



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 434 OF 2013

SIMON OMUKUBI SAKWA.....APPELLANT

AND

GERALD W. KIBOGO.....RESPONDENT

(Being an appeal from the Judgment of Kipkorir C. (RM))

delivered on 5th August 2013 in Nairobi Chief Magistrates Court

Civil Case Number 9518 of 2007.)

JUDGMENT

1. This appeal emanates from the judgment delivered in CMCC No. 9518 of 2007 delivered on 5th August 2013 dismissing the claim brought by **Simon Omukubi Sakwa** (hereafter the Appellant). By a plaint dated 26th September, 2007 the Appellant, had sued the **Gerald W. Kibogo** (hereafter the Respondent) seeking damages for injuries allegedly sustained while travelling as a fare paying passenger aboard the motor vehicle registration number **KAQ 649T** allegedly owned by the Respondent and driven at the time by **Richard Mwangi Nderitu** his alleged driver, servant. The Appellant averred that the Respondents' driver, servant and/or agent so negligently drove, managed, or controlled the said motor vehicle that he caused it to collide with motor vehicle **KAL 440G** as a result of which the Appellant sustained injuries and allegedly suffered loss and damage.
2. The Respondent filed a statement of defence dated 26th September, 2012 denying any liability for causing the accident and pleaded contributory negligence against the Appellant. **Richard Mwangi Nderitu** though sued as the second Defendant did not file a defence and the case against him was withdrawn on 27.05.2013 before the hearing commenced. During the trial, only the Appellant testified.
3. In her judgment, the learned trial magistrate found the Appellant had not proved that the Respondent owned the accident motor vehicle and thus liability for the accident. Consequently, the learned trial magistrate dismissed the Appellant's suit as against the Respondent but adjudged that had the Appellant proved his case, the court would have awarded general damages in the sum of Kshs. 250,000/-, interest from the date of judgment, special damages of Kshs. 6,270/- and the costs of the suit.
4. The Appellant being dissatisfied with the preferred the present appeal, on the following grounds in the Memorandum of Appeal:-

"1) The learned magistrate erred in finding that ownership of the motor vehicle KAQ 649T had not been proved.

2)The learned magistrate erred by failing to find that ownership of the motor vehicle had been proved on a balance of probabilities.

3)The learned magistrate erred in disregarding the admission of ownership by the Respondent or in finding that there was no admission of ownership of motor vehicle KAQ 649T".
5. He prayed that the judgment of the trial court be set aside and substituted with a judgment for the Appellant against the Respondent for Kshs, 250,000/- with costs and interest.
6. On 16th July, 2020 the court directed that the appeal be canvassed by way of written submissions. The matter came up severally with notice to the Respondent, to confirm compliance with the directions issued by the court. The Respondent did not attend and as at writing of this judgment had not filed his submissions despite being given ample opportunity to do so.

7. By his submissions, the Appellant primarily challenges the trial court's finding on ownership of the accident vehicle and therefore liability. Counsel for the Appellant faulted the trial court for relying on the decision in **Thuranira Karauriv Agnes Ncheche (1997) eKLR** and finding that the Appellant failed to prove his case because he did not produce a copy of record from the Registrar of Motor Vehicles. He argued that the police abstract produced sufficed and moreover the Respondent's witness statement admitted ownership while the investigation report prepared by the insurance company and filed as part of the Respondent's list of documents named the Respondent. Counsel asserted that civil cases are proved on a balance of probability and the police abstract was sufficient proof of ownership in the absence of rebuttal evidence by the Respondent. Referring to the Court of Appeal decision in **Joel Muga Opija v East African Sea Food Ltd [2013] eKLR** he argued that the rigid application of the obiter dictum in the **Thuranira Karauri** case was no longer tenable. Finally, counsel submitted the fact that the police abstract named the driver and owner of the accident vehicle raised the presumption that driver was acting with the owners' authority hence the latter is vicariously liable as stated in **Karisa v Solanki (1969) EA 318** and **Selle -Vs- Associated Motor Boat Co. (1968) EA 123**. He therefore urged that the appeal be allowed as prayed.

