



**Matayo v Obongita (Civil Appeal 29 of 2018)
[2023] KEHC 22551 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 29 OF 2018
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

LEONARD BENARD MATAYO APPELLANT

AND

ASMINI OKOKHA OBONGITA RESPONDENT

JUDGMENT

1. This Appeal is in respect to the determination of liability for a road accident.
2. By the Plaint filed on 13/3/2014 in Mumias Senior Principal Magistrate's Court Case No. 77 of 2014 through Messrs Makokha Oaka & Co. Advocates, the Respondent alleged that the Appellant was the owner of the motor cycle registration number KMCK 102C TVS Star, that on 14/09/2012 the Respondent was walking along the Matongo-Ogalla murrum road near Manani area when the said motor cycle lost control and knocked and/or hit the Respondent occasioning her serious injuries, namely pain in the neck, head, chest and shoulder and that the accident is attributed to the dangerous manner in which the Appellant managed or controlled the motor cycle. The respondent therefore sought general damages, special damages of Kshs 3,600/-, costs of the suit and interest.
3. The appellant filed his Statement of Defence on 27/7/2014 through Messrs Marisio Luchivya & Co. Advocates. He denied the allegations made in the Plaint and including negligence on his part. In the alternative, he alleged contributory negligence on the part of the Respondent.
4. The matter then proceeded to trial. 4 witnesses testified for the plaintiff while the appellant was the sole witness for the defence.

Prosecution evidence

5. The Respondent gave evidence as PW1. She stated that on 14/9/2012, she was walking from Ogalla to Matungu, also known as Emanani – Matungu, a motor-cycle moving in a zig-zag manner appeared in



front of her, she was on the left side on the way to Matungu and the motor cycle was moving towards Ogallo, it moved where she was and hit her on the left-hand side then again on the right-hand side, she suffered injuries on the chest, shoulder and on the left hand, she was treated at Matungu hospital and went for an X-ray at St. Mary's Hospital Mumias, she was later examined by one Dr. Andai who issued her with a medical report. She further stated that she obtained a P3 Form and abstract from the police. He stated that the appellant was the owner of the motor-cycle and that her Advocate issued a demand letter to the appellant. She blamed the Appellant for riding the said motor-cycle carelessly and at a high speed and stated that although she was now well, she could not carry out heavy work due to the chest problem.

6. In cross-examination she admitted that she could not tell who was riding the motor-cycle at the time. She then stated that the motor cycle was from Matungu heading to Ogallo and that she was from Ogallo heading towards Matungu, she went off the road but the motor-cycle followed her and hit her. She conceded that the police abstract does not indicate whether any criminal or traffic case was commenced against the appellant and that there was nothing to show that the motor-cycle was owned by the appellant, she obtained a search report and it indicated that the Appellant was the owner of the motor-cycle.
7. PW2 was one Musa Asmini Were. He testified that he knew the Respondent, on 14/9/2012 he was going to Matungu when on the way to Ogallo, about 50 metres away he saw a motor-cycle which had carried one woman, she was knocked on that side, the woman was from Ogallo to Matungu, the registration number of the motor cycle was KMCK 102C TVS Star, they took her to Matungu and he then came back to report to the police.
8. PW3 was one Hannington Wafula Soita. He testified that he is a clinical officer at matungu sub-county hospital. he confirmed that the respondent was attended to at the facility and that the Respondent suffered soft tissue injuries and also had cut wounds.
9. PW4 was one PC Freda Odada. She testified that he is attached at Mumias Police Station performing maintenance of traffic cases returns at the station. He referred to the police abstract and confirmed that a report was received there for an accident that occurred along Matungu-Ogolla murrum road on 14/9/2012. She stated that the motor-cycle registration number was KMCK 102C and that it belonged to the Appellant, it was not insured at the time of the accident, the motor-cycle owner had not been charged in Court, in the police abstract it is the rider who was blamed, not the Respondent. She conceded that she did not have the traffic file with him. In cross-examination, she conceded that she was not the investigating officer in the matter and that the investigating officer was now stationed at Kisumu Police Station. He conceded that he did not have the station map in Court and could not state the position of the impact. He stated that the murrum was about 7-8 metres wide, one could have time to move away in the event of danger on the road although it will depend on the speed of the vehicle. He confirmed that he looked at the Occurrence Book (OB) and that it does not indicate whether or not the motor-cyclist was arrested, the person who reported was the Respondent, the report was made on 17/9/2012 and the Respondent informed the police that she knew the rider.
10. PW5 was Dr. Charles Andai. He confirmed that he examined the Respondent after she was involved in a road accident. He stated that the Respondent suffered blunt injuries on the neck, chest and shoulder and that she had tenderness on the right side of the leg and on the right shoulder. He stated that the Respondent had pain on the neck, she sustained moderate serious injuries, the injuries were fresh and painful and he expected them to heal after one year from the time of examination. He then produced the medical report and stated that he was paid Ksh 3,500/= the receipt whereof he also produced. He also testified that he completed the P3 Form which he then also produced.



