



Car & General (Trading) Limited v Karisa (Suing on their and on behalf of the Late Karani Kazungu Fondo) & another (Civil Appeal E143 of 2023) [2024] KEHC 8770 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E143 OF 2023
M THANDE, J
JULY 19, 2024**

BETWEEN

CAR & GENERAL (TRADING) LIMITED APPELLANT

AND

GLADYS KAREMBO KARISA (SUING ON THEIR AND ON BEHALF OF THE LATE KARANI KAZUNGU FONDO) 1ST RESPONDENT

KAZUNGU FONDO MWANDAMA (SUED AND ON BEHALF OF THE LATE CHARO KAZUNGU FONDO) 2ND RESPONDENT

(Being an Appeal from the decision of Hon. Olivia Koranje, Resident Magistrate delivered on 28.8.23 in Mariakani SPMCC No. E169 of 2022)

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. Olivia Koranje, Resident Magistrate delivered on 28.8.23 in Mariakani SPMCC No. E168 of 2022. By a plaint dated 26.9.22, the 1st Respondent instituted a suit in the trial court against the Appellant and the 2nd Respondent. She sought both general and special damages arising from a road traffic accident which occurred on 19.7.22 along Nairobi-Mombasa Highway at Devki area. In the plaint, the 1st Respondent averred that Charo Kazungu so negligently managed, controlled and/or drove motorcycle registration number KMFU 012U on which Karani Kazungu Fondo (the deceased) was on board, causing it to collide with motor vehicle KCZ 903D occasioning fatal injuries to the deceased.
2. In its statement of defence dated 1.11.2022, the Appellant denied liability and ownership of the motorcycle and averred that it had sold the same to Evaglad Motors. A third party notice was served upon Evaglad Motors but it never entered appearance or file a defence.



3. The 2nd Respondent did not enter appearance or file a defence and judgment was entered against him on 2.11.22.
4. The matter proceeded to hearing and at the conclusion, the trial Magistrate entered judgment for the 1st Respondent against the Appellant and the 2nd Respondent jointly and severally in the following terms:
Liability 100%
Pain and suffering Kshs. 30,000.00
Loss of expectation of life Kshs. 100,000.00
Loss of dependency Kshs. 2,166,206.40
Total Kshs. 2,296,206.40
5. Being aggrieved, the Appellant filed the Appeal herein raising the following grounds:
 1. The Honourable Magistrate erred in law and fact in holding the appellant 100% liable jointly and severally with the 2nd Respondent against the weight of the evidence placed before her.
 2. The Honourable Trial Magistrate erred in law and fact in failing to appreciate the finding that the Appellant was not the insured of the motor cycle registration number KMFU 012U, and neither did it have the legal and beneficial ownership, interest, use or management of the said motor cycle registration number KMFU 012U at the time of the accident.
 3. The Honourable Magistrate erred in principle and fact in failing to hold the 2nd Respondent who was noted on Police Abstract as the owner of the motor cycle registration number KMFU 012U singly liable for the accident.
 4. The Honourable Magistrate erred in law and fact in failing to consider the express admission and evidence of the only eye witness Pw 3 absolving the rider of motor cycle registration number KMFU 012U of any blame and thereby arriving at a wrong decision.
 5. The Honourable Magistrate erred in law and fact in wholly basing her findings on probability and chance instead of on principle and law with respect to who was to blame for the accident.
 6. The Honourable Trial Magistrate erred in law and fact in failing to apply the provisions of Section 8 and 9 of the [Traffic Act](#) Chapter 403 Laws of Kenya and in finding that the Appellant had failed to establish that the motor cycle registration number KMFU 012U had been sold to the 2nd Respondent at the time of the accident.
 7. The Learned Trial Magistrate failed to appreciate the evidence and submissions before him that that appellant had proved her case on a balance of probability and was not liable for the accident.
 8. The Learned Magistrate erred in law and in fact and misdirected herself as to the law on quantum of damages and thereby awarded excessive and punitive damages contrary to the law, case law and expectation.
6. The Appellant prayed:
 - a. The Appeal be allowed.
 - b. The Judgment of the trial court in Mariakani SPMCC E169 of 2022 delivered on 28/8/23 be set aside and substituted with the Judgment of this Court.



