



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 166 OF 2009

BETWEEN

**MUSAU MUTHOKA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE MUTISYA MUSAU (DECEASED)).....PLAINTIFF**

AND

DODOMA TRANSPORT AGENCY LTD.....1ST DEFENDANT

**(AN APPEAL FROM THE JUDGMENT AND DECREE OF THE HON. MRS. MAINA
DELIVERED ON 3TH JUNE 2008 IN MILIMANI CHIEF MAGISTRATE'S COURT CIVIL
CASE NO. 2206 OF 2006)**

BETWEEN

**MUSAU MUTHOKA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE MUTISYA MUSAU (DECEASED)).....PLAINTIFF**

VERSUS

DODOMA TRANSPORT AGENCY LTD.....1ST DEFENDANT

SHAIBU SALIM IKOKI2ND DEFENDANT

JUDGMENT

1. The Appellant filed suit in the lower court against the 1st and 2nd Respondents seeking general damages together with special damages for the estate of the late Mutisya Musau, the Appellant's son. At the hearing the Appellant is the only one who gave evidence. During his evidence he produced a death certificate (exhibit 1), Police Abstract and its receipts, a piece of paper (exhibit 3), a receipt (exhibit 4) and the deceased's school report (exhibit 5). Hon. E. Maina (as she then) was in her judgment dated 13th June 2008 entered judgment for the Appellant against the 2nd Respondent for the sum of Kshs. 413,250,000/- with costs and interest. The suit against the 1st Respondent was dismissed with costs.

2. On the 2nd of April 2009 the appellant filed a Memorandum of Appeal dated 31st of March 2009. The grounds of appeal are as follows;-
 - i. That the Learned Principal Magistrate erred in law and fact in holding that there was no evidence to connect on a balance of probabilities that motor vehicle registration T. 952. AHU, Fiat Lorry was owned or being used for and on behalf of the 1st defendant.
 - ii. The learned Principal Magistrate erred in law and fact in failing to appreciate that the plaintiff's evidence that the motor vehicle belonged to the 1st defendant was not controverted.
 - iii. That the Learned Principal Magistrate erred in law and fact in failing to appreciate that there was no denial in the defense or by evidence by the 1st defendant that the 2nd defendant was not its driver as at the time of accident or that the said motor vehicle registration T. 92 AHU was not being driven by the 2nd defendant at the time for its benefit.
 - iv. That the Learned Principal Magistrate erred in law and in fact in holding that a document can only be acceptable in evidence if the same is signed.
 - v. That the Learned Principal Magistrate ignored and erred in law and fact in failing to appreciate plaintiff's own oral evidence as a eye witness and circumstantial evidence surrounding the occurrence of the subject accident which were not denied by the defendants and hence arriving at a wrong decision in dismissing the plaintiff's suit against the 1st defendant.
 - vi. That the Learned Principal Magistrate erred in law and fact in holding that there was no evidence on record to connect the 1st defendant with motor vehicle registration T.952. AHU.
 - vii. That the Learned Principal Magistrate erred in law and fact in holding that only documentary evidence could connect motor vehicle T.952 AHU and the 1st defendant.
 - viii. That the learned Principal Magistrate restricted herself and failed to look at the evidence in its entirety hence arrived at a wrong decision in dismissing the Plaintiff's suit against the 1st defendant.
3. At the hearing of this appeal Mr. Muindi collapsed the Appellant's grounds to one issue that of ownership of vehicle registration No. T 952. AHU, a Tanzania registration Number a vehicle allegedly owned by the 1st Respondent. It was submitted that the Appellant's/plaintiff's suit against the 1st Respondents/defendants was dismissed because the Court held that the plaintiff had not given evidence to connect the vehicle to the 1st defendant; that the Court erred in arriving at the said decision as there was ample oral evidence on the ownership of the vehicle by the Plaintiff who stated that the 1st Defendant owned the vehicle; that over and above the oral evidence, the Plaintiff produced a document issued to him by the 1st Defendant's driver indicating that the 1st defendant owned the vehicle and that the defence did not call any evidence to controvert that document given by the 1st Defendant's driver; that by virtue of part IV of the Evidence Act it was not necessary for the document to be signed to prove ownership; that a police abstract was produced by consent of the parties confirming the owner of the vehicle; that court erred in finding to find that the driver's space was full and the police wrote the owner of the vehicle at the top of the police abstract; that court used technicality to look at only paragraph 1 to determined ownership; that under section 16 of the Evidence Act the Plaintiff having given oral evidence or produced a document given by the 1st Defendant's driver and having produced a police abstract the burden shifted on the defendant to disproof ownership and hence the court made a mistake, thus the appeal should be allowed and the lower court decision set aside and judgment entered for the plaintiff.
4. M/s Onyikwa relied on the judgment of the lower court and the pleadings. That was her submission in court.
5. The duty of this court as the 1st Appellant Court as stated in the case of *Jabane Vs. Olenja 1986 KLR at page 661* is to examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on evidence should stand.

