



REPUBLIC OF KENYA



China Road & Bridge Corporation Ltd v Thoya & another (Civil Appeal E041 of 2022) [2024] KEHC 3083 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E041 OF 2022
GMA DULU, J
MARCH 14, 2024**

BETWEEN

CHINA ROAD & BRIDGE CORPORATION LTD APPELLANT

AND

HENRY KATANA THOYA 1ST RESPONDENT

KARUMBA MBUGUA JIMMY 2ND RESPONDENT

(From the Judgment in Civil Case No. 314 of 2017 delivered on 9th September 2022 by Hon. T. N. Sinkiyian (SRM) at Voi Law Courts)

JUDGMENT

1. In a judgment delivered on 9th September 2022, the learned trial Magistrate entered judgment for the plaintiff who is the 1st respondent herein and awarded damages in the sum of Kshs. 600,000/= for pain and suffering and Kshs. 15,210/=for special damages, as well as interest and costs.
2. Dissatisfied with the decision of the trial court the appellant China Road & Bridge Corporation Ltd who was the 2nd defendant in the trial court, has come to this court on appeal through counsel Ndegwa & Sitonik Karina Associates on the following grounds:-
 1. The Honourable Magistrate erred in law and fact by holding that the police abstract dated 17.10.2017 relied on by the 1st respondent to prove ownership is conclusive proof of ownership of the grader that allegedly caused the accident despite the abstract itself indicating the owner as China Road Company.
 2. The Honourable Magistrate erred in law and in fact by holding that the 1st respondent had proved that the appellant was the legal or beneficial owner of the grader without him producing any evidence of motor vehicle search records or giving any sufficient reason for not producing the searches.



3. The Honourable Magistrate erred in law and in fact by making a wrong finding that China roads Company named as the owner of the grader No.G215DO223244/07/13 in the police abstract and the appellant China Road & Bridge Corporation Ltd separate legal entities refer to the same entity.
 4. The Honourable Magistrate erred in law and in fact by relying on the evidence of police officer Joyce Iha who was not at the scene, did not investigate the accident, and did not visit the scene of the accident at any time and without her producing photographs or sketches by the officer who visited the scene of the accident.
 5. The Honourable Magistrate erred in law and in fact by holding the appellant liable for the alleged acts and omissions of the 2nd respondent despite the respondent testifying on 13.5.2022 and explaining to court that he was not an employee of the appellant but instead he was employed by China Daliam International Corporation Group and not the appellant.
 6. The Honourable Magistrate erred in law and in fact by relying on the testimony of the 1st respondent in finding that the accident was caused by the appellant's negligence despite the 1st respondent confirming on cross-examination that he was not sure whether it was the matatu he was travelling in that hit the grader or the grader that hit the matatu.
 7. The Honourable Magistrate erred in law and in fact by awarding excessive damages in the circumstances for the injuries suffered by the 1st respondent.
 8. The Honourable Magistrate erred in law and in fact by awarding costs because no demand notice before action was issued to or served on appellant.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Ndegwa & Sitonik, Karina Advocates for the appellant, as well as the submissions filed by Shem Obongo & Company Advocates for the 1st respondent.
 4. This being a first appeal, I have to be guided by the principle that as a first appellate court, I have a duty to evaluate all the evidence on record afresh, and come to my own findings, and I am not bound to go by the findings and determinations of the trial court – see *Selle =Versus= Associated Motor Boat Company Ltd* (1968) EA 132.
 5. At the trial, the 1st respondent who was the plaintiff Henry Katuma Thoya testified as PW1 and PW2 Sgt. Joyce Iha testified on his side. On the side of the appellant DW1 Jimmy Karumbah Mbugua testified but claimed to work for China Daliam and later China Road & Bridge Corporation. The appellant China Road & Bridge Corporation have now filed this appeal against both witnesses who testified at the trial, one of whom was the plaintiff Henry Katana Thoya, and one was the machine driver Karumba Mbugua Jimmy and 1st defendant.
 6. The burden was on the 1st respondent herein Henry Katana Thoya to prove his claim against the appellant herein. Such burden is codified under Section 107, 108 and 109 of the *Evidence Act* (Cap.80).
 7. This being a civil case, the standard of proof was on the balance of probabilities which has been explained severally by courts and in this regard, it will suffice to refer to the English case of *Miller =Versus= Minister of Pensions* (1947) 2 ALL ER 372 and the Kenya case of *Ignatius Makau Mutisya =Versus= Ranchers Musyoki Muli* (2015) eKLR. In short “if the evidence is such that the tribunal can say we think it more probable than not,” then the burden has been discharged.
 8. In the present case the major bone of contention with regard to liability, was whether the accident mobile road machine belonged to China Road & Bridge Corporation Ltd, as there is a company



mentioned in the evidence on record known as China Daliam International Corporation, and the police abstract also had an entry that the owner of the mobile machine was China Road Company.

9. Indeed, the three descriptions of the owner of the mobile machine were given in evidence, with the driver DW1 Karumba Mbugua Jimmy testifying that at the time of accident he worked for China Daliam International Corporation, but later before testifying in court, worked for China Road & Bridge Corporation. He said that at the time of accident China Daliam was the contractor and owned the grader.
10. According to him, he started working for China Road and Bridge Corporation 2 years after the accident. In cross-examination however, he said that he was testifying on behalf of himself and not China Road and Bridge Corporation.
11. It is also on record that the police abstract testified to by PW2 Sgt. Joyce Iha had an entry that the mobile machine belonged to China Road Company, and that no official search from NTSA was relied upon.
12. In my view, proof of ownership of a motor vehicle is not done exclusively an official search with NTSA. Infact some vehicles might be in the process of sale and property and risk passed to a new buyer, but the official record is still in the name of the previous owner. That being so, other evidence is admissible to prove ownership of a motor vehicle.
13. I note, China Road & Bridge Corporation was specifically sued as a defendant. It was represented by able counsel. It was the 1st defendant Karumba Mbugua Jimmy who was unrepresented and clearly stated that he testified in court on his own behalf, not on behalf of China Road & Bridge Corporation.
14. In my view, with the evidence on record, the evidential burden shifted to the appellant herein to show through evidence that it had nothing to do with the ownership of the said mobile machine. They chose not to tender any evidence in court to that effect.
15. In those circumstances, I concur with the trial Magistrate's finding that the appellant herein was on the balance of probabilities, proved to be the owner and in control of the subject moving machine at the time of accident.
16. On the issue of quantum of damages awarded, in my view the learned Magistrate properly exercised the trial court's discretion in assessing damages. The awards were not inordinately high. I will not disturb the awards.
17. For the above reasons, I find no merits in the appeal. I dismiss the appeal with costs to the 1st respondent Henry Katana Thoya to be paid by the appellant.

Dated, signed and delivered this 14th day of March 2024 in open court at Voi.

GEORGE DULU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Alfred – Court Assistant



Mr. Mwai for the appellant

Ms. Kikuyu for 1st respondent