Defence evidence

11. The Appellant testified as DW1. He adopted his witness statement as his evidence-in-chief and denied that the motor-cycle in question belonged to him. He claimed that he does not even know how to ride a motor-cycle, that on the material date he was at home, that he was never arrested with a motor cycle and that he comes from the same area as the Respondent. In cross-examination, he stated that he was never brought to the police station. He then produced a copy of a motor-cycle ownership report which indicated that the same was registered in the name of “Car & General Kenya Ltd”. In re-examination, he stated that he is 84 years old.

Judgment of the trial Court

12. At the end of the trial, the Learned Magistrate delivered his Judgment on 19/03/2018. He apportioned liability at 100% against the appellant and awarded Judgment in favour of the Respondent as follows:

General damages	Ksh 120,000
Special damages	Ksh 11,850
Total	Ksh 131,850

13. The Appellant was also awarded interest and costs of the suit.

Grounds of Appeal

14. The appellant was aggrieved by the said decision and filed this appeal on 3/4/2018. He preferred the following 4 grounds:
- i. That the learned honourable magistrate erred in law and fact in finding and holding that the Respondent had proved her case against the Appellant.
 - ii. That the learned honourable magistrate misdirected himself in the appraisal of the evidence that the authenticity of the police abstract had been proved.
 - iii. That the learned honourable magistrate failed to appreciate the fact that the Appellant proved he was not the owner of motor cycle registration no. KMCK 102 C TV Star when he proved a copy of records from authority in charge of motor vehicle registration.
 - iv. That the learned Honourable Magistrate introduced extraneous facts in his judgment which was the basis of the judgment the particular extraneous fact being that the Respondent was a pillion passenger at the time of occurrence of the alleged accident which fact was never mentioned by any of the witnesses.
15. It was then directed that this Appeal be canvassed by way of written submissions. Upon changing Advocates, the Appellant filed his Submissions on 21/1/2020 through the new Advocates, Messrs Malalah & Co. On her part, the respondent did not file any submissions.

Appellant’s submissions

16. Counsel for the Appellant submitted that the Respondent needed to prove that either the Appellant was the rider of the motor-cycle or that the Appellant was the owner thereof in which case the Appellant would be vicariously liable. Counsel further submitted that during cross-examination, the



Respondent specifically stated that that she could not tell who was riding the motor-cycle at the time of the accident, this is despite the fact that the Appellant is well known to the Respondent and would have been easily recognizable, she categorically stated that she did not know the person who was riding the motor-cycle and did not even give a description of the person responsible, without her testimony of who the rider was the Court was left with only speculations and hearsay evidence. Counsel further argued that when asked who the motor-cycle belonged to, the Respondent stated that she had no way of proving who owned it, he who alleges must provide evidence to support his allegations, the Respondent's only alleged evidence of ownership is a police abstract which does not indicate who owned the motor-cycle, without proof of ownership, the Respondent failed to prove that that the Appellant was vicariously liable for the accident.

