



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 58 OF 2013

DORCAS WANGITHI NDERI.....APPELLANT

VERSUS

SAMUEL KIBURU MWAURA.....1ST RESPONDENT

ANTHONY IRUNGU MACHARIA.....2ND RESPONDENT

(An Appeal from Judgment of the Chief Magistrate Embu in CMCC No. 142 of 2011 delivered on 17/10/2013)

J U D G M E N T

1. Introduction

This is an appeal from the judgment of Embu Chief Magistrate in CMCC No. 142 of 2011. The appellant sued the respondent for general and special damages resonating from injuries suffered in a road traffic accident on 11/6/2006. The appellant averred in his plaint that he was travelling along Thika – Muranga road near Chania River in a vehicle registration No. KAS 103 C Toyota Hiace as a fare paying passenger when the 2nd defendant negligently drove and managed the vehicle thereby causing an accident in which the plaintiff suffered serious injuries.

The 1st defendant was sued in his capacity as the owner of the motor vehicle while the 2nd defendant was sued as the driver of the vehicle. The case was heard and dismissed for failure to discharge the burden of proof.

2. The Appeal

The appellant seeks for setting aside the judgment of the trial magistrate and for substitution with one of liability against both the defendants as well as an award for general and special damages plus costs of the suit. He relied on three grounds.

- The magistrate erred in finding that the ownership of the vehicle registration No. KAS 103 C had not been proved to the required standard;
- That the magistrate erred in dismissing the suit against the 2nd defendant who was the driver; and
- That the magistrate erred in relying on a Court of Appeal authority which is obsolete in legal practice.

3. The Submissions

By consent the parties disposed of the appeal by way of written submissions. The appellant argued that

he produced a police abstract which demonstrated that the 1st respondent was the owner of the vehicle KAS 103 C. There was no evidence to controvert the testimony of the appellant that the 1st respondent was vicariously liable for the negligence of his driver. The abstract indicated that the 2nd respondent's driver was charged with the offence of causing death by dangerous driving. This position was not disputed by the respondents. For the foregoing reasons the appellant submits that the judgment of the trial magistrate was a misdirection.

The appellant relied on two authorities:-

(a) **JOEL MUNA OPIJA VS EAST AFRICAN SEA FOOD LIMITED [2013] eKLR**; where 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 vehicle showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied.

(b) **LAKE FLOWERS VS CILA FRANCKLYN ONYANGO NGONGA & ANOTHER [2008] eKLR** where the court of appeal held that without the appellant adducing evidence at the trial to counter 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.

The respondent submitted that the appellant did not prove his case on the balance of probability. Ownership of the vehicle was denied and it was the duty of the plaintiff to tender proof as provided for under Section 6 of the Traffic Act. The respondents relied on the Court of Appeal of **RUTH WANJIKU MUTHARE VS KENYA SUGAR BOARD [2014] eKLR** where it was held that a police abstract will be adequate proof only where ownership is not contested.

4. The Duty of the Court

The duty of the first appellate court was explained in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** as follows:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that 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 the evidence.”

5. The Issues

The issues for determination in this appeal have been identified as follows:-

- (a) Whether the magistrate erred in dismissing the case of the appellant;
- (b) Whether the magistrate should have awarded general damages and other incidental expenses.

6. The evidence

It was the testimony of the appellant that she was travelling to Nairobi in 1st respondent vehicle registration No. KAS 103 C driven by the 2nd defendant. It was along Thika – Muranga road on the 11/6/2006. The driver was over-speeding and near Chania River in Thika whereas he lost control of the vehicle while avoiding to hit a pedestrian. The vehicle then overturned at the river bed. The plaintiff was injured and lost consciousness until two weeks later when she found herself admitted at Kenyatta National Hospital.

The appellant produced a police abstract from Thika police station which showed that the 2nd respondent was charged with a traffic offence as a result of the accident. The respondent did not tender any evidence during the hearing.

The magistrate in dismissing the case for failure to discharge the burden of prove relied on the case of **SECURICOR KENYA LIMITED VS KIJUMBA HOLDINGS LIMITED Court of Appeal at Nyeri Appeal No. 73 of 2002**. In that case, the appellant had sold his vehicle to a 3rd party but transfer had not been executed. It was involved in an accident in which the respondent was injured. He sued the driver and the appellant who was the registered owner of the vehicle for damages. The high court found the appellant was vicariously liable for the negligence of the 2nd defendant on the ground that he was the registered owner of the vehicle. This decision was overturned by the Court of Appeal on grounds that the vehicle's interest and possession had passed to a third party. In allowing the appeal the court held:-

There was no relationship whatsoever between the appellant and the 2nd defendant. Indeed there was no agency relationship... moreover the appellant was still the owner by way of logbook being in his name, such ownership was not sufficient to create vicarious liability for the negligence of everyone who happened to drive it".(vehicle).

