



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 92 OF 2013

RUTH WANJIKU MUTHAE.....APPELLANT

VERSUS

KENYA SUGAR BOARD.....RESPONDENT

JUDGMENT

This appeal arises from a judgment in which the learned magistrate (Hon M.W. Mutuku) dismissed the appellant's suit in the subordinate court principally because the appellant had not proved liability against the respondent.

The appellant's claim against the respondent in the subordinate court arose from a road traffic accident; according to the appellant's plaint, on or about the 6th February, 2010, the appellant is said to have been travelling as a fare-paying passenger in motor vehicle registration number **KBJ 259 M** when the respondent's driver drove motor vehicle registration number **KAA 223 J** so carelessly and negligently that it collided with the vehicle in which the appellant was travelling. The accident is said to have occurred on Nairobi-Thika road and the appellant is alleged to have been the lawful owner of motor vehicle registration number **KAA 223 J** at the material time.

The appellant sued for, *inter alia*, damages, both general and special because she claimed to have sustained severe injuries as a result of the accident.

In its defence, the respondent denied all the allegations raised in the appellant's plaint except for the descriptive parts of the parties in the suit. Of particular interest to the claim and the appeal herein, the respondent denied ownership of motor vehicle registration number **KAA 223**. It stated in paragraph 6 of the defence that:-

“The defendant refers to paragraph 6 of the plaint and avers that at the time of the alleged accident motor vehicle registration number KAA 223 J did not belong to it, the driver thereof was not under the defendants (sic) instructions or authority and the defendant cannot therefore be held vicariously liable.”

As it turned out, this issue influenced the direction that the appellant's claim took; it is apparent from the learned magistrate's judgment that the failure of the appellant's claim largely turned on the proof or lack thereof of ownership of motor vehicle registration number **KAA 223 J**. This is what she said at page 2 of her judgment:-

“The occurrence of the accident is not disputed. However, the defendant called evidence to rebut

the plaintiff's evidence that the motor vehicle in question did not belong to the defendant-Kenya Sugar Board. To prove his claim, he produced records from the registrar of motor vehicle as at 6/2/2010. The accident took place at 6/2/2010(sic). The records indicate that the motor vehicle as at the date belonged to Kang'ethe Samuel."

The learned magistrate concluded at page 3 of her judgment that:

"Section 8 of the Traffic Act clearly states that 'the person on whose name a vehicle is registered, shall unless the contrary is proved, be deemed to be the owner of the vehicle. As such, I find that the plaintiff has failed in her duty of proving the ownership and hence liability on the part of the defendant."

She proceeded that;

"The police abstract did not disclose the name of the driver nor his relationship with the Kenya Sugar Board, and so, if the defendant company could be held vicarious liability (sic)."

"I hereby dismiss the plaintiffs (sic) case on the grounds that the issue of liability on the part of the defendant has not been proved with costs (sic)."

The centrality of the issue of ownership of motor-vehicle registration number **KAA 223 J** in the determination of the appellant's claim is also clear from the appellant's memorandum of appeal in which only two grounds are raised against the decision of the learned magistrate. In the first ground, the magistrate is faulted for holding that the respondent was not the lawful owner of motor vehicle registration number **KAA 223 J** as at 6th February, 2010; in the second ground of appeal, the learned magistrate is said to have erred in law and in fact in dismissing the appellant's suit solely on the ground that the ownership of the vehicle in question was not proved.

At the hearing of the appellant's suit, the appellant admitted, in cross-examination, that she did not carry out any sort of search on the ownership of motor vehicle registration number **KAA 223 J** and that she did not have any documentary proof to demonstrate that the vehicle belonged to the defendant. The police officer (PW2) who testified as her witness stated that he indicated the respondent to be the owner of the vehicle because that is the information he was given by the vehicle's driver.

The respondent, through its transport manager, DW1, discounted the appellant's claims and denied that the respondent owned the vehicle in question. In support of the respondent's case, the witness produced an extract from the registrar of motor vehicles showing that as at 6th February, 2010, when the accident occurred, the vehicle belonged to one Samuel Kang'ethe. This extract was duly admitted in evidence.

In the submissions filed by the appellant's counsel, it was argued that it is not always necessary that one must produce a certificate of official search from the registrar of motor vehicles to prove ownership of a vehicle; according to counsel, a police abstract would suffice. Counsel relied on the decisions in **Kisumu Civil Appeal No. 333 of 2003 Ibrahim Wandera versus P.N. Mashru Ltd**, **Kisumu Civil Appeal No. 309 of 2010 Joel Muga Opija versus East African Seafoods Ltd** and **Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another** in support of his submissions on this point.

