



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL CASE NO. 67 OF 2012**

MUNYIRI SPECIAL HONEY LTD..... APPELLANT

VERSUS

KENNEDY WACHIRA NYAGA..... RESPONDENT

*(An Appeal from the Judgment and decree of P. NANDI Resident Magistrate Runyenjes in Civil Case No. 4 of 2011 on 15th June, 2012)*

**J U D G M E N T**

This appeal is from the judgment of the Senior Resident Magistrate Runyenjes delivered on 16/6/2012. The appeal is against both liability and the quantum of damages as can be noted from the grounds of appeal:-

1. *That the trial magistrate erred in law and in fact in finding the appellant 100% liable.*
2. *That the trial magistrate erred in law and in fact in failing to appreciate the fact that the respondent did not prove that the motor vehicle registration No. KAC 071 A belonged to the appellant.*
3. *That the trial magistrate erred in law and in fact in holding the appellant liable based on rule 55 of the Traffic Rules despite the fact that the said Rule was inapplicable to the suit.*
4. *That the trial magistrate erred in law and in fact in failing to appreciate the fact that the respondent had Amended his Complaint and substituted Joseph Murithi Munyiri with the appellant.*
5. *That the trial magistrate erred in law and in fact in awarding general damages that were manifestly excessive, which were not in line with the respondent's injuries and which were against the tenor, spirit and principle of awarding general damages.*
6. *That the trial magistrate erred in law and in fact by failing to fully consider the evidence on record, the submissions and authorities by the appellant and in so doing he arrived at an erroneous decision.*

The facts of the case were that on the 8th December 2010 the respondent was driving his vehicle Registration No. KAX 345G along Embu-Ishara road at around 7.30 p.m. The appellant's driver approached the main road from a feeder road and hit the respondent's vehicle damaging it whereas the respondent sustained injuries. The appellant's driver was charged and convicted of negligent driving, convicted and fined Kshs.10,000/= in default six (6) months imprisonment. The Senior Resident Magistrate found the respondent fully liable and awarded damages for loss of amenities of Shs.300,000/=. The appellant was dissatisfied with the judgment and lodged this appeal.

This being a first appeal, the duty of the court was explained in the case of *SELLE VS ASSOCIATED MOTOR BOAT COMPANY [1968] EA 123* at page 126 and also in the case of *JAVANJI VS SANYO ELECTRICAL COMPANY LIMITED [2003] KLR 425* at page 431 as follows:-

*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. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*

The issues for determination in this appeal are whether the magistrate erred in law and fact in deciding the issues before him being:-

1. *Whether the defendant was the owner of motor vehicle registration No. KAL 071 A.*
2. *Whether the driver of the vehicle Registration No. KAL 071 A was to blame for the accident.*
3. *Whether the Respondent contributed to the accident.*
4. *Whether the damages awarded by the magistrate were manifestly excessive.*
5. *Who ought to bear the costs.*

The evidence adduced by the Respondent was that on the material day he was driving vehicle Registration No. KAX 345G carrying passengers on board along Embu-Ishiara road around 7.30 p.m. The appellant's driver who was driving vehicle registration No. KAL 071A joined the main road from a feeder road. The respondent had tried to warn him by flicking lights of his vehicle but the driver (DW1) proceeded on. The respondent's vehicle was hit and as a result of the accident, the respondent and his passengers sustained injuries. The accident was reported at Runyenjes police station and investigations led to DW1 being charged with negligent driving. He was convicted of the offence by the Senior Resident Magistrate Court. PW1 produced the police abstract in court and said investigations revealed that the appellant's driver was to blame for the accident. Dr. Njiru examined the respondent and produced the medical report.

The appellant's witness was the driver of vehicle registration No. KAL 071A. He testified that he was driving the said vehicle belonging to one Joseph Muriithi Munyiri trading as Munyiri. At Karurumo, he was joining the main road and was on the left side while the Respondent's vehicle Registration No. KAX 345G hit his on the bumper. He said the vehicle which hit him was speeding. He said he was later charged and convicted of the offence of careless driving upon his own plea of guilty.

