



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 4 of 2008

(Appeal from the judgment of the Chief Magistrate dated 20th day of December, 2007 in Naivasha Senior Resident Magistrate's Court Civil Case No. 248 of 2000)

CHARLES NYAMBUTO MAGETO.....1ST APPELLANT

DOUGLAS OJWANG.....2ND APPELLANT

VERSUS

PETER NJUGUNA NJATHI.....RESPONDENT

JUDGMENT

By a Plaint dated 7th March 2000, the Respondent sued the Appellants in tort for the damage to his motor vehicle arising out of an accident which occurred on 4th May 1997, and claimed damages therefor in the aggregate of Ksh 353,100/= comprising -

- (a) Police Abstract – Shs 100.00/=
- (b) Assessment Fees – Shs 3,000.00/=
- (c) Cost of Motor Vehicle

Pre-accident Value Sh 500,000/=

less salvage value Sh 150,000/= - 350,000/=

= **Sh 353,100/=**

The trial magistrate on the evidence found the Appellants 100% liable for the accident and awarded the Respondent not only the above sum, but also a substantial sum of Ksh 763,666/= for alleged loss of user of the motor vehicle. Aggrieved with the lower court's findings and judgment, the Appellant came to this court on appeal and set not less than thirteen (13) grounds of appeal -

(1) *that the learned trial magistrate erred in law by failing to give a concise statement of the case, points for determination, the decision thereon and the reasons for his judgment.*

(2) *that the learned magistrate erred in law and in fact in holding that the Plaintiff's case was not statute barred under the Limitation of Actions Act, Cap. 22 Laws of Kenya and the Appellant submits that the extension of time was based on insufficient and or not valid reasons.*

- (3) *That the learned magistrate erred in law and in fact in disregarding that the burden of proof lay on the plaintiff to prove his claim which he had failed to do and in particular -*
- (i) *that the plaintiff had failed to prove that he was the registered owner of vehicle KAG 650H and the Magistrate was wrong in holding that ownership was proved by the plaintiff's oral evidence, police abstract and loss assessor's statement,*
- (ii) *failure to prove negligence and particulars of negligence as pleaded in the plaint.*
- (4) *the learned Magistrate erred in law and in fact in holding that the police accident investigation file was produced in court whereas the document produced in court by PW1 was an unsigned summary.*
- (5) *That the learned magistrate erred in law and in fact in relying on the aforementioned summary and finding that there was sufficient evidence to prove negligence of the Defendant driver.*
- (6) *The learned magistrate erred in law and in fact in holding in the absence of any conclusive evidence that the Defendant's vehicle had a brake failure and that it was the fault of the Defendant for failing to maintain the vehicle in good mechanical condition that caused the accident.*
- (7) *The learned magistrate erred in law and in fact in failing to appreciate that a finding of brake failure cannot be adequate proof of negligence.*
- (8) *The learned magistrate erred in law and in fact in awarding loss of user which was not claimed as a special damage and was not proved as special damages and particularly was wrong in awarding loss of user when the vehicle was treated as a write off.*
- (9) *The learned magistrate erred in law and in fact in awarding loss of user in the absence of any evidence and the award so made was unjustly, manifestly excessive, unrealistic and an erroneous estimate.*
- (10) *The learned magistrate erred in relying on an assessment report made and produced by an unqualified person to award damages.*
- (11) *The learned magistrate erred in holding in the absence of conclusive evidence that the fact that the driver (2nd defendant) was acquitted of a traffic offence does not discharge him from a civic liability.*
- (12) *The learned magistrate erred in law and in fact in disregarding the Defendant's claim for contributory negligence.*
- (13) *The learned magistrate failed to appreciate the totality of the evidence before him, did not consider submissions filed on behalf of the Defendants and his judgment is based on conjectures and suppositions which were not on record.*

And on these ground the Appellants prayed that their appeal be allowed, judgment against them be set aside or in the alternative the damages awarded be reviewed, the costs of the Appeal and the suit in the lower court be awarded to the Appellants, and also any other orders this court would deem fit to grant.

