



REPUBLIC OF KENYA



KENYA LAW
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**Masinde v Wanunda (Civil Appeal E021 of 2021)
[2023] KEHC 17246 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E021 OF 2021**

WM MUSYOKA, J

MAY 12, 2023

BETWEEN

JOHN MASINDE APPELLANT

AND

PAMELA AKINYI WANUNDA RESPONDENT

*(Appeal from judgment and decree of Hon. L Ambasi, Chief
Magistrate, CM, in Busia CMCCC No. 74 of 2017, of 10th June 2017)*

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation arising out of the death of Vincent Mukwambo Wanunda, to be referred hereafter as the deceased, following a road traffic accident on 2 August 8, 2016, along Butula-Nambale road. The deceased was riding a motorcycle, and was knocked down by motor vehicle registration mark and number KBP 027G, said to have belonged to the appellant, and liability was attributed to the appellant on account of negligence. The appellant filed a defence, denying the accident, and everything else pleaded in the plaint.
2. A trial was conducted. On liability, the court held the appellant 100% liable. On quantum, the court found in favour of the respondent, and awarded Kshs. 10, 000.00 for pain and suffering and Kshs. 100, 000.00 for loss of expectation of life, under the *Law Reform Act*, Cap 26, Laws of Kenya; Kshs. 1, 443, 864.00 for loss of dependency, under the *Fatal Accidents Act*, Cap 32, Laws of Kenya; and Kshs. 73, 895.00 being special damages.
3. The appellant was aggrieved, hence the instant appeal. The appeal has raised several grounds: that the cause of death was not determined; that the case had not been proved on balance of probability; that liability was not at 100%; that burden of proof was shifted to the appellant; that a police abstract is not proof of ownership of a motor vehicle; that the judgment was bad; and that the judgment was contrary to the weight of evidence.



4. On November 28, 2022, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions.
5. The appellant collapsed his grounds to 2: proof of ownership of the motor vehicle and cause of death. On proof of ownership of a motor vehicle, he cited [*Joel Muga Opinja v East African Sea Food Limited*](#) [2013] eKLR (Onyango-Otieno, Azangalala & Kantai, JJA) and [*Thuranira Karauri v Agnes Nchebe*](#) [1997] eKLR (Kwach, Pall, JJA & Bosire, AJA), where the court had stated that ownership of a motor vehicle is proved by production of a document from the Registrar of Motor Vehicles. On cause of death, he submits that as no postmortem report was produced, the cause of death was unknown, and cited [*Becky Jemutai Chesire v Vernon Oyaro Mochache & another*](#) [2016] eKLR (Janet Mulwa, J).
6. On her part, the respondent argues 3 grounds: on ownership of the accident vehicle, proof of cause of death and the award being excessive and erroneous. On proof of ownership of a motor vehicle, she cites Wellington Ng'ang'a Muthiora v [*Akamba Public Road Services Limited & another*](#) CA No. 260 of 2004 and [*Superfoam Ltd & anor v Gladys Nchororo Mbero*](#) [2014] eKLR (Makau, J), that a police abstract was adequate proof of ownership of an accident vehicle, so long as no rebuttal evidence is presented by the opposing party. On proof of cause of death, she submits that she presented evidence that the deceased died as a result of a motor accident, and that all what the trial court needed to do was to evaluate and consider the totality of the evidence. On whether the award was excessive, she cites [*John Kipkemboi & another v Morris Kedoli*](#) [2019] eKLR (Musyoka, J) and [*Charles Oriwo Odeyo v Appollo Justus Andabwa & another*](#) [2017] eKLR (Riechi, J), for the submission that award of damages is subject to judicial discretion, guided by previous awards.
7. The appeal herein is brought at the instance of the appellant. He has reduced his grounds to 2, going by his submissions, and I shall confine determination of this appeal to the 2 grounds, on the presumption that, by submitting only on the 2, the appellant has abandoned the other grounds.
8. The first is on proof of ownership of an accident vehicle. The appellant relies on section 8 of the [*Traffic Act*](#), Cap 403, Laws of Kenya, which states that the person under whose name a motor vehicle is registered, is deemed to be the owner of the vehicle, unless the contrary is proved. Section 8 makes that presumption rebuttable. See [*Anthony Kuria Wangai v Guardian Bank Limited*](#) [2021] eKLR (Kasango, J) and [*Nancy Ayemba Ngaira v Abdi Ali*](#) [2010] eKLR (Ojwang, J). However, section 8 of the [*Traffic Act*](#) is not useful in resolving question of proof of ownership. It is more useful in a contest between the registered owner of the vehicle and beneficial owners of the vehicle, or where such a scenario presents itself. That issue does not arise here.
9. Production of documents from the registry of motor vehicles is superior evidence for the purpose of proving ownership of a motor vehicle. See [*Nancy Ayemba Ngaira v Abdi Ali*](#) (2010) eKLR (Ojwang, J). However, it is not the only evidence. In [*Fredrick Odongo Otieno v Al-Hussain Motors Ltd*](#) [2020] eKLR (Aburili, J), [*Bernard Muia Kilovoo v Fresh Produce Exporters*](#) [2020] eKLR (Gitari, J) and [*Cyprian Sibwoga Mokurumi vs. Richard Mutwol Kipyegon*](#) [2021] eKLR (Ng'etich, J), it was stated that the police abstract was good enough evidence on ownership of an accident vehicle, unless it was challenged by some other evidence.
10. In the instant case, the respondent did not produce records from the registry of motor vehicles. Instead, she produced a police abstract, to prove the accident, and ownership of the motor vehicle. According to that police abstract, the owner of the accident vehicle was the appellant herein. The police abstract was produced by the respondent. She stated, on cross-examination, that she did not know the owner of the vehicle. In defence, the appellant testified that he was not the owner of the vehicle, and that he was not aware that it had an accident. I have noted that the appellant has complained that the trial court had shifted burden of proof to him. Yes, indeed, the evidential burden was shifted to him, quite