The respondent was driving on the main road Embu-Ishiara road while the appellant's driver was joining the main road from a feeder road at Karurumo. These facts were not disputed by the key witnesses. The traffic rules require that a driver on a minor road joining a major road shall give way to vehicles on the major road. The appellant's driver failed to stop and thus hit the respondent's vehicle.

The magistrate in his finding on liability stated:-

*“The plaintiff in this case testified that his motor vehicle was on the main road. The defendant motor vehicle KAL 071A was joining the main road and as such, the plaintiff according to traffic rules had right of way. It was upon the DW1 to wait until the road was clear and then join the road.*

*The accident was investigated by police officers from Runyenjes police station. Upon investigations, the driver of KAL 051A was charged with the offence of causing death by dangerous driving, vide Traffic Case No. 6/2011 to which he pleaded guilty and was fined Kshs.10,000/= or serve six (6) months imprisonment in default. He has never appealed against the said court decision.*

*As such, I find that the DW1, who admitted to having been the driver of motor vehicle KAL 071A was to blame for the accident”.*

The defendant's driver pleaded guilty to the charge of causing death by dangerous driving and was convicted. No appeal lodged against the conviction and sentence and therefore the conviction still

stands. My analysis of the evidence of the three key witnesses (PW1, PW2 and DW1) lead to the conclusion that the driver of vehicle registration number KAL 071A Toyota pick-up was to blame for the accident.

The ownership of the vehicle was denied by the defendant and it is the most contentious issue in this appeal. The evidence of the police officer PW1 was that the accident was investigated by Runyenjes police station vide TC1/115/004/96 of 2011 involving two vehicles registration No. KAX 345G Toyota matatu and KAL 071A Toyota Hilux pick-up. One passenger in the matatu died and that the driver of vehicle registration No. KAL 071A was charged and convicted of the offence of causing death by dangerous driving. The police abstract produced by the officer showed the vehicle belonged to Joseph Muriithi Munyiri. The driver of the vehicle testified that he was an employee of Joseph Muriithi Munyiri who trades in the name of "Munyiri". At the time of the accident he was transporting "Munyiri Beer".

The appellant argued that the respondent did not prove ownership of the motor vehicle and that the vehicle was in possession of the appellant Munyiri Special Honey Ltd. The appellant submitted that it was only by producing a certificate of the official search that the respondent would have proved the disputed ownership.

The respondent on the other hand argued that proof of ownership must not only be by certificate of official search but even by other evidence. It was submitted further that the evidence on record including the affidavit sworn by the director of the appellant was sufficient to prove ownership of the vehicle registration number KAL 071A.

Each of the parties marshalled several authorities in support of their arguments on proof of ownership of a motor vehicle which have indeed eased the work of the court in preparing this judgment. It is established law that the burden of proof of ownership of a motor vehicle in a damages claim arising from a traffic accident where ownership has been denied lies on the party alleging that the vehicle belongs to the other party.

The burden of proof in a civil case is on the balance of probabilities. The respondent did not produce a certificate of the records from Kenya Revenue Authority to show who the registered owner of the motor vehicle registration number KAL 071A was. He relied mainly on the evidence on record including the police abstract and that of the other witnesses.

Section 112 of the Evidence Act provides :-

*"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him".*

The issue which arises here is whether the defendant Munyiri Special Honey Limited was in possession of the vehicle KAL 071A at the time of the accident and whether the fact that Joseph Munyiri's name and address (though deceased) were still inscribed on the vehicle. The respondent testified on how the accident occurred and how the driver of the vehicle was later charged and convicted of the offence. He further told the court that the time of the incident, *"the vehicle was carrying Munyiri Beer"*. This information was admitted in evidence by the defendant's driver DW1 who testified that he was an employee of one Joseph Muriithi Muiyiri who was trading in the name of "Munyiri". He also said the vehicle was carrying Munyiri Beer. There is evidence that at the time of the accident the said Joseph Muriithi Munyiri was deceased. His widow Lucy Wambui Muriithi came in this suit to defend it in her capacity as director of the defendant. In her affidavit sworn on 21st May 2012 which is a part of the record, she described herself as the director of the defendant Munyiri Special Honey Limited of Post Office Box 356 Kerugoya. The police took the name and address inscribed on the vehicle and used the details to prepare the police abstract:-

Joseph Muriithi Munyiri

P.O. BOX 356

KERUGOYA.