17. Counsel further submitted that the Appellant stated that he was 84 years and not only did he not own a motor-cycle but also, he has never learned how to ride one, that he provided the Court with a copy of records indicating that the motor cycle in question was owned and registered in the name of "Car General Kenya Ltd". Counsel then cited section 8 of the *Traffic Act* which provides that "a person in whose name a vehicle is registered, shall unless the contrary is proved, be deemed to be the owner of the vehicle", the copy of records produced in Court was not disputed and it is the only indication as to who owned the motor-cycle and who should have therefore been the correct defendant in the case.
18. Counsel added that without proof of ownership, the only option for the case to succeed was if the court believed the narrative put forth by the Respondent. However, an exhaustive look at the evidence indicates that the Respondent suffered very minor injuries, if any, there were no bruises, nor cuts nor broken bones, the medical evidence put forth does not support the narrative that the Respondent was hit by a fast approaching motor cycle at full speed, she sustained close to no injuries, on a balance of probabilities, this is highly, if not entirely impossible, the only other person who witnessed the accident was PW2 who testified that he saw a motor cycle which had carried one woman and that she was knocked on that side", PW2 is clearly an unreliable witness as he outrightly contravened the evidence of the Respondent, none of the witnesses was able to give clear details on how the accident occurred, critical details like what part of the motor-cycle hit the Respondent were left out, the evidence of PW2 who was supposed to be the corroborating witness should be struck out as its is highly unreliable and gives details of a completely different incident, without corroboration, the testimony of neither of the witnesses can be relied upon, without proof that the Appellant was the rider or that he owned the motor-cycle, the Respondent failed to prove either direct or vicarious liability against the Appellant.
19. Counsel submitted further that the trial Magistrate introduced extraneous facts in his judgment, the particular extraneous fact being that the Respondent was a pillion passenger at the time of the accident which fact was never mentioned by any of the witnesses. Counsel added that from a look at the record of appeal and the judgment, one can clearly discern that the learned Magistrate used a completely different set of facts to arrive at the judgment, in his judgment the Magistrate refers to a case where a lady was a pillion passenger on motor-cycle that was hit from behind by a matatu, on page 1 and 2 of the judgment, the Magistrate references the correct case in his factual background but at page 3 he refers to a completely new set of facts and a different Plaintiff altogether. According to Counsel, this is not a typographical error or an error on the part of the Appellant. Counsel submitted that human is to error, especially when the facts of cases are very similar, that the footnotes on all pages refer to "CC 77 of 2014" and the page numbers flow. While praising the learned Magistrate for being known for having the knack for recalling cases and facts on his fingertips even without referring to any notes, Counsel maintained that on this occasion, the Magistrate mixed up facts and therefore gravely erred. According to Counsel, this explains how he found the Appellant to be 100% liable in a case where the Appellant was neither identified as the rider nor the owner of the motor-cycle.



Analysis & Determination

20. Being a first appeal, this Court applies the now settled principles set out in many cases. For instance, in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123, the following was stated:

“... 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.”

21. Upon perusing the record and the Submissions presented, my view is that the broad issue that arises for determination is the following;

Whether the trial Court was justified in finding the Appellant liable for the accident and entering Judgment against him.

22. I now proceed to analyze the said issue.

23. As stated above, the appeal is solely on the issue of liability. The appellant has argued that the trial Court misdirected itself by apportioning liability against the Appellant at 100% despite overwhelming evidence to the contrary. In regard thereto, in the case of *Bundi Murube v Joseph Omkuba Nyamuro* [1982-88] 1KAR 108, the following caution was reiterated:

“However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did.” And also, in *Rahima Tayabb & another v Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated; -

“An appellant Court will be slow to interfere with a Judge’s findings of fact based on his assessment of the credibility and demeanour of witnesses who has given evidence before him.”

