



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Civil Appeal 34 of 2002

SAMUEL MUKUNYA KAMUNGE APPELLANT

VERSUS

JOHN MWANGI KAMURU RESPONDENT

(Appeal from original Judgment in Chief Magistrate's Court at Nyeri in Civil Case No. 197 of 2000 by Mr. Kaburu Bauni –C.M. –Nyeri)

J U D G M E N T

The suit in the lower court was initiated by the appellant who sued the Respondent seeking damages under the Law Reform Act and the Fatal Accidents Act arising from the death of Kamunge Wahome deceased. In the plaint it was alleged that the deceased was lawfully traveling as a fare paying passenger in motor vehicle KAH 264A owned by the Respondent when he sustained fatal injuries as a result of an accident caused by the negligence of the Respondent or his servant or agent in the management and control of the motor vehicle.

The Respondent denied the appellant's claim, specifically denying paragraph 3 of the plaint relating to his alleged ownership of motor-vehicle KAH 264A.

At the hearing of the suit, the appellant called two witnesses. These were P.C. Stephen Kioko an officer attached to Nyeri Traffic Base who testified that he received a report of an accident involving motor vehicle KAH 264A along Nyeri/Nyahururu Road. He proceeded to the scene and found that the accident was a self involving accident which occurred after a tyre bust. He confirmed that the deceased Kamunge Wahome was one of the passengers who died in the accident. He produced a police abstract report of the accident which named the Respondent as the owner of motor vehicle KAH 264A. The second witness was the appellant who testified that he is a son to the deceased and the administrator of his estate as per letters of administration which he produced in evidence. He received a report of the accident from the police, went to Nyeri Hospital mortuary and identified the body of the deceased. He produced a death certificate in respect of the deceased. He also identified the police abstract produced by P.C. Stephen Kioko as the one he received from the police. He therefore instructed an advocate who wrote letters of demand to the owner of the motor vehicle and sent a statutory notice to the Insurers of the motor vehicle. The appellant maintained that the Respondent was the owner of the motor vehicle because the police abstract stated so.

At the close of the evidence for the plaintiff the advocate for the Respondent opted to call no evidence but filed written submissions in which he urged the court to dismiss the appellant's case as the appellant had failed to prove the following. ·

- ***That the deceased was a passenger in motor vehicle KAH 264A.*** ·

- ***That motor vehicle No. KAH 264A belonged to the Respondent***
- ***That the accident was caused by the Respondent's negligence as pleaded.***

On damages counsel for the Respondent submitted that if the appellant was entitled to any damages at all then the same should be limited to Kshs.60,000/= in respect of loss of expectation of life and Kshs.5,000/= for pain and suffering, and that no damages should be awarded for loss of dependency as no dependants were pleaded in the plaint, and further that the deceased being an old man of 87 years of age was the dependant rather than the provider.

For the appellant it was submitted that sufficient evidence was adduced which proved that there was an accident involving the Respondent's motor-vehicle and that the accident was caused by a rear tyre burst and the Respondent having offered no explanation for the tyre burst, and the subsequent loss of control of the motor vehicle the accident was consistent with negligence or lack of due diligence on the part of the Respondent. The court was therefore urged to find the Respondent fully liable. The court was further urged to award damages under both the Law Reform Act (Cap. 26) and the Fatal Accidents Act (Cap 32) totaling 428,000/=. The judgment of the trial magistrate was very brief and the gist of it is as contained in the following excerpt:

"I have considered all evidence. The first issue is that of liability. The Defendant in paragraph 3 of the defence denied he was the owner of the motorvehicle and put plaintiff to strict proof thereof. However, the plaintiff did not prove that indeed the defendant was the owner of the vehicle. He sought to rely on police abstract (Exhibit I) which stated that the defendant was the owner. It has been held severally that where ownership of a vehicle is denied, the best evidence to prove ownership is a certificate of search from the Registrar of motor vehicles. Despite the denial in the defence, the plaintiff never bothered to go and get a certificate. I therefore find that he has failed to prove ownership of the vehicle. Once ownership is not proved the other issues are of no consequence. In the circumstances I find the Plaintiff has not proved his case and the same dismissed with costs"

The appellant has filed 7 grounds of appeal against the above finding. The appeal was heard ex-parte as the Respondent's advocate failed to attend court despite having been duly served.