The respondent in his submissions intimated that he amended the plaint on the advice of the defendant and changed the name of the appellant from Joseph Muriithi Munyiri to Munyiri Special Honey Limited. This is supported by a letter dated 15th April 2011 addressed to Khan & Associates advocate for the respondent and copied to the Principal Magistrate Runyenjes Law Courts. It was signed by one M.G. Mwaniki of Muri Mwaniki & Wamiti Advocates for the appellant.

It states

*We refer to the above matter in which we filed a Memorandum of Appearance on 1st April 2011 on instructions of the insurer of the subject motor vehicle.*

*We have since learnt that the defendant passed away some time back and we, therefore, entered appearance in error in the circumstances, we will not file the defence and we expect that you will hold off the matter as it cannot proceed the way it is.*

*Kindly get in touch with us for any clarification.*

*M.G. MWANIKI*

*c.c. Principal Magistrate's Court*

*Runyenjes Law Court*

*Runyenjes*

*Client*

The death certificate of Joseph Muriithi Munyiri bearing the court stamp of Runyenjes Law Courts of 10th May 2011 shows that the deceased passed way on 10th May 2009. The death was registered on 19th May 2009 and his occupation indicated a "businessman". This death certificate was sent to the Respondent's advocate by the appellant's advocates Muri Mwaniki & Wamiti Advocates with a covering letter dated 5th May 2011 and copied to the Principal Magistrate Runyenjes. These correspondences exchanged by the parties and copied to court and which backed the amendment of the plaint form part of the court record and may be used by the court or by either party in support of their case.

It is not in dispute that when the accident occurred, Joseph Muriith Munyiri who was sued initially as the plaintiff and whose address were inscribed in the vehicle was deceased. Upon death of Joseph Muriithi Munyiri, the defendant continued to use the vehicle KAL 071A and on the material day the vehicle was still in use by the defendant carrying its product for sale of Munyiri Beer. The driver DW1 continued to work for the defendant and was on duty on the material day as he said in his evidence that he was carrying Muiyiri Beer. When DW1 said the deceased "was trading as Munyiri" the court would be justified under Section 119 of the Evidence Act to draw an inference that he meant the defendant Munyiri Special Honey based the facts of this case whose director was the widow of the deceased. All the time of the accident, the deceased was not in possession of the vehicle. It was in possession of the defendant who was using it on the material day to transport its goods. The deceased's widow was the director of the defendant.

Section 116 of the Evidence Act states:-

*When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."*

The director of the defendant in her affidavit sworn on 29/7/2011 states:-

1. *I am a director of Munyiri Special Honey as sued; I am familiar with matters subject of this application. I am duly authorized by the defendant, and therefore, competent to depone to the matters set out herein on behalf of the defendant.*
2. *On or about 24th May 2011 the defendant received the summons to enter appearance and the amended plaint in the above matter and dully forwarded the same on or about 16th May 2011 to the Kenya Orient Insurance Limited (herein the "Insurer") through the broker, Care Insurance Agency, for further action.*
3. *I am informed by the insurers and verily believe the same to be true that upon receipt of the said summons and amended plaint they proceeded to ascertain various aspects of the insurance and the claim and that it was not until 18th July 2011 that they proceeded to appoint Ms. Muri Mwaniki & Wamiti Advocate (hereinafter "the Advocates") to come on record and take over the conduct of this matter to defend the same on behalf of the defendant.*

The police abstract showed that the vehicle was insured by Kenya Orient Insurance Limited through certificate number 402080213/COMP. which is supported by the defendant director in her averments. The said director deponed that she was familiar with the matters in question including following up the insurance company in regard to the claim.

