



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 99 OF 2016

CYPRIAN SIBWOGA MOKURUMI.....APPELLANT

-VERSUS-

RICHARD MUTWOL KIPYEGON.....RESPONDENT

(Being an appeal from the judgment and/or decree of honourable B. Mararo

principal magistrate delivered on 17th August 2016 in Nakuru CMCC No. 529 of 2014)

JUDGMENT

1. This appeal arises from the suit filed by the plaintiff/appellant against the defendant for injuries sustained on 21st February 2014 when tuk-tuk Registration No. KTWA 857S, which he was traveling collided with the defendant's motor vehicle registration no. KAC 353T along Eldoret Nakuru highway.

2. After the hearing, the Court found that the plaintiff failed to prove ownership of motor vehicle KAC 353 T for failure to attach the certificate of search and dismissed the suit with costs to the defendants. She further assessed general damages that would be awarded were assessed at Kshs 150,000/= and special damages of Kshs. 13,440/=

3. Being aggrieved by the trial magistrate's decision the appellant filed this appeal on the following grounds:

i. That the learned magistrate erred in law and fact in misdirecting himself by not considering the evidence by the police officer and the production of the police abstract proving that the respondent was the owner of the motor vehicle.

ii. That the learned magistrate erred in law and fact in considering facts that were mere allegations and were not proved by the respondent in evidence.

iii. That the learned magistrate erred in law and fact in failing to consider the evidence by the appellant, the evidence on record, and the submissions.

iv. That the learned magistrate erred in law and fact in not appreciating the fundamental principles of the rule of evidence, that if the respondent was opposed to being the owner it was upon him to give evidence to the contrary.

4. The respondent despite being served failed to file any response or submissions.

5. The appellant canvassed the appeal through written submissions.

APPELLANT'S SUBMISSIONS

6. The appellant submitted that the main issue in contention is whether the appellant proved ownership of the accident motor vehicle KAC 353T; whether the police abstract adduced as evidence by the police officer was sufficient to prove ownership of the accident motor vehicle. The respondent submitted that the respondent failed to rebut the evidence of the abstract adduced, and the same was produced by consent of the parties. The appellant cited the case of **Nyeri High Court Appeal No. 34 of 2002, Samuel Mukunya Kamunge v John Mwangi Kamuru** where the Court held as follows: -

“It is true that a certificate of search from the registrar of motor vehicle would have shown who was the registered owner of the motor vehicle accordingly to the records held by the registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as Section 8 of the Traffic Act provides that the contrary can be proved. This is in

recognition of the fact that often times vehicles change hands but the records are not amended. Replying on Kasereka vs Gateway Insurance Co. Ltd (2003) 2. E.A. 502 he submitted that the police abstract was sufficient evidence to prove on a balance of probability the ownership of the motor vehicle.”

7. The respondent further submitted that the appellant proved that sufficient evidence was adduced which proved the accident did occur involving the respondent's motor vehicle and the magistrate erred in holding that only a certificate of search from the registrar of motor vehicle could prove ownership.

8. The respondent urged this Court to allow the appeal and grant general damages and special damages.

ANALYSIS AND DETERMINATION

9. This being the 1st appellate court, I have duty to reevaluate the evidence and come up with its own independent finding bearing in mind that unlike the trial Court I never had the benefit of taking evidence firsthand and observing the demeanor of the witnesses. The principles governing the first appellate court were set out **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the Court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

10. In view of the above, I have perused the record of appeal and the submissions filed, I note the issue arising for determination is:

a. whether the appellant proved the ownership of the accident motor vehicle KAC 353T.

11. The Trial magistrate stated as follows: -

“the official search from the registrar of the motor vehicle was not produced as an exhibit before court. The police abstract cannot be evidence of proof of ownership and a search was needed to prove the respondent was the owner of the motor vehicle that caused the accident”

12. **Section 8 of the Traffic Act** provides as follows: -

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

13. From the record, I note that the appellant relied on a police abstract which was produced in Court by police constable Samson Okello to prove ownership and not motor vehicle search. The respondent never objected to production of police abstract during the hearing.

14. During the hearing, the police officer who testified indicated that the information in the abstract was received from the insurance obtained on the date of the accident and the information offered to the investigating officer by the parties involved in the accident.

15. **The question is, whether** a police abstract is sufficient proof of ownership. In the case of **Wellington Nganga Muthiora v Akamba Public Road Services and Another CA Kisumu 2010 eKLR** held that: -

“...where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a 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 is challenged by evidence or in cross-examination the plaintiff would need to produce a certificate from the registrar of motor vehicles or any other proof such as an agreement for the sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”

16. In the case of **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR**, the Court of Appeal relied on the case of **Joel Muga Opinja v East Africa Sea Food Ltd [2013] eKLR** and restated this position as follows:-

“We agree that the best way to prove ownership would be to produce to the Court a document from 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, the contents cannot later be denied”

17. Record show that the respondent failed to challenge the evidence adduced in the abstract. The police abstract indicated the respondent as the owner of the motor vehicle;he vehicle was insured, the particulars of the insurance were stated in the insurance certificate. The abstract stated the address and names of the owner and the name of the insurance company.Evidence on ownership was therefore corroborated.

18. I find that the evidence tendered by the appellant was not controverted, the appellant proved on a balance of probability that the respondent was the owner of the motor vehicle KAC 353T.

19. From the foregoing, I find that the trial magistrate erred in finding that the appellant did not prove his case and allow this appeal.

20. **FINAL ORDERS**

- 1) **This appeal is allowed**
- 2) **General damages assessed at Kshs. 150,000/=**
- 3) **Special damages of Kshs. 13,440/= awarded.**
- 4) **Interest on (a) and (b) above from the date of this judgment.**
- 5) **Costs of the suit in the lower court and in this appeal.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 7TH DAY OF OCTOBER, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Ms. Obura for Appellant