The Appeal was argued by way of written submissions. The Appellants first submissions and further submissions are respectively dated 9th October 2012, and 6th November 2012. Those of the Respondent's counsel are dated 26th October 2012.

This being a first appeal this court is required to evaluate all the evidence adduced before the lower court and draw its own independent conclusions, always bearing in mind that it did not get the benefit of seeing and observing the demeanor of any of the witnesses. I will consider each of the grounds of

appeal in the paragraphs following.

On the **first** ground the Appellants contend that the learned trial magistrate erred in fact and in law by failing to give a concise statement of the case, points of determination, the decision thereon and the reasons for the judgment pronounced on 20th December 2007. Having carefully examined the judgment, I am of the considered view that the said judgment is sound, and is in compliance with the requirements of Order XX rule 4 (*now Order 21 rule 4 of the Civil Procedure Rules, 2010*). This ground therefore fails.

In the **second** ground of appeal, the Appellants faulted the trial court for not finding that the suit was statute-barred under Section 4(2) of the Limitation of Actions Act (*Cap. 22, Laws of Kenya*), and that the extension of time by the lower court was irregular, and that it was based on insufficient and/or invalid grounds.

Section 4(2) aforesaid requires actions based on tort to be brought within a period of 3 years from when the time the cause of action arose. In this case, the accident occurred on 4.05.1997, and the suit was filed on 22.09.2000. This was clearly out of time, and were it not for the extension of time granted on 11.09.2000, the suit was certainly statute-barred.

The Appellants however contended that even if leave to extend time within which to commence action was granted, the Respondent had a duty at the trial to demonstrate both to the court and the Appellants (*then Defendants*) that such order of extension of time was indeed granted. Failure to do so rendered the suit incompetent. The Appellant relied upon the Court of Appeal decision in **THURANIRA KARAUARI VS. AGNES NCHECHE** (*Nairobi Civil Appeal No. 192 of 1996*).

The Appellants cannot however succeed on this ground either. This is so **firstly** because leave to file actions out of time is sought and granted *ex parte*. As such the only time when a Defendant or party would challenge such leave is firstly by raising the issue in its defence, and taking it up as a preliminary objection before or at the hearing of the main suit. A defendant or other party which fails to raise the issue of limitation of time in its defence or any other time before hearing, is deemed to have acquiesced with the plaintiff's claim and cannot raise either in its submissions or on appeal.

Secondly the Appellants cannot rely on the **Thuranira case** as authority for defeating the Respondent's case on the basis of being statute-barred. The **Thuranira case** was properly decided because the Defendant had in that case raised the issue of limitation of time in its defence. The Appellants had not raised any such defence in this case.

Besides, the Thuranira case is no authority for the proposition that the Plaintiff should produce an order allowing extension of time, or that it be served upon the Defendant. That would only be necessary if the issue of limitation is raised by the Defendant or other party such as a third party. It is however good practice, as it was in this case, that the order for extension of time was part of the court record. The mere fact that such order was neither produced at the hearing nor served upon the Appellants does not invalidate the order, nor negate its existence. I am satisfied that the lower court made a correct finding that leave to file the suit out of time was duly granted.

The Appellants' **third** ground of appeal was that having pleaded that he was the registered owner of motor vehicle registration number KAG 650 H, the onus lay on him to prove that he was indeed the registered owner of the said motor vehicle. Otherwise the lower court, the Appellants contended, erred in not so finding. The Appellants again, with respect, wrongly relied on the decision in the Thuranira case, that where ownership of a motor vehicle is denied by the alleged owner, evidence of ownership must be adduced by production of a certificate of an official search from the Registrar of Motor Vehicles.

I say wrongly relied on that case because, the Respondent has not, unlike the Thuranira case, claimed that he is not the owner of the motor vehicle in question. The Respondent testified that he had left his logbook at home, as none walks around with a title to property.