I come to the conclusion that the plaintiff has proved that the actual possession of the vehicle at the time of the accident was in the hands of the defendant. I rely on the case of ***KHAN VS COOKE & OTHERS Civil Appeal No. 45 of 1975*** where in a case with similar facts, the Court of Appeal held that ownership of a motor vehicle can be ascertained by actual possession, beneficial, financial interest, registration or insurance. The court further held that the burden of rebutting these presumptions lay on the appellant. In the same case, the court relied on the case of ***MORGANS VS LAUCHBURY [1972] 2 ALL ER 606*** where it was held:-

*"to make a person vicariously liable for negligence of the driver where the relationship of master and servant does not exist, there must be a duty or task delegated to the driver by the person sought to be charged with liability, who must also be shown to have had an interest in the purpose of the journey."*

In the appeal before me, there is evidence to support that there was a task or duty delegated to the driver of the vehicle by the defendant to transport its goods using the vehicle registration No. KAL 071A which caused the accident.

The appellant relied on the case of ***THURANIRA KARURI VS AGNES NCHECHE Civil Appeal No. 192 of 1996*** where the Court of Appeal held that ownership of a vehicle can only be proved by tendering the vehicle registration book in evidence. I note in that case that the Court of Appeal did not say or hold that tendering a log book was the only way of proving ownership. It has been held even in more recent cases that there are other ways of proving ownership. In the case of ***SECURICOR (K) LTD VS KYUMBA HOLDINGS*** it was held that:-

*"a registration card or log book was only prima facie evidence of title to a motor vehicle, but it is not the only way of proving ownership of a vehicle, evidence was led and proved on a balance of probability that the appellant was not the owner of KWJ 816 at the time the accident occurred."*

In the case of ***OSAPIL VS KADDY [2000] 1 EALA 187*** the Court of Appeal Uganda held that the person whose name was registered was presumed to be the owner thereof unless proved otherwise. The appellant had indeed proved otherwise and the court found in his favour.

The appellant argued that when the magistrate found the defendant liable, he had in his mind that the owner of the vehicle was the deceased Joseph Muriithi Munyiri. I have perused the said judgment and there is nothing to support the appellant's argument. The court knew the defendant was Munyiri Special

Honey Limited when it decided the case in favour of the plaintiff. The plaint had been amended substituting the name of Joseph Muriithi Munyiri with that of Munyiri Special Honey Ltd as the plaintiff.

There is no evidence on record to show that the plaintiff contributed to the accident and therefore, the issue of apportionment of liability does not arise. The respondent having established liability against the appellant, the magistrate was correct to enter judgment against the appellant on full liability.

The respondent was awarded damages for loss of amenities of Shs.300,000/=. Dr. Njiru's medical report showed the following injuries:-

- (a) Multiple cut wounds on the right parietal region;
- (b) laceration scars on the right shoulder and lower region between the right elbow and wrist joint
- c. A fracture on the base of the skull which caused bleeding through the ears.

He was admitted in the hospital for seven (7) days. The doctor in cross-examination admitted that no MRI was done to confirm the fracture of the skull. The quantum of damages only related to injuries (a) and (b).

I rely on the case of **ARROW CAR LTD VS BIMONO & 2 OTHERS Civil Appeal No. 344 of 2001** where the Court of Appeal set out the principles in reviewing the quantum of damages on appeal:-

*“the principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge are that it must be satisfied that either that the judge in assessing damages took into account an irrelevant factor, or left out of account a relevant one or short of these the amount is so inordinately low or high that it must be a wholly erroneous estimate of the damage.”*

The foregoing principles have been cited in several other cases and provide a sound guide to courts in reviewing the quantum of damages. I have looked at the authorities relied in by the plaintiff in support of his case for quantum. The record does not show that the magistrate took into account any irrelevant factors in assessing the damage. Neither are the damages inordinately high to justify interference by this court.

In effect, I find no merit in this appeal and I dismiss it accordingly. The judgment of the magistrate's court is hereby upheld. The appellant will meet the costs of the suit in this appeal and in the court below.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 25TH DAY OF NOVEMBER, 2014.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Okiror for Ogweno for Respondent**

**Mr. Odhiambo for Munene Wambugu for Appellant**

**F. MUCHEMI**

**JUDGE**