24. From the evidence adduced, there is no doubt that on 14/9/2012, an accident occurred involving the Respondent and the motor cycle registration number KMCK 102C and that as a result thereof, the Respondent sustained some injuries. The bone of contention is in respect of who is responsible for the accident. The police abstract produced in evidence indicates that the Appellant was the owner of the motor-cycle which allegation was however refuted by the Appellant who maintained that he never owned the motor-cycle nor was he the rider at the time of the accident.

25. On this issue of ownership, section 8 of the *Traffic Act* provides as follows:

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

26. At the trial, the Appellant produced a copy of ownership certificate or record from the National Transport & Safety Authority (NTSA) which shows that the registered owner of the motor-cycle as at 23/10/2017 was “Car General Kenya Ltd”. The Appellant also produced a separate copy of another



record from the Registrar of Motor Vehicles which also shows that the registered owner as at 20/3/2014 was “Car General Kenya Ltd”. However, since the accident is said to have occurred on 14/09/2012, the said records and/or certificates, insofar as they are for dates subsequent to the accident, 2 and 5 years respectively, may not necessarily be useful in establishing ownership as at the date of the accident. The same could therefore be rebutted.

27. On the rebuttability of a Certificate of search in proving ownership of a motor-vehicle, Hon. Justice Ojwang (as he then was) in the case [*Nancy Ayemba Ngana v Abdi Ali*](#) (2010) eKLR held as follows:

“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 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 had 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; and 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 a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question...”

28. Further, in the case of [*P.N.M. & another \(the legal personal Representative of Estate of L.M.M.\) v Telkom Kenya Limited & 2 others*](#) (2015) eKLR, it was held as follows:

“of the accident motor vehicle and whose agent was the 3rd defendant in view of the two positions- 1st defendant being registered owner whereas the 2nd defendant being the beneficial owner thereof. This court finds that albeit the search certificate/copy of records produced by the plaintiff showed that the 1st defendant Telkom Kenya Ltd was the registered owner of the accident motor vehicle at the material time, it is clear from the evidence gathered by the police investigating the accident, and the driver’s own statement and the vehicle’s insurance policy cover with Kennindia Assurance Co. Ltd, that the owner thereof was the 2nd defendant who was the beneficial owner as the vehicle was then being used for his benefit not the 1st defendant’s benefit. The latter had sold the accident motor vehicle and its possession and use thereof passed to the 2nd defendant. Section 8 of the [*Traffic Act*](#) Cap 403 of the Laws of Kenya 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.”

In this case, prima facie, the 1st defendant was the registered owner of the accident motor vehicle. Nonetheless, the contrary was proved, that the said vehicle had at the material time of the accident been sold and possession and use delivered to the 2nd defendant.”

29. It follows that the provision of section 8 of the [*Traffic Act*](#) is only prima facie evidence and can be rebutted where sufficient evidence to the contrary has been produced. In the present case however, no such evidence was produced to rebut the presumption. The traffic police officer PW4 who came to



Court to produce the police abstract was not the Investigating Officer and he did not even bring with him the police file. In the circumstances, he knew very little about the accident and could not explain nor give any reasons how and why the Appellant's name was entered in the police abstract as owner of the motor-cycle.

