November 2016.

D.S. MAJANJA

JUDGE

Mr Omondi instructed by M. M. Omondi and Company Advocates for the appellant.

Mr Nabifo instructed by Ouma Njoga and and Company Advocates for the respondent.