properly. Once the police abstract was placed on record, showing him to be the owner of the motor vehicle, the burden shifted to him, to disprove that. The police abstract is a document generated by the police, based on material on the motor vehicle itself. There is an insurance sticker which shows the insured owner of the vehicle, and in this instance, that insured owner appeared, on the insurance sticker, as the appellant. Burden shifted to him to challenge that evidence, either by demonstrating that he was not the person named in the police abstract, or otherwise. He did not, and the case, as presented by the respondent, stood. The trial court was not in error.

11. On the second ground, proof of cause of death, the case by the respondent is that the death was as a result of the accident. The certificate of death indicates that the deceased died on August 31, 2016, while the police abstract indicates that the accident occurred on August 28, 2016. The cause of death, according to the certificate of death, is indicated as VCA/spinal injury. PW2 testified as an eyewitness, according to his witness statement, he saw the accident happen. The deceased was knocked down by the accident vehicle and sustained serious injuries. The appellant argues that the cause of death was not established, as no post mortem report was produced, and there was no evidence that the death of the deceased had anything to do with the accident.
12. There is evidence, from the police abstract and PW2, that the road traffic accident happened, on August 28, 2016, and it involved the deceased. According to the certificate of death, the death occurred 3 days after that accident, and the cause of death was a spinal injury, among others. The respondent discharged her evidential burden, that an accident occurred involving the deceased, he sustained serious injuries, and he died 3 days thereafter, on account of those injuries. The evidential burden thereafter shifted to the appellant to disprove that, by establishing that the cause of death had nothing to do with the road accident. The appellant did not lead any evidence to challenge or contradict or counter that. The trial court was not in error in finding the appellant liable for causing the death.
13. In the end, I find no merit in the appeal, and I hereby dismiss it. The respondent shall have the costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 12TH DAY OF MAY 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Makokha, instructed by JP Makokha & Company, Advocates for the appellant.

Mr. Mukisu, instructed by Mukisu & Company, Advocates for the respondent.