- c. The costs of the Appeal be granted to the Appellant.
7. Being a first appeal, this Court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123). The Court is also guided by the Court of Appeal in the case of *Samuel Kalomit Murkoven v Telkom Kenya Limited* [2017] eKLR, where it stated:

Our role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach our own conclusion. However, we are conscious of the fact that unlike the trial court, we did not have the benefit of observing the witnesses as they testified. Accordingly, we ought not to interfere lightly with findings of fact by the trial court. This much was appreciated by this Court in *J. S. M. v E. N. B.* [2015] eKLR -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

8. Parties filed their written submissions which the Court has duly considered.
9. The Appellant faults the trial Magistrate for finding that it owned the motorcycle given that there was sufficient proof that at the time of the alleged accident, that it had sold the same to a third party. It was contended that the documents produced by the 1st Respondent namely the police abstract indicated that the motorcycle was owned by Charo Kazungo Fondo while the copy of records indicated that the same owned by the Appellant. Further that the Appellant exhibited a delivery note/invoice indicating that the motorcycle had been sold to Evaglad Motors. The Appellant further submitted that it is within public knowledge that it is in the business of sale of a variety of motorized units and that it is required by law to have each imported unit registered in its name before transfer of ownership to local purchasers. The Appellant argued that the trial Magistrate erred in failing to consider the contradictory evidence on ownership and finding that the owner of the motorcycle was as indicated in the copy of records yet the Appellant had through evidence, rebutted the presumption of ownership as provided under Section 8 of the *Traffic Act*. The Appellant thus submitted that in light of the foregoing, the suit against it ought to have been dismissed.
10. For the 1st Respondent, it was submitted that the police abstract has been contradicted by the copy of records of the motorcycle which shows that the Appellant is the sole owner of the same. It was contended that there was no evidence of sale of the motorcycle to Evaglad Motors. Further that the Appellant’s witness stated in cross examination that Evaglad Motors is the Appellant’s agent. As such, it was argued, Evaglad Motors were not buyers of the motorcycle but were acting on the Appellant’s instructions as the principal which retained ownership of the same. Moreover that the Appellant should not drag the 1st Respondent into its relationship with Evaglad Motors, but that having issued a 3rd party notice, should settle the claim and proceed to claim indemnity from Evaglad Motors. It was added that the police abstract cannot override the records from the Registrar of Motor Vehicles without any further evidence. According to the 1st Respondent, the trial Magistrate correctly found the Appellant and the 2nd Respondent jointly and severally liable.



11. In her judgment, the trial Magistrate noted, and correctly so, that the invoice that the Appellant relied on did not indicate that the Appellant had received payment for the sale of the motorcycle or the person who took delivery of the same. She thus found that the invoice was not proof of sale of the motorcycle.

12. In the case of *E.P. Communications Limited v East Africa Courier Services Limited* [2019] eKLR, cited by the trial court, Gikonyo, J. observed as follows:

The other invoices dated 23/20/08 and 20/08/09 were not supported by any delivery note or notes to show receipt of the goods stated therein. The Appellant may have supplied the goods, but courts of law act on hard evidence not sympathy or speculation. In the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered.

13. I concur with the learned Judge and find that there is no evidence of payment and delivery of the motorcycle. As such, the invoice relied on by the Appellant being unsupported cannot be proof of sale of the motorcycle to Evaglad Motors.

14. The 1st Respondent's case is that the copy of records from the Registrar of Motor Vehicles indicates that the Appellant is the owner of the motorcycle and that it is vicariously liable. Further that the Appellant did not adduce any evidence to show that the rider of the motorcycle was not its agent or employee.

15. In the case of *Thuranira Karauri v. Agnes Ncheche* [1997] eKLR, the Court of Appeal had this to say about ownership of a motor vehicle:

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."

16. The Appellant submitted that the trial Magistrate erred in relying on the police abstract and without corroborating evidence, to determine ownership of the motor vehicle yet the certificate from the Registrar of Motor Vehicles indicated that the same was owned by the 2nd Respondent.

