Munuku v Abdulhamid & 2 others (Civil Appeal 12 of 2023)
[2024] KEHC 7014 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7014 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 12 OF 2023

FN MUCHEMI, J

JUNE 14, 2024

BETWEEN

ANNE WANGARI MUNUKU ..... APPELLANT

AND

ESMAIL ABDULSATTAR ABDULHAMID ..... 1ST RESPONDENT

CHEGE AHMED GIKERU ..... 2ND RESPONDENT

DAVID NJUGUNA CHEGE ..... 3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. C. A. Otieno-Omondi (SPM) delivered on 18th January 2022 in Thika CMCC No. 198 of 2019)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Principal Magistrate in CMCC No. 198 of 2019 in a claim of damages for injuries sustained in a road traffic accident involving motor vehicle registration number KBW 741C and KAZ 418A. The court below found that the appellant failed to discharge the required burden of proof and dismissed the suit against the 1st and 2nd respondents. The court found the 3rd respondent 100% liable and awarded the appellant special damages of Kshs. 416,360/- plus costs and interest.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-

    a. The learned magistrate erred in fact and law in dismissing the suit against the 1st respondent citing that a copy of motor vehicle records produced in court did not prove that he was the owner of the vehicle as at the time of the accident.

b. The learned magistrate's finding on liability was erroneous in law and fact.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the learned trial magistrate erred in fact and in law in holding that the motor vehicle records adduced in court were not sufficient proof of ownership of the third party motor vehicle that was blamed for the accident. In arriving at that conclusion, the learned magistrate in her judgment, determined that the motor vehicle records that had been produced in 2018 had no way of showing that the 1st defendant was the owner in the year 2016 when the accident occurred. The appellant relies on Section 8 of the *Traffic Act* and the cases of Nancy Ayemba Ngana vs Abdi Ali (2010) eKLR; P.N.M. & Another (the legal personal representative of the Estate of L.M.M) vs Telcom Kenya Limited & 2 Others (2015) eKLR; Benard Muia Kilovoo vs Kenya Fresh Produce Exporters (2020) eKLR and Abdi Ali Dere vs Firoz Hussein Tundal & 2 Others [2013] eKLR and submits that the motor vehicle record has an endorsement from NTSA on the upper part confirming that the 1st defendant was the owner as at 4/7/2016 and their stamp impression had been countersigned. The appellant argues that the trial magistrate erred in ignoring the said evidence and choose to go by the date of the preparation of the record which was 11/12/2018. That endorsement coupled with the information in the investigation report that the 1st respondent was the registered owner of the vehicle was unassailable/unrebutted.

The Respondents' Submissions

5. The respondents submit that the learned magistrate dismissed the suit as against the 1st and 2nd respondents and found the 3rd respondent liable. Consequently, the appellant ought to execute the judgment against the 3rd respondent. The 1st & 2nd respondents submit that it is not clear how the appellant is unable to execute the judgment given is in her favour.

Issue for determination

6. The main issue for determination is whether the magistrate erred in finding the 1st and 2nd respondents not liable and instead found the 3rd respondent solely liable for the accident.

The Law

7. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

8. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though

it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

9. It is trite law that the duty of this appellate court can be stated in three complementary principles:-

   a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

   b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

   c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appellant proved her case on a balance of probabilities as against the 1st & 2nd respondents.

10. This degree of proof is well enunciated in the case of Miller vs Minister of pensions [1947] cited with approval in D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR where the court stated:-

> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepodence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

11. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

12. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

13. The facts presented before the court below can be briefly stated. It is not in dispute that an accident occurred on 4/7/2016 between motor vehicle registration number KBW 741C and KAZ 418A. The appellant sued the 1st respondent as the registered owner of motor vehicle registration number KAZ 418A and the 2nd respondent as the beneficial owner. The appellant called PW5 an investigator with CIC Insurance to trace the owner of motor vehicle registration number KAZ 418A and to establish his financial status. The witness testified that they traced the owner of the said motor vehicle as the 1st respondent at the time of the accident and prepared a report. On cross examination the witness said

that the tracing report did not mention the names respondents as having any involvement in the said accident. The investigator identified the owner of the said motor vehicle as David Njuguna Chege. The witness further testified that they filed a copy of records which showed the ownership of the said motor vehicle as at 11/12/2018 despite the fact that the accident occurred on 4/7/2016. PW3 told the court that the copy of records indicated that the 1st respondent was the owner of the said motor vehicle as at 11/12/2018 which was two years after the said accident. The copy of record did not bear the name or particulars of the 2nd respondent.

14. The 2nd respondent in his defence testified that motor vehicle registration number KAZ 418A was not his and neither did he know the 1st and 3rd respondents.

15. Section 8 of the *Traffic Act* provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

16. Proof of ownership was discussed in the case of Thuranira Kaururi vs Agnes Mucheche (1997) eKLR where the Court of Appeal stated:-

> 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.

17. The copy of records on record shows that motor vehicle registration number KAZ 418A was owned by the 1st respondent as at 11th December 2018, the accident having occurred on 4th July 2016. The copy of records was obtained about two years after the accident. Therefore the copy of records does not show who owned the vehicle as at the date of the accident on 4/7/2016. As such, appellant failed to prove that the 1st respondent was the registered owner of motor vehicle registration number KAZ 418A at the date of the accident. The magistrate could therefore not hold the 1st respondent vicariously liable for the actions of the 3rd respondent.

18. As for 2nd respondent, the appellant sued him as the beneficial owner of the said motor vehicle. The issue of various ownerships was discussed in the case of Charles Nyambuto Mageto vs Peter Njuguna Njathi [2013] eKLR where it was held as follows:-

> From the interpretation of Section 8 of the *Traffic Act* as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The court recognizes that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract report, even as held in Thuranira and Mageto case that the police abstract is not, on its own, proof of ownership of a motor vehicle. If however, there is no evidence to corroborate the contents of the police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership.

19. PW3 told the court on cross examination that the investigator identified the owners of motor vehicle registration number KAZ 418A as David Njuguna Chege and Ahmed Chege. PW5, the investigator, produced the investigation report to the effect that the 2nd respondent was the beneficial owner of the subject motor vehicle having bought it from the 1st respondent before the occurrence of the accident. Further the particulars of the insurance indicated the 2nd respondent took out an insurance

policy for the respective motor vehicle from Directline Assurance Limited. The 2nd respondent in his defence denied the ownership of the said motor vehicle as well as taking out any insurance cover for it. The appellant was therefore obligated to give evidence linking the 2nd respondent with the beneficial ownership of the said motor vehicle. From the evidence in respect of the date of the accident. The appellant did not produce any evidence from Directline Assurance Limited showing that the 2nd respondent had insured the said motor vehicle as at the time of the accident. Furthermore, although the police abstract bore the insurance details of motor vehicle registration number KAR 418A, the police did not give the name of the 2nd respondent as the policy holder. The appellant further failed to show that the 1st respondent sold the said motor vehicle to the 2nd respondent before the occurrence of the accident as alleged in the report. As such, the appellant did not provide any evidence linking the 2nd respondent with beneficial ownership of the motor vehicle registration number KAR 418A.

20. Section 107 (1) of the *Evidence Act* provides that he who alleges must prove. The appellant, therefore, had a duty to prove on the balance of probabilities that the 1st and 2nd respondent were either registered or beneficial owners of vehicle registration number KAR 418A at the time of the accident which he failed to do. As such, the magistrate in the court below cannot be faulted in her finding on liability.

Conclusion

21. Consequently, I reach a finding that the appellant has failed to establish any of his grounds of appeal. Indeed, the judgment of the magistrate in my view, was based on the evidence on record.

22. It is my finding that this appeal has no merit and it is hereby dismissed with costs to the respondents.

23. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE