



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 107 of 2008

-BETWEEN-

NANCY AYEMBA NGAIRA..... APPELLANT

-AND-

ABDI ALI..... RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate Mr. T. Nzioki dated 15th May, 2008 in CMCC No. 1891 of 2005 at Mombasa Law Courts)

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JUDGMENT

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The appellant herein was the plaintiff in Civil Suit No. 1891 of 2005 filed in the Chief Magistrate's Court on 2nd June, 2005. She had been traveling in Nissan minibus (or *matatu*) Reg. No. KAP 410P, owned by the defendants, when the motor vehicle veered off the road, causing an accident, in the course of which the plaintiff sustained injuries.

It was alleged that the said motor vehicle accident had been occasioned by negligence on the part of the driver; but 1st defendant made denials of, firstly, the charge of negligence; secondly, ownership of the said *matatu*; and thirdly, that the plaintiff was a passenger in the said motor vehicle.

As 2nd defendant failed to enter appearance, the Court entered interlocutory judgment against him on 25th January, 2006.

It was the plaintiff's (as PW1) evidence that she was travelling on *matatu* Reg. No. KAP 410P on 5th February, 2005 as a fare-paying passenger, from Changamwe towards Magongo Mwisho, when at the junction of Airport Road, the motor vehicle veered off the road and knocked a road-side pillar; and she testified that the said motor vehicle was at the time over-speeding.

PW1's evidence was supported by that of PW3, Police Inspector *Ali Ngoni*, who received a report on the said accident at 2.30p.m on the same day.

PW1 produced as exhibits records which indicated that the registered owner of the said motor vehicle at the material time, was 2nd defendant. The trial Court found that the Police Abstract was the only item of evidence showing 1st defendant to have been an owner of the said motor vehicle at the material time; and the Court cited the Court of Appeal decision, *Thuranira Karauri v. Agnes Ncheche*, Civil Appeal No. 192 of 1996, as holding that a Police Abstract by and of itself, does not constitute sufficient proof of the ownership of a motor vehicle. So the trial Court held that the appellant herein had failed to establish liability against 1st defendant, and dismissed the case against 1st defendant with costs.

However, the trial Court found sufficient proof that as a result of the said accident, the plaintiff had sustained certain injuries, to wit –

(i) fracture on the lower left tibia;

(ii) bruises on the right lower leg.

PW3 gave evidence that the driver of the said *matatu* was charged in Traffic Case No. 2677 of 2005, with the offence of careless driving contrary to s. 49(1) of the Traffic Act (Cap. 403, Laws of Kenya); and this evidence was not challenged, just as the plaintiff's evidence that the driver was overspeeding, veered off-road and knocked a pillar, too, was uncontroverted. On these facts, the trial Court found as a fact, that the driver of the said *matatu* was entirely to blame for causing the accident – and thus 2nd defendant was 100% vicariously liable for the negligence of the driver.

The plaintiff, who was complaining of pain on the left leg, was examined by **Dr. Chidagaya Swaleh** (PW2), who concluded that she had sustained serious injuries.

The learned Magistrate used as a reference in the determination of damages, the Mombasa High Court decision in **Jackson Radoli v. Systemetric Supplies Co. Ltd**, HCCC No. 925 of 1991, in which general damages for pain, suffering and loss of amenities was assessed at Kshs. 490,000/=. The trial Court found similarities between that case and the instant one, and determined that the sum of Ksh. 450,000/= was a reasonable award in general damages. The Court also made orders for the payment of special damages, in the sum of Kshs. 1,500/=. The plaintiff won “costs and interest [at] Court rates from the date of judgment”.

The plaintiff was dissatisfied, and she comes before this Court as the appellant, her grounds being as follows:

- (a) that, the trial Court erred in law and in fact, in finding that there was no evidence to establish that the respondent was the owner of the said matatu at the material time;**
- (b) that the trial Court failed to take into account the fact that the suit had been brought against two defendants jointly;**
- (c) that the trial Court erred in law and in fact in not recognizing that the Police Abstract confirmed the respondent as a beneficial owner of the matatu in which the accident occurred;**
- (d) that the trial Court erred in failing to find joint and several liability against both defendants;**
- (e) that the trial Court had wrongly interpreted the authority, Civil Appeal No. 192 of 1996;**
- (f) that the trial Court erred in fact and in law, in dismissing the case against the respondent herein.**

Learned counsel, **Mr. Onyango**, stated that the appeal was concerned with just one point in the decision of the trial Court: the dismissal of the appellant's case against the respondent herein – on the ground that there was no evidence to establish that the respondent was the owner of the *matatu*, Reg. No. KAP 410P at the time of the accident.

Counsel submitted that, by Order XX, rules 4 and 5, a judgment in any civil case is required to contain a concise statement of the issues for determination, and that the trial Court had stated no issue for determination which could lead to the holding that there was no evidence to establish that the respondent was the owner of the motor vehicle in question. Counsel relied on the Court of Appeal decision in **Galaxy Paints Co. Ltd. v. Falcon Guards Ltd** [2000] 2EA 385 in which it was thus held (p.385):

“The issues for determination in a suit generally flow from the pleadings, and a trial Court could only pronounce

judgment on the issues arising from the pleadings, or such issues as the parties framed for the Court's determination. Unless pleadings were amended, parties were confined to their pleadings...."