17. In her judgment, the trial Court citing Section 8 of the *Traffic Act* had this to say on the ownership of the motor vehicle:

In the instant case, the motor vehicle copy of records shows that the registered owner of the suit motor vehicle at the time of the accident was the 2nd Defendant. Therefore, pursuant to Section 8 of the *Traffic Act*, the 2nd Defendant would be deemed to be the owner of the suit motor vehicle unless the contrary was proved.

18. Section 8 of the *Traffic Act* provides:

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

19. The law is that a record from the Registrar of Motor Vehicles showing the registered owner of a motor vehicle shall be deemed to be evidence of such ownership. This evidence is however not conclusive and may be rebutted by other evidence showing the contrary.



20. In the case of *Nancy Ayemba Ngaira v Abdi Ali* [2010] eKLR, Ojwang, J. (as he then was stated:

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question.”

21. Flowing from the cited decision, it can be seen that the official record from the Registrar of Motor Vehicles is not conclusive proof of ownership of a vehicle. The learned Judge gave examples of categories of ownership as have arisen in judicial practice including actual ownership, beneficial and possessory ownership. Indeed, Section 8 of the Act recognizes that a different person other than the registered owner could be the owner of a motor vehicle. To this end, the words unless the contrary is proved, are instructive. Evidence can be led to prove that the person indicated as the owner of a motor vehicle in the records is not actually the owner thereof.

22. In the *Joel Joel Muga Opija v East African Sea Food Limited* [2013] eKLR, the Court of Appeal stated:

In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.

23. What comes out from the above passage is that whereas the best proof of ownership of a motor vehicle is a document from the Registrar of Motor Vehicles, where a police abstract and its production is not challenged, its contents cannot later be denied. The respondent in that case did not rebut the appellant's evidence regarding the contents of the police abstract or to challenge or even to counter that evidence.

24. The police abstract exhibited by the 1st Respondent indicates that Charo Kazungu Fondo (deceased) was the owner of the motorcycle. Further, the statutory notice addressed to the G. A. Insurance Limited, the 1st Respondent's advocates referred to Charo Kazungu Fondo (deceased) as the insured.

25. Black's Law Dictionary Tenth Edition defines an insured as
Someone who is covered or protected by an insurance policy.



26. Had Charo Kazungu Fondo (deceased) been the Appellant's agent or employee as the 1st Respondent would have this Court believe, surely the insurance policy would not have indicated that he was the insured. He clearly took out the insurance policy to be covered or protected for such eventuality as the liability in the present case.
27. The Appellant did in its statement of defence deny ownership of the motorcycle. While I concur with the trial Magistrate that an invoice is not evidence of ownership, beyond the invoice, there is the police abstract, an official government document indicating that the owner of the motorcycle is Charo Kazungu Fondo (deceased). The contents of the police abstract were not challenged by the 1st Respondent. This is no doubt why they named his legal representative as the 1st Defendant in the suit in the court below. Had Charo Kazungu Fondo (deceased) been the Appellant's agent or employee as the 1st Respondent would have this Court believe, surely, he would not have been the named insured in the insurance policy. On a balance of probabilities therefore, I find that the motorcycle was no longer in the possessory ownership of the Appellant.
28. The police abstract not being challenged, the presumption in Section 8 of the *Traffic Act* that the Appellant being the person in whose name the motor cycle is registered, is the owner of thereof has been rebutted. Thus, the Appellant not being the owner of the motorcycle is not liable for the accident or the injuries sustained by the deceased. As such, it would be unjust to condemn the Appellant to bear liability jointly and severally with the 2nd Respondent.
29. Having found as I have, it follows that it is unnecessary to delve into the issue of quantum of damages.
30. In light of the foregoing, the judgment against the Appellant cannot stand and the Appeal succeeds. The judgment of the trial court in so far as it relates to the Appellant is hereby set aside. The Appellant shall have costs of this Appeal.

DATED SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF JULY 2024

M. THANDE
JUDGE