6. The plaintiff in his evidence testified that when he reported the accident to Embakasi Police Station the next day after the accident, he found the 2nd Respondent who told him that the owner of the vehicle was Dodoma Transport Agency Limited and that the 2nd Defendant gave him the chit with the 1st Defendant's particulars. This evidence was not rebutted by the 2nd Respondent. Later he obtained a police abstract (exhibit 2). Hon. E. Maina in her judgment stated the following;

“However I find no evidence at all to connect the 1st Defendant with his driver or even the motor vehicle. The note allegedly written by the driver has no signature or even the name of the person who wrote it. It has nothing on to connect it to the accident and is therefore of no probative value. Counsel for the plaintiff has submitted that we could rely on the police abstract on the issue of ownership and has cited the decision of the Hon. Lady Justice Okwengu in Criminal Appeal No. 34 of 2002 (H.CNyeri) Samuel Mukunya Kamunge Vs. John Mwangi Kamuru.

I could have done so but the police abstract makes no mention of the 1st Defendant being the owner of the motor vehicle. In the line reserved for details of owner the name given is that of the driver. The claim against the 1st defendant must therefore fail and I would dismiss it with costs there being no evidence upon which a finding of vicarious liability can be made. I do however find the 2nd Defendant 100% liable.

7. In the case cited by the appellant Civil Appeal No. **34 of 2002 Samuel Mukunya Kamunge Vs. John Mwangi Kamuru (supra)** the police abstract produced showed that the Respondent was the owner of the vehicle and no evidence was adduced to rebut the police abstract. In this matter the record of appeal has two police abstracts, one dated the 11th of May 2006 No. A717559 at page 68 and another dated 10th November 2005 no. A685390 at page 93. Both police abstracts bear the following details under paragraph No. 1 a. ***“Name and address of owner vehicle registration no. T. 925 AHU/ Trailer driven by Sahaibu Salim Ikoki.*** The owners name is not indicated anywhere in the police abstract at page 68. In the police abstract dated 10th of November 2005 the following details ***MV T. 952 AHU FIAT OWNER – DODOMA TRANSPORT AGENCY LTD ARUSHA.,*** are written at the top and not at paragraph No.1a.
8. I have perused the original court file and it appears that the police abstract that was produced in court is the one with serial no. A685390 at page 93 and in it the owner is indicated as ***DODOMA TRANSPORT AGENCY LTD of P O Box 114 ARUSHA.*** Though this ought to have been written under paragraph No. 1a. The Respondents' in their submissions in the lower court stated that the police abstract did not state the owner of the vehicle nor did the Plaintiff produce a copy of record from the Registrar of motor vehicles to establish who the real owner of the vehicle was. I find that the police abstract produced in court bore the name of the owner of the vehicle as the 1st Respondent and the driver as the 2nd Respondent. The fact that it was not at paragraph No. 1 it does not negate the fact that the 1st defendant was said to be the owner. I find and hold that evidence of ownership of the vehicle was established by the Plaintiff.
9. In the case of **Joel Muga Opija vs. East African Sea Food Limited (2013) eKLR** the Court of Appeal held as follows;

“It is noteworthy, that Bosire JA sat in Thurania's case (supra) Wandera's case (supra) and in the Lake Flower's case. It would appear that like us, he treated the comments in Thurania case as obiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as abiter, in the Thurania case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. 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 be later denied.” (emphasis mine).

10.Guided by the Court of Appeal decision and noting that the Respondent did not object to the production of the police abstract I find and hold that based on evidence of the Plaintiff and the police abstract produced the Appellant proved his case on a balance of probabilities that the 1st defendant was the owner of the vehicle and the 2nd Respondent its driver. Being the owner of the vehicle the 1st defendant is vicariously liable for the acts of the 2nd defendant. This was the main issue in this appeal. The appeal is therefore allowed. I set aside the Lower Court’s decision dismissing the appellant’s case against the 1st defendant. I enter judgment for the plaintiff against the 1st defendant. The appellant shall have costs of this appeal.

Orders accordingly.

Dated signed and delivered this **10th** day of **December 2014**.

R.E. OUGO

JUDGE

In the presence of;

.....**For the Appellant**

.....**For the Respondents**

.....**Court Clerk**