8. This being a first appeal it is the duty of this court to re-evaluate the evidence adduced at the trial and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see and hear the witnesses testify. See **Peters v Sunday Post Ltd [1958] EA 424**; **Selle -Vs- Associated Motor Boat Co. [1968] EA 123**, **Williams Diamonds Limited v Brown (1970) EA 11**

9. The Court of Appeal stated in **Ephantus Mwangi & Another vs Duncan Mwangi Wambusu [1982 – 1988] 1 KAR 287** that:-

“A court of 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 to have demonstrably acted on wrong principle in reaching the finding he did.”

10. The court has considered the record of the lower court and submissions on appeal. The key issue for determination is whether the Appellant proved on a balance of probability that Respondent was the owner of the accident motor vehicle registration number **KAQ 649T** and consequently liability on the part of the Respondent.

11. **PW 1** testified that the accident occurred along Thika Road at around 5pm, involving himself and motor vehicle **KAQ 649T** owned by Respondent. He testified that he reported the accident at Pangani Police Station and obtained an abstract which he produced as **Pexh 1(a)** and receipt thereof as **Pexh 1(b)**. He stated further that he got to know the owner of the suit motor vehicle after making inquiries with the insurance company that had insured the vehicle. He admitted during cross-examination he did not conduct an official search in respect of accident motor vehicle.

12. The applicable law as to the burden of proof is found in Section 107 (1) of the Evidence Act which states 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?”

13. Section 108 further provides that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

14. In her judgment, the learned magistrate grappled with the evidence and rival submissions made before her concerning the twin issues of ownership of motor vehicle **KAQ 649T** and liability stating in part that:

“The plaintiff did not produce in evidence the copy of records to prove ownership of the motor vehicle but sought to rely on documents outlined in the entire contents of the evidence of PW1 as proof enough of ownership...In C.A No. 192 of 1996 Thuranira Karauri v Agnes Ncheche the court stated that only sufficient proof of ownership of the motor vehicle is the copy of records and rejected that a police abstract can be proof of ownership.....The defence opted not to call any witness and it was upto the plaintiff to prove his case despite that. It follows that the plaintiff has not proved that the 1st defendant owned the motor vehicle. Liability can only attach to the owner of the motor vehicle vicariously as outlined in Ali Khalifa & 8 Others v Pollman Safaris & 2 Others (supra). It is my considered opinion, that for want of proof of ownership, the opinion of the court in Selle & Another v Associated Motor Boat Co. Ltd (supra) will not be applicable herein. I have no basis of finding the 1st defendant liable and I dismiss the plaintiff suit against him for that reason.” (sic)

15. Counsel for the Appellant has submitted that the obiter dictum in **Thuranira Karauri's case** has since been qualified by the Court of Appeal in various decisions and that the Respondent could not avail himself of it in this instance. This court agrees with the Appellant on that score. Beyond faulting the Appellant for failing to prove ownership through a copy of records, the Respondent did not seriously challenge or controvert the Appellant's evidence comprising of the police abstract tendered by the Appellant. Moreover, the said Respondent had in his written statement filed into Court admitted the ownership of the accident vehicle. Besides, at the material time, Section 8 of the Traffic Act provided 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 “.

Evidently therefore, a logbook or certificate of search is not conclusive proof of ownership and is rebuttable.

16. The Court of Appeal sitting at Kisumu held as follows in the case of **Wellington Nganga Muthiora vs Akamba Public Road Services**

“Where a police abstract was tendered and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being *prima facie* evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.

17. I find it useful to quote in *extenso* from the decision rendered in 2013 by the Court of Appeal sitting in Kisumu in **Joel Muga Opija v East African Sea Food Limited [2013] eKLR** . Effectively qualifying the application of **Thuranira’s** case the Court stated that:

“The learned Judge overturned this finding as she held that production of Police abstract alone was not enough proof of ownership of the vehicle.

We have anxiously considered this aspect of the appeal as it is a legal matter as to what constitutes evidence that would establish ownership of a motor vehicle involved in an accident particularly in a situation such as obtained in this appeal before us. In the case of *Thuranira Karauri vs Agnes Ngeche – [Civil Appeal No. 192 of 1996] (UR)* which was annexed to the submissions of the respondent in the Senior Resident magistrate's court, this Court differently constituted 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.”