Mr. Gathiga Mwangi who appeared for the appellant has submitted that the trial magistrate erred in rejecting the police abstract as sufficient proof of ownership of the motor-vehicle in view of the fact that there was no evidence adduced by the Respondent to rebut that evidence. Relying on **Kasereka v/s Gateway Insurance Co. Ltd. [2003] 2 E.A. 502** he submitted that the police abstract was sufficient evidence to prove on a balance of probability the ownership of the motor vehicle. Mr. Gathiga Mwangi further attacked the trial magistrate's finding that the best evidence to prove ownership of a motor vehicle is a certificate of search from the Registrar of motor vehicles. Relying on the Ugandan case of **Osapil v/s Kaddu [2000] 1 EA 193** and the Kenyan court of appeal decision in **Securicor Kenya Limited v/s Kyumba Holdings Ltd. [2005] eK.L.R.** he submitted that a Log Book or registration card is only prima facie evidence of ownership and can be rebutted through evidence.

It was further submitted that the trial magistrate erred in failing to assess the damages and also failing to address the issues raised in the submissions.

It is evident that the issue of ownership of motor vehicle KAH 264A was one of the crucial issues in the determination of this suit. The Respondent having denied the ownership of the motor vehicle in his defence and the appellant having joined issue in his reply to the defence, it was incumbent upon the appellant to prove on a balance of probability that the motor vehicle belonged to the Respondent.

The appellant sought to discharge this obligation by producing a police abstract report of the accident which showed that the Respondent was the owner of the motor-vehicle. The officer who produced the police abstract report had visited the scene and verified his information. Since no evidence was adduced on behalf of the Respondent there was no evidence to rebut the police abstract report. Prima facie therefore the evidence before the court was that motor-vehicle KAH 264A owned by the Respondent was

involved in a fatal accident wherein the deceased died.

It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. 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 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 vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle 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 KAH 264A was owned by the Respondent.

I find further that there was sufficient evidence from P.C. Stephen Kioko and the Appellant that the deceased was a passenger in motor vehicle KAH 264A and died as a result of fatal injuries sustained from the accident involving this motor-vehicle on 19th August 1997.

It was the appellant's case that the accident was caused by the negligence of the Respondent or his servant or agent. The evidence adduced shows that the deceased was a passive passenger in the motor vehicle which was involved in a self involving accident. There was evidence that there was a rear tyre burst and that the driver lost control of the motor vehicle. No evidence was adduced by the Respondent to rebut the above evidence or to explain how the accident occurred. I am satisfied that a rear tyre burst would not ordinarily cause a motor vehicle to overturn if the vehicle is being driven at a reasonable speed and with due care and attention. The evidence was sufficient to establish on a balance of probabilities that there was negligence on the part of the Respondent's driver hence his inability to control the motor vehicle.

Although there was an element of contributory negligence attributed to the deceased in the Respondent's defence no evidence was adduced in support of the same.

I am satisfied and I do find that the accident was wholly caused by the negligence of the Respondent's driver or agent for which negligence the Respondent is vicariously liable. I accordingly find the Respondent 100% liable.

With regard to the issue of quantum, the trial magistrate had the obligation to assess the damages payable notwithstanding the fact that he did not find the Respondent liable.

Having considered the age of the deceased and the authorities which were cited I find that a sum of Kshs.80,000/= would be adequate compensation for loss of life expectancy and a sum of Kshs.10,000/= for pain and suffering.

As regards the appellant's claim for damages under the Fatal accidents act for loss of dependency, the appellant did not give actual particulars of the dependants of the deceased either in his plaint or in his evidence before this court. The appellant did not adduce any evidence to show what the deceased was doing and whether he had any income or was in any way providing for the appellant or any other dependants. In the circumstances I find that this claim was not proved and therefore no damages would be awarded for loss of dependency.

The upshot of the above is that I do allow this appeal set aside the order of dismissal made on 13th February 2002 and substitute it thereof with an order for judgment in favour of the appellant as against the Respondent, in the sum of Kshs.90,000/= general damages together with costs and interest thereon from 13th February 20a02.

I further award the appellant the costs of this appeal.

Dated signed and delivered this 23rd day of November 2005.

H. M. OKWENGU

JUDGE