



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Appeal 172 of 2006

A. JIWA SHAMJI LTD.....APPELLANT

–VERSUS–

MARSELA KIPKEMOI (suing as a personal representative of DAVID KIPRONO
KIMOING(DECEASED.....RESPONDENT

JUDGEMENT

The respondent brought this suit against the appellant under both the *Fatal Accidents Act* and the *Law Reform Act* to recover general and special damages following the death of her husband who was injured on 21/1/2004 along Sotik-Litein road. He was said to have been riding a bicycle when he was knocked by motor vehicle registration number Mark KXQ 207. It was alleged the vehicle was owned by the appellant and was being driven by its driver who negligently caused the accident. The respondent obtained a limited grant of letters of administration *ad colligenda bona* under section 67(1) of the *Law of Succession Act (Cap. 160)* to be able to bring the suit.

The appellant filed a defence denying the fact of the accident; ownership of the vehicle; negligence; and liability.

Evidence was called for the respondent but none for the defence. The respondent testified that the deceased was her husband who was fatally injured in the accident which she did not witness. He left her with a family which he was providing for before his death. He died at 83 and was farming maize and beans which provided the family with income. She called Robinson Kiplangat Koingeny (PW2) who witnessed the accident. He said the lorry was being driven at a very high speed at a bend and was going downhill. He saw it veer off the road and that was followed by a sound. The lorry had overturned. PW2 rushed to the scene and found the vehicle had knocked down the deceased who had a bicycle. The incident was on 21/1/2004 at about 10.p.m. The witness

said he knew the lorry to belong to A.Jiwa Shamji.

The respondent produced Police Abstract (exhibit 2) showing the owner of the vehicle to be Jiwa Samji.

The trial court found the respondent had proved her case on balance of probabilities. It found that the cause of the accident in which the deceased died was the negligent driving of the vehicle. The appellant was held vicariously liable.

On damages, the court awarded Kshs. 100,000/= for loss of expectation of life; Kshs. 10,000/= for pain and suffering; and Kshs. 420,000/= for loss of dependency. The total was Kshs. 530,000/= which was granted together with costs and interest.

The appeal was filed to challenge these findings. When the parties filed written submissions in the trial court, the appellant's position was that it had not been proved by the respondent that it was the owner of the vehicle that was involved in the accident. Quite unfortunately, the trial court did not address, or resolve, this issue. It should be noted that the respondent's case in regard to the ownership of the vehicle was stated in paragraph 3 of the plaint as follows:-

“3.The defendant was at all material times the registered owner of motor vehicle registration Mark KXQ 207.”

This was specifically denied by the appellant in paragraph 3 of the defence as follows:-

“3.The defendant denies that at all material times to the suit is or at all, it was the registered owner of motor vehicle Registration Number KXQ 207, and the plaintiff is put to strict proof thereof.”

The respondent did not witness the accident and did not see the vehicle involved. That was left to PW2 who said the vehicle belonged to A. Jiwa Shamji. The plaint had indicated in its paragraph 2 that the appellant was a Limited Liability Company incorporated in Kenya. A.Jiwa Shamji is an individual, and not a limited liability company. Even if the Police Abstract (exhibit 2) were to be accepted as evidence of ownership, it indicated the owner to be Jiwa Samji. Again, that is an individual. It follows that the respondent did not establish that the appellant was the registered owner of the vehicle that fatally knocked her husband.

The decision of the Court of Appeal in *Thuranira Karauri.V. Agnes Ncheche, Civil Appeal no. 192 of 1996* at Nyeri was brought to the attention of the trial court in the submissions by the appellant's counsel. The Court of Appeal held that where the defendant has denied ownership of the vehicle, the plaintiff has to place before the court a certificate of search signed by the Registrar of Motor vehicles showing the registered owner of the vehicle to be the defendant. A Police Abstract alone cannot do.

In *Samwel Mukunya Kamunge.V. John Mwangi Kamuru,HCCA.no. 34 of 2002at Nyeri*, the High Court found that a Police

Abstract could prove ownership of the vehicle where the defence offered no evidence. It should be noted that in *Thuranira's case* the defence had offered no evidence. Secondly, a Police Abstract is proof of the fact that the accident was reported to Police, and no more. A party is bound by his pleadings. Where he states that the vehicle is registered in the name of the defendant, which the defendant has denied, he has to produce evidence of that registration.

There were other issues raised by the appellant in the appeal but, in view of the finding above, it would be an exercise in futility to deal with them.

The appeal is allowed with costs. The judgment and decree of the lower court are set aside, and in their place an order is made dismissing the respondent's suit with costs.

Dated, signed and delivered at Kisii this 23rd Day of November, 2009.

A.O.MUCHELULE

JUDGE

23/11/2009

Before A.O.Muchelule-J

Mr. Odongo for the appellant

Mr. Oguttu for Mr. Abisai for Respondent

COURT: Judgment in open.

A.O.MUCHELULE

JUDGE

23/11/2009