



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT MIGORI**  
**CIVIL APPEAL NO. 55 OF 2015**  
**(FORMERLY KISII HCCA NO. 58 OF 2009)**

**BETWEEN**

**MOI BIGEGE.....APPELLANT**

**AND**

**STANCOM TOBACCO (K) LTD.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. K. Sambu, SRM at the Principal's***

***Magistrates Court in Migori in Civil Case No. 139 of 2007 dated 11<sup>th</sup> March 2009)***

**JUDGMENT**

1. The appellant sued the respondent claiming special and general damages arising from bodily injuries sustained during a road traffic accident involving him as a pedal cyclist and the defendant's motor cycle registration number KAR 702F along the Maberu – Motembaru road on 16<sup>th</sup> June 2005. After hearing the case, the learned magistrate dismissed the case on the ground that the appellant had failed to prove that the respondent owned the subject motor cycle. He however assessed general damages at Kshs. 120,000/- and special damages at Kshs. 6,500/-.

2. The appellant appeals against the judgment on the grounds set out in the memorandum of appeal dated 26<sup>th</sup> March 2009. The thrust of the appellant's case before this court is that the learned magistrate erred in dismissing the suit despite the existence of overwhelming evidence of liability. He contends that the appellant's evidence was not controverted and that there was no reason for the learned magistrate to find in favour of the defendant. Mr Kaburi, learned counsel for the appellant submitted that the court misapprehended the law when it held that the appellant had not proved ownership of the motor cycle that caused the accident.

3. The appellant did not appeal against the assessment and award of damages nor did the respondent cross-appeal. The appeal was heard in the absence of the respondent's counsel who, though served with a hearing notice, did not attend court.

4. As this is the first appeal, this court is obliged to review the evidence and reach an independent decision as to whether or not to uphold the decision of the lower court. Such an exercise must be done with circumspection bearing in mind that it neither saw nor heard the witnesses (see *Selle v Associated*

**Motor Boat Co. [1968] EA 123).**

5. On the issue of liability on the appellant testified. He recalled that on 16<sup>th</sup> June 2005 while he was cycling from Mabera headed to Motembaru when near Motembaru Primary School he saw a motor cycle registration No. KAR 702F Yamaha coming from the opposite side and being driven in a zig zag manner. It came onto his lane on the left side of the road and knocked him down. He stated that the road was rough and the motorcycle was being driven at a high speed. He knew that the rider of motorcycle was one Linus Obioma who was an employee of the appellant. He also produced a police abstract which showed that the owner of the motor vehicle was Stancom Tobacco Limited, the respondent.

6. The trial court held that the respondent was not liable as the appellant had not proved that it was the owner of the motor cycle. He applied the dictum in the case of **Thurania Karauri v Agnes Ncheche NRB CA Civil Appeal No. 192 of 1996 [1997]eKLR** where the Court of Appeal held as follows;

*[T]he plaintiff did not proved that this vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr Kimathi for the plaintiff submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it ..... [Emphasis added]*

7. The position taken the **Thuranira Case** was rigid and went the grain of the general principle that the plaintiff need only prove its case on the balance of probabilities. The Court of Appeal in **Joel Muga Opija v East Africa Sea Food Ltd KSM CA Civil Appeal No. 309 of 2010 [2013]eKLR** considered the import the **Thuranira Case** and stated that;

*We agree that the best way to prove ownership [of a motor vehicle] would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when an abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.*

8. In the instant case, the appellant testified that he knew that rider of the motorcycle and that he worked for the respondent. He also produced a police abstract, which was unchallenged and which showed that the motor cycle belonged to the respondent. In **Lake Flowers v Cila Francklyn Onyango Ngoga & Another NKR CA Civil Appeal No. 210 of 1996 [2008]eKLR**, the Court of Appeal noted that;

*Where it is proved that a car has caused damage by negligence, the absence of evidence to the contrary a presumption arises that it was driven by a person whose negligence the owner is responsible.*

9. It must be recalled that in a civil case proof is on a balance of probabilities and on the un rebutted evidence of the appellant, I find and hold that the appellant established ownership of the motorcycle.

10. I further find that the appellant's testimony, which I have outlined above, remained un rebutted and nothing came out in cross-examination to undermine his case. Although the respondent pleaded contributory negligence, the uncontested evidence is clear that the motorcyclist was riding at a high speed in on rough road and he came onto the appellant's lane and knocked him down. I therefore find the respondent fully liable for the accident.

11. As I have found the respondent fully liable, I allow the appeal and set aside the judgment dismissing the suit and substitute with judgment in favour of the appellant for the sum of **Kshs. 120,000/-** general damages and **Kshs. 6,500/-** special damages. The same shall accrue interest from the date of judgment in the subordinate court.

12. The appellant shall have costs of the suit in the subordinate court and of this appeal.

**DATED and DELIVERED at MIGORI this 14<sup>th</sup> day of May 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Kaburi instructed by Kaburi Henry and Company Advocates for the appellant.