



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 233 of 2004

[Being an appeal from the Judgment of the Hon T. WEKULO – SRM in Nakuru Chief Magistrate’s Court CMCC No. 955 of 1996 delivered on the 23rd day of August 2004]

AGNES MUENI APPELLANT

VERSUS

JULIUS MBURU RESPONDENT

JUDGMENT

The appellant, *Agnes Mueni* was the plaintiff in Chief Magistrate’s Civil Case 955 of 1996 which she instituted against the respondent for claim for general and special damages as a result of an accident that occurred on 23rd December 1995 involving motor vehicle registration number KTH 681. By a judgment delivered on 23rd August 2004, the learned trial Magistrate dismissed the appellant’s case with costs.

The appellant being dissatisfied with the said judgment has appeal to this court and in her memorandum of appeal she has raised the following grounds of appeal: -

- 1. That the learned trial magistrate erred in law and in fact in dismissing the plaintiff’s case on the ground that the plaintiff had failed to prove the case to the required standard.**
- 2. That the learned trial magistrate erred in law and in fact in holding that there was no link between the defendant and the motor vehicle subject matter of the accident.**
- 3. That the learned trial magistrate erred in law and in fact in holding that there was no sufficient proof of ownership of the motor vehicle subject matter of the accident as against the defendant.**
- 4. That the learned trial magistrate erred in law and in fact in believing in whole that testimony of the defendant and disregarding the testimony of the plaintiff.**
- 5. That the learned trial magistrate erred both in law and in fact in failing to find that the doctrine of *Res Ipsa Loquitur* applied to found negligence on the part of the defendant.**
- 6. That the learned trial magistrate erred in law and in fact by failing to appreciate that the burden on the plaintiff/appellant lay in establishing that there was an accident involving the defendant’s motor vehicle in which the plaintiff was injured and further by failing to appreciate that the**

plaintiff/appellant had discharged that burden.

The evidence before the trial court was given by the appellant to the effect that the motor vehicle that she was traveling in being KTH 681 public transport vehicle (matatu) was negligently driven and as a result the motor vehicle rolled three times. The appellant was injured and was taken to the Nakuru Provincial General Hospital and later on, she was transferred to a Nursing Home where she was operated on, for the injuries that she sustained in the accident. Thereafter the appellant reported the matter at the police station and **P.C Christopher Mwangi** produced a police abstract form which shows that the appellant was involved in a road traffic accident on 29th December 1996 while aboard motor vehicle KTH 681 Mitsubishi Matatu. According to the abstract, the owner of the motor vehicle is **Julius Mburu**, the respondent herein.

The respondent denied having been the registered owner of the motor vehicle. He also denied having been a driver. In his evidence, and even in his written statement of defence, the respondent denied that he was the registered owner of motor vehicle KTH 681. He also denied that he was the driver or that the vehicle at the time was being driven with his consent or by his agent.

The learned trial magistrate after hearing the matter concluded as follows in her judgment.

“On liability it is upon the plaintiff to prove that the defendant was both the owner and driver of the said motor vehicle. The police abstract provided has no particulars of the driver and the plaintiff herself would not confirm that the defendant was the driver of the motor vehicle. She clearly shared that she found when the motor vehicle was full and entered it. She never checked who was driving. She said that the defendant was the driver because he used to transport them in that motor vehicle.”

Thus apart from her testimony there was no other evidence that the defendant was the driver of the motor vehicle. The same is confirmed by that of the police officer PW 2 that the driver of the said motor vehicle disappeared after the accident. When that is put together, it removes the defendant from the scenario as a driver.

*So was the defendant the owner? It is upon the plaintiff to prove the same. Evidence of a police abstract when it comes to ownership of a motor vehicle has been held to be insufficient. This was clearly held in the case of **Thuranira Karauri Vs Agnes Ncheche Civil Appeal No.192 of 1996** which case I have following in open judgments. I have delivered on the issue of ownership of motor vehicle.”*

The appellant’s main contention is that the trial court erred by finding that the appellant’s case was fatal for failure to join the driver of the motor vehicle KTH 681 as a defendant in the suit. Counsel for the appellant argued that failure to join a driver in a claim for damages is not fatal because the employer’s liability if pleaded and supported in evidence can support the claim for damages. He put forward the case of **Ndungu Vs Coast Bus Company Ltd E.A.L. R [2000] page 462** where the Court of Appeal held as follows: -

“From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee’s liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya J that the non-joinder of the driver in an action such as the one which gave rise to this appeal renders that suit incompetent.”

Although I gratefully accept the above as the correct exposition of the law, the present case is different from the above case in that the respondent denied both ownership and having been a driver of the motor vehicle. He went further and produced a certificate of search which was admitted in evidence and it showed motor vehicle registration, KTH 681 the registered owner was **Joseph Steve Macharia Mwangi**. It is for that reason that the trial court while relying on the Court of Appeal decision in the case of **Thuranira Karauri Vs Agnes Ncheche Civil Appeal No 192 of 1996 Njeri (unreported)** where the

Court of Appeal held that

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”

It is clear from the proceedings before the trial court that **P.C Mwangi** who produced the police abstract form did not visit the scene of the accident. It was also his evidence that the driver of the motor vehicle disappeared after the accident. The investigating officer had preferred charges against the driver but he could not be found.

Upon evaluation of the entire evidence and judgment of the trial court, I am not persuaded that the appellant proved her case of damages against the respondent. In a claim of damages it is trite that the burden of proof lies on the appellant to connect the damages suffered and the omission on the part of the respondent. The appellant must prove that the respondent was responsible for the injuries that she suffered. Thus the appellant had a duty to prove the ownership of the motor vehicle. In view of the decision of the Court of Appeal the appellant had a duty to prove ownership of the motor vehicle by a certificate from the Registrar of Motor Vehicle for reasons that ownership was denied and the abstract form was challenged by the defence evidence.

Am satisfied that the learned trial magistrate arrived at the correct decision having taken into consideration the evidence and material that was before her. Taking the totality of all the evidence, I find no merit in this appeal and it is therefore dismissed with costs to the respondent.

Judgment read and delivered on 9th day of March 2007.

MARTHA KOOME

JUDGE