I have had the opportunity to read these decisions; in the **Ibrahim Wandera (supra)** appeal, the appellant had been awarded judgment in damages in the subordinate court. This judgement was overturned by the High Court on the ground that ownership of the accident vehicle had not been proved. When the issue was raised in the second appeal at the Court of Appeal, the Court held that it was wrong for the learned judge of the High Court to have proceeded as if the plaintiff had not produced any evidence of ownership of the vehicle when the police abstract which was produced and admitted in evidence clearly showed the particulars of the vehicle and its owner.

The court found as fact that the plaintiff had not been cross examined on this document and that the issue

of ownership of the vehicle was only first raised when the matter came up for appeal in the High Court; the Court of Appeal held that the learned judge ought to have made reference to the police abstract before allowing the appeal on the ground that ownership of the vehicle was not proved. In any event, so the court held, it was wrong for the learned judge to have allowed an appeal on a ground that was not raised at the trial.

Since the production by the appellant of the police abstract and its subsequent admission by court in evidence was not contested, the Court of Appeal held that it could not be an issue at the appeal in the High Court without an explanation as to why the issue was not raised during the trial in the first place. The court held that the defendant was deemed to have been satisfied with the evidence as a sufficient proof of the facts it sought to establish.

I do not understand the Court of Appeal's decision to mean, as the appellant's counsel seemed to suggest, that the evidence of a police abstract is a sufficient proof of ownership of a motor vehicle if such ownership is a contested issue; what I understand the court to say is that if such document is produced and admitted in evidence without any objection, then a party should not be heard contesting its admission at an appellate level without offering any explanation as to why he could not raise his objection at the earliest opportunity. Without such a contestation one is deemed to be satisfied with the evidence and whatever it is purporting to prove.

In the **John Muga Opija (supra) appeal**, the same question of proof of ownership of a motor vehicle involved in a road traffic accident in which a claimant is injured arose. Here the subordinate court found for the claimant and awarded him both special and general damages but subject to contribution.

When the defendant appealed to the High Court, the learned judge overturned the subordinate court's decision on amongst other grounds, that the ownership of the accident vehicle was not proved since all that the plaintiff produced to prove this fact was a police abstract.

The court of appeal did not agree with the learned judge of the High Court and found the High Court decision in **Collins Ochung Ondiek versus Walter Ochieng Ogunde Civil Appeal No. 67 of 2008** persuasive on this point. The Court quoted Ali Aroni J in that case in which she held:

“In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did not take the issue of ownership seriously”

The court held the evidence by a police abstract that defendant was the owner of the accident vehicle was ***“not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence.”*** In allowing the appeal, the court concluded that:

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

Again in **Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another (supra)**, the court of appeal sitting at Nakuru held that the evidence by the plaintiff of the ownership of the accident vehicle was not controverted because the defendant who is alleged to have been the owner of the vehicle did not call any evidence. The court held that without the defendant adducing evidence to counter the plaintiff's evidence of, *inter alia*, the police abstract showing the defendant to have been the owner of the vehicle, it could not deny that it owned the vehicle.

It is clear from all these decisions that a police abstract as evidence of ownership of an accident vehicle will suffice as proof of that fact if it is neither contested nor controverted. The defendants in these cases either did not call any evidence or they did not challenge the plaintiffs' evidence on the question of

ownership of the vehicles in issue. This is the basis upon which these cases must be distinguished from the appeal herein.

As noted earlier, the respondent denied ownership of the offending vehicle *ab initio*; the respondent did not merely deny ownership of the vehicle but it also produced evidence to the effect that the vehicle belonged to somebody else.

It must be remembered that the police officer who produced the abstract in court testified that the information in the abstract on the ownership of the vehicle was given by its driver and there was no evidence that he had, so far, undertaken any independent investigations to verify this information. The respondent on the other hand, challenged this information by way of documentary proof.

I am bound to agree with the learned counsel for the respondent that the police abstract could not, in these circumstances, be taken to be conclusive proof that the respondent was the owner of motor vehicle registration number KAA 223 J. In my view, that piece of evidence was rebutted, controverted or challenged to satisfaction of the trial court. The burden was on the appellant to present something more than a police abstract to prove that the respondent was the owner of motor vehicle registration number KAA 223 J at the material time; I hold that she did not discharge this burden, regrettably.

It therefore follows that liability was not proved; without proof of ownership of the accident vehicle, there is no basis upon which the respondent could be said to be liable, vicariously or otherwise. The link between the accident and the respondent was not proved on a balance of probabilities.

In the premises I hold that the appellant's appeal is not merited and is accordingly dismissed with costs.

Signed, dated and delivered in open court this 23rd day of September, 2014

Ngaah Jairus

JUDGE