Notwithstanding decisions such as Nakuru HCCA No. 188 of 2002 (**Mageto & Another vs. Joshua Mwangi Mgonda**) the basis in my humble view, for ascertaining the ownership of a motor vehicle in accident cases, is for attachment of vicarious liability. That is why courts have consistently held that a registration card or logbook is only prima facie evidence of ownership and the person registered therein is deemed to be the owner of the motor vehicle unless the contrary is proved. That is the provision of Section 8 of the Traffic Act, (*Cap. 403 Laws of Kenya*) – the inference being that a certificate of registration is not absolute proof of ownership, and evidence may be led to prove the contrary. There is often a time-lag between the sale and transfer of a motor vehicle, and the registration of the transfer by the Registrar of Motor Vehicles.

In **SECURICOR KENYA LTD VS. KYUMBA HOLDING LTD [2005] eKLR**, cited with approval in **NANCY AYEMBA NGAIRA VS ABDI ALI [2010] eKLR** by J. B. Ojwang, J. (*as he then was, now Judge of the Supreme Court of Kenya*) held -

“There is no doubt that the registration certificate obtained from the Registrar of Motor Vehicles will show the name of the registered owner of a motor vehicle, but the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owner(s) of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership – actual ownership, beneficial ownership, possessionary ownership. A person who enjoys any of the other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the Certificate of Registration, ……”

From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need not necessarily produce a log book or a certificate of registration. The courts recognize that there are forms of ownership, that is to say, *actual, possessionary and beneficial*, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the **Thuranira** and **Mageto** cases (*supra*) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership.

In this case, the trial magistrate found that the Police Abstract showed that the Respondent was the owner of the motor vehicle. The evidence of the Respondent on ownership of the motor vehicle was corroborated by PW2, the Loss Assessor who testified that he had been instructed by the Respondent to prepare a Loss Assessment Report of the damage to the Respondent's motor vehicle, registration No. KAG 650H. Although the Respondent did not prove by complete documentary evidence (*such as the logbook*), that he was the owner of the motor vehicle as pleaded, he did on the balance of probability prove that he had ownership of the vehicle.

I therefore find and hold that the Respondent showed sufficient interest in the motor vehicle to entitle him to file the suit herein. I dismiss the third ground of appeal.

In the **fourth** and **fifth** grounds of appeal, the Appellants submitted that the learned trial magistrate erred in holding that the Police Investigation Report had been produced in court whereas what was produced is the unsigned and unauthenticated summary report which was of no evidential value, that the learned trial magistrate erred in admitting this document into evidence whereas the same had not been signed and authenticated and that the magistrate erred in holding that the 1st Appellant's vehicle had a brake failure which caused the accident whereas there was no sufficient evidence produced to support that holding.

These grounds too must fail, and this is why so. The summary of investigations was produced by the Investigating Officer and the results of the investigations clearly showed that the second Appellant was to blame for the accident. The Appellants did not challenge the authenticity or question its validity during the trial and did not object to its production. The credibility of the facts as contained in the

summary of investigations was not controverted, and nor was the fact that it was neither signed nor authenticated raised during the trial nor even in the defence submissions. It cannot be raised on appeal, and in any event in the absence of any other evidence to controvert it, the learned trial magistrate did not err at all in admitting the said document.

Further, the investigations revealed as already noted, that the second Appellant was to blame for the accident and was charged with the offence of causing death by dangerous driving. Even though he was acquitted under Section 215 of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*), such acquittal did not of course exonerate the second Appellant (*as the driver*), from civil liability. The acquittal was due to the prosecution's failure to call come crucial witness. In any event, the standard of proof in criminal cases, beyond reasonable doubt is different from proof in civil cases, (*on the balance of probability*). I have no cause to differ from the trial court's finding.