The facts in this case are different from those of the **SECURICOR KENYA LIMITED** in that there was no evidence that the appellant herein had not sold the vehicle which caused the accident. The 2nd respondent was the driver of the vehicle and there was in existence agency relationship between the respondents. The appellant's evidence was not rebutted in respect to possession of the vehicle. The decision of **SECURICOR KENYA LTD** supports the position that one does have to be the registered owner for vicarious liability to be applied. If possession is proved, then the person in possession may be found vicariously liable unless there is evidence to the contrary. I do not find the decision relevant to the facts in this case. It was a misdirection on the part of the magistrate to rely on the **SECURICOR KENYA LIMITED** case. Its applicability to the facts before her was not explained.

It is not in dispute that the respondents denied ownership and that the appellant was duty bound to prove her case on the balance of probability. The burden of proof in civil cases on the balance of probability was defined in the case of **KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR** that when the 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.

The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on part of the 2nd respondent.

The ownership of the motor vehicle was disputed and forms the main ground in this appeal. The appellant produced an abstract which showed that the 1st respondent was the owner of the vehicle and that the 2nd respondent was the driver at the material time.

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".

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.

It was held in the case of **CHARLES NYAMBUTO MAGETO VS PETER NJUGUNA NJATHI [2013] eKLR:-**

"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”.

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.

In the case of **JOEL MUGA OPIJA (Supra)** the Court of Appeal in Kisumu was dealing with a case of similar facts with this appeal. The relevant ground on appeal was “*that the Superior Court Judge erred in holding that there was no proof of ownership of the vehicle disregarding the police abstract which was produced in court with any objection from the defence*”. The learned Judge had set aside the decision of a magistrate who had found the respondent vicariously liable for the negligence of his driver. The decision of the superior court was based on the ground that there was no proof of ownership since the appellant had not produced a copy of records by only a police abstract. The Court of appeal in setting aside the superior court's judgment held:-

“We agree that the best way to prove ownership would be to produce 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 be later denied”.

The case relied on by the respondent of **RUTH WANJIKU MUTHAE VS KENYA SUGAR BOARD, Muranga High Court HCA No. 92 of 2013** where the Judge found that ownership of the vehicle was not proved is a High Court decision which is only persuasive but not binding. Secondly, the case has different facts in that Police Abstract produced therein did not show the name of the driver nor his relationship with the defendant.

The Police Abstract in this appeal contained all the relevant information including the name and address of the owner, the name of the insurance company and the fact that the driver had been charged with a traffic offence. I do not find the **RUTH WANJIKU CASE (supra)** relevant to this appeal. It is now established law that the copy of records or the logbook is only *prima facie* evidence of ownership and can be rebutted.

It is my considered opinion 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 her case against the respondent. The plaintiff established on the balance of probability that the 1st respondent was vicariously liable for the negligence of his driver the 2nd respondent. I hereby find that the plaintiff proved her case on the balance of probability.

I hereby set aside the trial court's judgment and substitute it with one of full liability. The appellant sustained the following injuries:-

- (a) *Multiple soft tissue injuries*
- (b) *Blunt injury to the head*
- c. *Failure fracture to the radius/ulna (left)*

(d) *Compound fracture to the right tibia/fibula*

(e) *Compound fracture to the left tibia/fibula*

The degree of injury was classified as grievous harm. The appellant was admitted at Kenyatta National Hospital for about 1½ months.

The trial magistrate considered Kshs.2,000,000/= as an adequate award for loss of amenities relying on **NYERI HCCC NO. 95 OF 2002** which case had comparable injuries. She rejected the claim for future earning and house help wages. These findings were not contested in this appeal. An award of Shs.461,324/= for medical bills and other minor items was not contested either. The total damages awardable was fixed at Shs.2,461,324/= from the date of judgment in full and costs of the suit.

I find the awards reasonable and uphold them accordingly. The interests at court rates on the award and costs will run from the date of judgment of the lower court until full payment.

The appeal is allowed with costs to the appellant.

DELIVERED, SIGNED AND DATED AT EMBU THIS 22ND DAY OF APRIL, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

1. Mr. Kathungu for Kinyua Kiama for the appellant