Counsel submitted that the trial Court had failed to determine all the issues pleaded as regards the ownership of *matatu* Reg. No. KAP 410P; for at paragraph 4 of the amended plaint dated 9th August, 2005 the appellant herein had stated that the defendants were "the registered and/or beneficial owners of motor vehicle No. KAP 410P Nissan *Matatu*". And so, it was submitted, "the learned trial Magistrate was enjoined to consider whether any one or both.....defendants was an owner [or were owners] of the subject motor vehicle either by way of registered or beneficial ownership"; but the trial Court went on abruptly to consider only one aspect of the said pleading, namely, ownership by way of **registration**. It was right, counsel urged, to hold that 2nd defendant was the registered owner of the said motor vehicle; but, counsel submitted, it was wrong to use that finding as a basis for dismissing the appellant's case against the respondent herein, without considering if there was proof that the respondent was a beneficial owner of the motor vehicle. Counsel urged that if the trial Court had considered the issue of **beneficial ownership**, it would have found for the appellant herein.

Learned counsel urged that s.8 of the Traffic Act envisages a situation in which evidence can be tendered to prove ownership of a motor vehicle that is of an unregistered kind; and by this principle there may be **actual, possessory or beneficial** ownership which exists independently of registration. The authority for such a statement of the law is the Court of Appeal decision in *Securicor Kenya Limited v. Kyumba Holdings Limited* [2005] 1KLR 748, and the following passage (at p.750) is relevant:

"It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the Traffic Act when she states that the true owner of the motor vehicle was the appellant"

Counsel urged that when the appellant herein pleaded that the respondent was either the registered or the beneficial owner, the appellant had set out to prove either of the two forms of ownership; and as the trial Magistrate failed to consider the two forms of ownership, he ended up reaching a decision that was "manifestly incorrect".

Learned counsel urged to be particularly relevant the decision of the High Court (*Okwengu, J.*) in *Samuel Mukunya Kamunge v. John Mwangi Kamuru*, Nyeri H.C. Civ. Appeal No. 34 of 2002, especially the following passage:

"It is true that a certificate of search from the Registrar of motor vehicles would have shown who was the registered owner of the motor vehicle according to the records.....That however, is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often-times motor vehicles change hands but the records are not amended.

"I find that the trial Magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicles could prove ownership of the motor vehicle. I find [that] a Police abstract report having been produced showing the respondent as the owner of motor vehicle No. KAH 264A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle, and the respondent having offered no evidence to contradict the information on the Police Abstract report, the appellant had established on a balance of probability that motor vehicle No. KAH 264A was owned by the respondent".

Counsel urged that the trial Magistrate had misinterpreted the precedent in *Thuranira Karauri v. Agnes Ncheche*, Civil Appeal No. 192 of 1996 which was concerned with registered ownership, and did not extend to **other forms** of ownership of a motor vehicle.

The respondent, counsel submitted, had not adduced any evidence to contradict the evidence of actual, beneficial and/or possessory ownership stated in the Police abstract; and hence the trial Court should not have dismissed the case against the respondent herein.

Counsel for the respondent agreed with the decision of the trial Court, and urged that PW3 who had produced the Police abstract showing the respondent to be an owner of the subject motor vehicle, had not conducted investigations into the circumstances in which the accident had taken place.

Counsel took the position that what was required in this case, was just the certificate of registration from the Registrar of motor vehicles – and that the same had not shown the respondent herein to be an owner of the said *matatu*. These are the words of counsel:

“The 1st defendant/respondent in his defence has denied owning the motor vehicle; therefore, in the light of the case of Thuranira Karauri v. Agnes Ncheche.....it was incumbent upon the plaintiff to produce a certificate of registration in addition to the police abstract, to prove the two owners of the motor vehicle. In this case both documents were produced [and they] contradicted each other. However, the learnedMagistrate was of the view that the certificate of registration.....belongs to 2nd defendant and not to 1st defendant”.

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* owners 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; possessory ownership*. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the *matatu* in question.

The trial Court, therefore, had no legal basis for limiting ownership to 2nd defendant whose name was shown on the certificate of registration for the motor vehicle. The correct decision would have been to attach liability not just to 2nd defendant, but to both defendants.

Consequently, the appeal is allowed, and I enter judgment for the appellant herein against ***Abdi Ali*** and ***Kamau Jacob Maguta*** who shall bear liability jointly and severally; the two shall, jointly and severally, pay general and special damages to the appellant herein in the amounts awarded by the trial Court in its judgment of 15th May, 2008; interest shall be paid on the general damages at Court rate, with effect from 15th May, 2008 until payment in full; interest shall be paid on the special damages at Court rate, with effect from the date of filing suit, until payment in full; ***Abdi Ali*** and ***Kamau Jacob Maguta***, jointly and severally, shall pay the appellant’s costs in the trial Court, and the same shall bear interests at Court rate with effect from the time of filing suit, till payment in full; the respondent herein shall pay the appellant’s costs on appeal, and the same shall bear interest at Court rate, as from the time of filing the appeal, until payment in full. The decree from the trial Court’s Judgment dated 16th July, 2008 shall be amended accordingly.

DATED and DELIVERED at MOMBASA this 11th day of June, 2010.

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J. B. OJWANG

JUDGE

Coram: *Ojwang, J*

Court Clerk: *Ibrahim*

For the Appellant: Mr. Onyango

For the Respondent: *Mr. Waithera*