The **sixth, seventh, eleventh, twelveth and thirteenth** grounds of appeal dealt with the question whether the evidence adduced was sufficient to find the second Appellant liable in negligence for the occurrence of the accident the subject matter of the suit and whether the Respondent contributed to the accident. Only three witnesses testified at the trial. They were PW1, the Investigating Officer, PW2, the Loss Assessor and PW3 the Respondent (*the owner of the motor vehicle KAG 650H*). There was no eye witness to the accident. The trial court relied upon the summary of investigations produced as Pexh. I. The summary of investigations showed the accident the subject of the suit herein, involved eight (8) motor vehicles.

On the material day, the 1st Appellant's motor vehicle (*KAH 540L*), which was being driven by the 2nd Appellant developed brake failure at around the area known as Kinungi (*along the Nairobi-Naivasha stretch, to Nakuru Road*). As a result it hit on-coming vehicles including the Respondent's motor vehicle, which was being driven by one Bernard Warui Murage. The second Respondent did not stop. He fled from the scene. Though particulars of negligence were denied, the evidence of the Respondent was not controverted.

The first Appellant owed the Respondent and other road users a duty of care to ensure that his motor vehicle was roadworthy, and in good mechanical working condition. The Appellants led no evidence to show that the failure of the brakes was due to factors beyond their, or in particular, beyond the control of the 1st Appellant, or that at the material time, all reasonable care had been taken by the 1st Appellant that his motor vehicle was in good working condition.

Neither is there any substance in the Appellant's submissions that the Respondent contributed to the accident as contended in their Defence. The Appellants contention that the trial court did not consider their defence of contributory negligence could not be sustained without evidence on their part. The pleading of contributory negligence without evidence is not proof of negligence. The trial court was consequently correct in finding the 2nd Appellant wholly liable for the accident.

In grounds eight and nine of the Grounds of Appeal, the Appellants contended that the trial magistrate erred in law and in fact in awarding the Respondent damages of Ksh 676,666/= for the loss of user whereas that claim was not specifically pleaded in the plaint, and it was not proved because the vehicle was a write-off, that the award was excessive, unrealistic and an erroneous estimate of loss.

The law is that a person (*or litigant*) is bound by his pleadings. That is the provision of former Order VI, rule 6 (*and now Order 2, rule 6*) of the Civil Procedure Rules 2010. Consequently it was incompetent for the Respondent to lead evidence on the loss of user of their vehicle without first amending their pleadings. The learned trial magistrate erred in awarding the Respondent any such sum on the mere assumption that he lost earnings because the vehicle was allegedly used as a matatu. He had to plead and prove such loss. In **DAVID BAGINE VS. MARTIN BUNDI** (*Nairobi Court of Appeal No. 283 of 1996, the Court of Appeal*) said -

“We must and ought to make it clear that damages claimed under the title “loss of user” can only be special damages. The loss is what the claimant suffers specifically. It can in no circumstance be

equated to general damages to be assessed in the standard phrase “doing the best I can”. These damages as pointed out earlier by us must be strictly proved (and I should add, be specifically pleaded and specifically proved).

The court concluded -

“..Having so erred, the learned Judge proceeded to assess the same for a period of three years. There the learned judge seriously erred.”

Similar sentiments are expressed in **WAWERU VS. NDIGA [1983] KLR 236**, and **JACKSON K. KIPTOO VS. ATTORNEY-GENERAL [2009] eKLR**. Special damages must not only be pleaded but must also be specifically proved, and the claim for loss of user being a specie of special damages, it ought to have been specifically pleaded and proved. The trial magistrate therefore grossly erred in awarding the sum of Ksh 500/= daily profits in the absence of both pleading and proof. The said award is wholly set aside. Grounds 8 and 9 of the appeal therefore succeed.

In conclusion, I allow the appeal in terms of prayer (b) (*by setting aside award of damages on loss of user*), but dismiss the appeal on all other grounds and uphold the learned trial magistrate's findings on liability, special damages, costs and interest.

As the appeal substantially fails I award the costs of the appeal to the Respondent.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 10th day of May, 2013

M. J. ANYARA EMUKULE

JUDGE