We observe that in that case the defendant did not give evidence in his defence, and we further note that the learned Judges of Appeal in that case had settled for allowing the appeal on other grounds they considered more serious so that the finding above remained obiter. Hear them at the end of their judgment: -

“In the final analysis, the appeal succeeds and is allowed. We set aside the judgment and decree of the Superior Court and in view of our finding that the claim was time barred, which rendered the suit incompetent, we substitute an order striking out the plaintiff's suit with costs to the defendant. The defendant will also have the costs of this appeal.”

We find of persuasive value the view held by *Ali Aroni J.* when she considered a similar issue of ownership in the case of *Collins Ochung Ondiek vs Walter Ochieng Ogunde – [HC Civil Appeal No. 67 of 2008,] (UR)*. She distinguished *Thuranira's* case from the case that was before her as follows: -

“In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did not take the issue of ownership seriously. The case of Thuranira Karauri vs Agnes Ncheche can be distinguished from the current case in many ways, it had several loopholes, it was time-barred and no proof of extension of time was produced in evidence, other material documents were produced in breach of provisions of Section 35 of the Evidence Act which is not the case here.”

We agree, many reasons led to the decision in *Thuranira's* case the main one being that the suit was time-barred.

In the more recent case of *Ibrahim Wandera vs P.N. Mashru Limited, [Civil Appeal No. 333 of 2003] (unreported)* this Court, again differently constituted considered a similar scenario. In that case only the appellant testified and on appeal the issue of whether ownership was proved was raised. Coincidentally, the advocate for the appellant was the same as is in this case and some of the grounds advanced in the Memorandum of Appeal were very close to the grounds raised in this appeal. This Court stated as follows: -

“The issue of liability was not specifically raised as a ground of appeal before the superior court. *Tanui J.* proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned Judge, with respect to him, did not at all make any reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashiru of P.O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross examined on it. It means the respondent was satisfied with that evidence.”

In fact, in that case *Mr. Menezes* who represented the appellant applied to challenge the admissibility of the police abstract but without success. That he did so, demonstrated the importance of the contents of the abstract as to ownership.

Lastly, in the case of *Lake Flowers vs Cila Franklyn Onyango Ngonga (suing as the personal legal representative of the estate of Florence Agwingi Ogam (deceased) and Josephine Mumbi Ngugi (2008) eKLR* which was also on the same issue, it was held: -

“Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or (sic) attempt to partly or wholly blame

the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the Police Abstract produced by the 1st respondent which shows it to be the owner of that motor vehicle.”

It is noteworthy, that *Bosire JA.* sat in Thuranira's case (*supra*), Wandera's case (*supra*) and in the Lake Flower's case. It would appear that like us, he treated the comments in Thuranira case as obiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as obiter, in the Thuranira case. 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. (Emphasis added).

18. Similarly in this case while no copy of records was tendered, the police abstract produced without objection was not challenged in any serious way during cross -examination of the Appellant, nor any attempts made to rebut its contents. As stated earlier, on the court record was a statement recorded by the Respondent admitting ownership of the accident vehicle. Consequently, the police abstract sufficed as uncontroverted evidence of proof of the Respondent's ownership of the motor vehicle registration number KAQ 649T. Thus, I find the trial court erred in law in finding that the Appellant had not proved the ownership of the accident motor vehicle by and therefore liability against the Respondent.

19. In the circumstance this court must allow the appeal and interfere with the said finding by setting it aside and substituting therefor a finding that the Appellant proved ownership and liability on a balance of probability against the Respondent. In the result, the judgment of the lower court dismissing the Appellant's suit is hereby set aside. This Court hereby substitutes therefor and enters judgment for the Appellant against the Respondent in the sum of Shs.250,000/- in general damages and Shs.6,270/- in special damages, together with costs in the lower court and interest. The costs of this appeal are also awarded to the Appellant.

DELIVERED AND SIGNED ON THIS 8TH DAY OF JULY 2021

C.MEOLI

JUDGE

In the presence of:

Ms Kanana h/b for Mr Kaburu for Appellant

N/A for Respondent

C/A; Carol