30. On her part, the Respondent admitted that indeed, apart from the police abstract, there was nothing else before the trial Court linking the Appellant to the motor-cycle. In fact, in cross-examination, she expressly admitted that she could not tell who was riding the motor-cycle at the time of the accident. She also disclosed that it is her who informed the police that the motor-cycle was owned by the Appellant. She however did not explain how and on what basis she possessed that information which she then passed to the police. It appears that the police simply accepted the information as supplied without interrogating it or verifying its veracity.
31. More interesting is the testimony of the Appellant who alleged that on the said date he was at home and that no police officer has ever talked to him about his alleged ownership of the motor-cycle. He vehemently denied ever owning the motor-cycle and stated that he does not even know how to ride one. He also stated that he is 84 years of age and that the Respondent is his neighbour. On this allegation, I understood the Appellant to be arguing that the two being neighbours, the Respondent should have found it very easy to bring further evidence that the indeed the Appellant was the owner of the motor-cycle.
32. Although the issue was not taken up during the trial, I also note that in his witness statement which he adopted as his evidence-in-chief, the Appellant had also further stated that the Respondent was his neighbour, that she sells local brew and that it is through this trade that she developed differences with the Appellant's son hence she swore to punish him for their differences. I find it strange that despite being aware of these allegations in the Appellant's witness statement, Counsel for the Respondent did not deem it necessary to cross-examine the Appellant on the same. In the circumstances, the allegations remained uncontroverted.
33. The Appellant's testimony that he was 84 years old was also never challenged nor was he cross-examined on it. Again, I find that this statement remained uncontroverted. Although I am not ruling out the possibility that an 84 years old senior citizen can very well still ride a motor-cycle, I take judicial notice that most would find it a quite challenging exercise. In my view, the age of the Appellant creates a lot of doubt over the allegation that it is him who was riding the motor-cycle at the time of the accident.
34. From my reading of the Respondent's testimony, I also form the view that the Respondent did not seem to be certain whether her case was that the Appellant was the owner of the motor-cycle or whether her case was that the Appellant was the person riding the motor-cycle at the time of the accident. She appeared unsure and to be only speculating.
35. From the foregoing, I find that no nexus or link between the Appellant and motor-cycle was established. In the circumstances, the learned Magistrate had no material before her to arrive at his finding that the Appellant was liable or vicariously liable for the accident. For a case with a similar scenario, I cite the case of *Thuranira Kaururi v Agnes Mucheche* (1997) eKLR, where the Court of Appeal stated as follows:

“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.”

36. Applying the foregoing principles to the facts of this case, I find that, on a balance of probabilities, the Respondent failed to prove her case against the Appellant. A Party is bound by his pleadings, and what the Respondent pleaded is that the Appellant is the registered owner of the motor cycle. The Respondent was therefore expected to adduce evidence in support of that allegation. Unfortunately, she hopelessly failed to do so.
37. Further, the inconsistencies from the Respondent’s witnesses especially PW2 on how the accident occurred raises doubt in the mind of this Court as to whether, in any event, the rider of the motor-cycle was even to blame for the accident. First, PW2’s testimony is not even clear whether according to him, the Respondent was a pillion passenger of the Appellant when the accident occurred. His testimony appeared to imply as much. To this end, the testimony contradicted that of the Respondent who stated that she was a pedestrian when she was hit by the motor-cycle. The Respondent was represented by Counsel and it is strange that Counsel did nothing in re-examination, to address this apparent discrepancy.
38. Further, I agree with the Appellant’s Counsel that from a cursory look at the trial Court’s Judgment dated 19/3/2018, it evident that there is a serious but obvious mix-up of two different set of facts relating to different cases. At page 1 and 2, the facts recounted clearly relate to the present case but as from page 3, the learned trial Magistrate introduces totally different set of facts and also parties and Advocates who are not even involved in this particular suit. Clearly, the learned Magistrate did not proof-read the Judgment before delivering it. Accordingly, I concur with the Appellant’s Counsel that the Magistrate gravely erred by mixing up two different cases in one Judgment. On this ground alone, the Judgment cannot stand and is a nullity.

Final Orders

39. The upshot of my findings is that this appeal is merited and succeeds. Accordingly, I order as follows:
 - i. The Judgment delivered in Mumias Senior Principal Magistrate’s Court Civil Case No. 77 of 2014 on 19/03/2018 is hereby set aside in its entirety.
 - ii. The lower Court suit, Mumias Senior Principal Magistrate’s Court Civil Case No. 77 of 2014 on 19/03/2018 is hereby dismissed.
 - iii. The Appellant is awarded costs of both this Appeal and of the suit before the trial court.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023.

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WANANDA J.R. ANURO

JUDGE

