



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CIVIL APPEAL NO. 100 OF 2011**

**ZAKARIAH NACHARI.....APPELLANT**

**VERSUS**

**CLEOPHAS WASWA.....RESPONDENT**

**JUDGMENT**

1. The Appellant filed an appeal against the judgment of the Learned Magistrate E.C. Cheronu in Webuye **SRMCC No. 64 of 2007** which dismissed the Appellant's suit against the Respondent that arose from an accident that occurred on 15/08/2006 involving motor vehicle registration number KYM 386 and the Appellant.

2. The grounds for the appeal are:

- a. **THAT the learned magistrate erred in law and fact by disregarding the weight of the Appellant's evidence.**
- b. **THAT the learned magistrate erred in law and fact by failing to make a finding that the Appellant's evidence had not been rebutted or controverted.**
- c. **THAT the learned magistrate erred in law and fact in failing to take cognizance of the Appellant's evidence.**
- d. **THAT the learned magistrate erred in law and fact in making a finding that Appellant had not established liability of the respondent.**
- e. **THAT the learned magistrate erred in law and fact in arriving at his decision by considering extraneous issues and matters.**
- f. **THAT the learned magistrate erred in law and fact in finding that the Appellant had not proved his case on a balance of probability.**
- g. **THAT the learned magistrate erred in law in disregarding the the Appellant's submissions.**
- h. **THAT the learned magistrate erred in law in arriving at a decision of dismissing the Appellant's suit basing on wrong and inapplicable principles of law.**

3. In his written submissions the Appellant's counsel stated that ownership was proved as the police

abstract produced in court was a prima facie evidence of ownership. He further submitted that the evidence tendered was not controverted or rebutted as the respondent did not testify in court to either support his defence or controvert the Appellant's evidence. That the learned magistrate relied on extraneous issues to arrive at his findings.

4. In reply the respondent's counsel through written submissions stated that liability was not proved since a certificate of search was not availed to court. He further asserted that the respondent's driver was acquitted in Bungoma Traffic case No. 1965 of 2006. He relied on **Wanjiku Muthae vs Kenya Sugar Board Murang'a HCCA No. 92 of 2013 (2014) eKLR** , **Karuri vs Nchenche (1995-1998)1 E.A 87 & Kago vs Njenga Civil Appeal NO. 1 of 1979**

5. This being a first appeal this court is tasked with the duty of re - evaluating the entire evidence of the trial court and come up with its own independent findings and conclusions. See the case of ***Abok James Odera T/A A.J. Odera & Associates vs John Patrick \Machira T/A Machira***

6. The plaintiff called 3 witnesses the plaintiff included.

**PW1** ZACHARIA NACHOLI testified that on 15/8/2006 he was cycling towards Kanduyi and was on the left side of the road when a tractor suddenly hit him from behind. That he suffered injuries on the right knee and the right leg was swollen. He was admitted at Bungoma District Hospital for 7 days. The matter was reported at Bungoma Police Station, where he was issued with a P3 form. The police also issued him with a police abstract which indicated one Cleophas Waswa was the owner of the motor vehicle in question. That the driver of the said tractor was charged.

**PW2** SAMUEL ALUDA medical doctor testified that he examined the plaintiff on 11/1/2007 and established that he had sustained injuries in the right knee and the right leg was swollen and tender; that he also sustained a comminuted fracture of the right tibia.

**PW3** P.C MOSES KINUTHIA based at Bungoma Traffic office produced an abstract form prepared by his colleague Japheth Namulata. He informed the court that the accident in question involved a pedal cyclist and a tractor registration Number KYM 386 Merssey Furgusson belonging to Cleophas Waswa. The cyclist received injuries.

7. The defendant did not adduce any evidence. However the parties by consent produced the traffic accident proceedings as an exhibit.

Having heard the case the trial magistrate had this to say of the evidence before him

***“In the absence of search indicating that the offending tractor belongs to the defendant, I find that the plaintiff has failed to establish the threshold on negligence under the law of tort against the defendant.”***

8. Ownership of a motor vehicle need not necessarily be proved by of an official search or a log book for that matter.

In the case of ***Wellington Ng'ang'a Muthira vs Akamba Public Road Services and Another Kisumu Civil Appeal No. 260 of 2004*** court held that

***“ where a police abstract is produced and there is no evidence adduced by the defendant to rebut it and not even cross-examination challenges it as was the case here, the police abstract being a prima facie evidence not rebutted can be relied on as proof of ownership.....”***.(emphasize mine)

9. I am of the considered opinion that without any evidence stating otherwise a police abstract form stands as prima facie proof of ownership . In this case the abstract indicated the name and address of the owner and such it was a prima facie evidence of ownership. The respondent only availed a traffic case which was indeed defeated on account of lack proper investigations and no further evidence was adduced

to rebut evidence of ownership that was adduced by the plaintiff.

10. Having established the issue of ownership next consideration is whether any liability can be attributed to the respondent's driver herein.

PWI the appellant blamed the driver of the tractor for the accident as he hit him by the left tyre from behind. No evidence was adduced by the respondent to rebut this averment. What is also apparent to me is that with the kind of injuries sustained the appellant must have been hit.

11. In the case of **Lake Flowers v Cila Francklyn Onyango Ngonga & Another (2008) eklr** the Court of Appeal stated in part

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

In the circumstances, I am of the view that the appellant having proved his case on a balance of probability then the respondent is vicariously liable for the negligence of his driver

12. On quantum the Appellant proposed a sum of Kshs 350,000 as general damages. The Appellant suffered the following injuries:

a. **Swollen right knee and right leg**

b. **Comminuted fracture of the right tibia**

In **Maingi Muteru vs Peter Ngungi Nairobi HCCC NO. 400 of 1989** The plaintiff awarded a sum of Kshs. 150,000 in general damages for pain and suffering and loss of amenities. The appellant in that case aged 75 had sustained the following injuries: fracture of the right leg tibia and fibula, multiple bruises on the scalp and neck. His leg was put in plaster for a period of 3 months during which time he walked with the aid of clutches.

In the case of **Matano Mbiti Ngati & Another vs Ali Rajab Bindo MBSA HCCA No. 53 of 2008** the Appellant sustained fracture in tibia and fibula, a compound fracture occasioning fragments which took a long time to be held together. Court awarded a sum of Kshs. 450,000 for pain and suffering and loss of amenities.

For the reasons set above I set aside the trial Court's judgment.

Guided by the above authorities cited and considering injuries sustained I award the sum of Kshs. 250,000 as general damages having factored the inflation and rise in cost of living . Kshs. 1,700/= is awarded for special damages. Costs of the appeal go to the appellant.

**Dated at Bungoma** this 17<sup>th</sup> day of June 2015

**ALI-ARONI**

**JUDGE**