



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 31 OF 2018

JOSEPHINE KADZO MBUVI.....APPELLANT

VERSUS

KYANIA MASUA.....RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate delivered on 10th July, 2018 in Mutomo Principal Magistrate's Court Civil Case No. 62 of 2017)

JUDGEMENT

1. The Appellant sued the Respondent praying for general damages, special damages and costs of the suit.
2. The genesis of the suit is a road traffic accident that occurred on 9/3/2013 involving motor vehicle registration No. KZD 627 injuring the Appellant who alleges to have been a passenger in the said motor vehicle. The respondent denied appellant's claim.
3. After full hearing the court dismissed the appellant's suit thus precipitating instant appeal in which appellant challenged the verdict.
4. The Appellant set 4 grounds of appeal namely;
 - (i) **That the learned trial magistrate erred in fact and in law by failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgment.**
 - (ii) **That the learned trial magistrate erred in law and in fact in failing to consider Applicant's submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination and thereby dismissed Appellant's suit.**
 - (iii) **That the learned trial magistrate erred in fact and in law by dismissing the Appellant's case without justification and failing to appreciate the fact that the Appellant had proved on balance of probabilities that the Respondent was the beneficial owner of the suit motor vehicle and therefore liable in law.**
 - (iv) **That the learned trial magistrate erred in law and in facts by applying wrong and inapplicable principle of law in civil case and which did not form any basis to warrant his determination on liability and general damages.**

5. Parties were directed to canvass same via submissions.

APPELLANT'S SUBMISSIONS

6. Appellant herein in her submissions, dated 8th June, 2018, she proved that Respondent was the beneficial owner and therefore liable to compensate the Appellant herein for the injuries she sustains as per pg 41 line 15-19 and pg 42 line 1-11 of the record of appeal.

“It is worthy to know that copy of records is not always proof of ownership and especially beneficial ownership is purely not necessary proved by copy of records. The police abstract is sufficient proof ownership as it was held by Okwengu, J (as then was) in Samuel Mukunya Kamunge vs John Mwangi Kamuru Nyeri HCCA No. 34 of 2002 expressed herself as follows;- “A police abstract is sufficient proof of ownership of a motor vehicle if not controverted. Though a certificate of search from the registrar of motor vehicle would show who was the registered owner of motor vehicle according 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 as vehicles often times change hands but the records are not amended.”

7. The magistrate erred in law and in fact dismissing Appellant's case when the evidence on records speaks otherwise and confirms on a

balance of probabilities that Respondent in all standards was the beneficial owner and in full control of motor vehicle registration No. KZD 627.

8. The Appellant called the investigating officer who testified and confirmed that he released the vehicle to the Respondent herein Kyania Masua who is the beneficial owner as he agreed at the police station to compensate the victims of the accident and there was no evidence to controvert this position hence the trial magistrate erred in law in holding that the Appellant had not proved that Respondent was the beneficial owner yet the decision by **Okwengu, J** (Supra) (as she then was) in *Samuel Mukunya Kamungu vs John Mwangi Kamuru Nyeri HCCA No. 34 of 2002* expressed herself as follows:-

“A police abstract is sufficient proof of ownership of a motor vehicle if not controverted. Though a certificate of search from the registrar of motor vehicle would show who was the registered owner of motor vehicle according 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 as vehicles often times change hands but the records are not amended”.... was presented before the trial magistrate who opted to reject the decision held by superior court without justification.”

9. In the case of *Joel Muga Opija vs East African Sea Food Limited [2013] eKLR* where the court of appeal stated as follows:-

“In any case in our view an Exhibit is evidence and in this case, the Appellant’s evidence that the police recorded the Respondents as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with the words to the effect that the owner was East African Sea Food was not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. We agree that the best was 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.”

10. The police abstract in the present case was never challenged by the Respondent hence the findings of the trial court to hold otherwise was not justifiable. Similar position was reiterated by **F. Tuiyott** in *Petrocity Enterprises Ltd vs Fredrick Okello Opiyo & 2 Others [2016] eKLR* where he held as follows:-

“Appellant had, without raising objection or question, accepted the production of a police abstract indicating that it was the owner of the trailer and truck head. There was also evidence, not seriously denied by the defence witness, that the body of the Trailer and Truck Head bore the name of the Appellant. It is on the basis of this evidence that the trial magistrate held that the Appellant needed to do more to disassociate itself with the Trailer and Truck Head than to raise a simple denial. I would have to agree with the trial court. The Appellant needed to place before court sufficient evidence that could displace the evidence of the police abstract and the writings on the vehicle. This court finds that the 1st Respondent successfully proved that the Appellant was the beneficial owner of both the Trailer and Truck Head.”

11. Appellant sustained the following injuries also as stated in the plaint and further confirmed by Dr. John Mutunga.

- (a) Fracture of ribs.
- (b) Enlargement of the heart.
- (c) Dislocation of sternoclavicular joint.

12. The Appellant has proved her case on a balance of probabilities as required under the law and hereby implore upon court to find this appeal in her favour and consider her submissions as of great merit and uphold the same in this court’s judgement in a nutshell as follows;

i. **Liability:** Enter judgment 100% in favour of the Appellant as against the Respondent.

ii. **Quantum:** General Damages for pain suffering and

loss of amenities.....Kshs.800,000/=

Special Damages.....Kshs. 3,550/=

TOTAL.....Kshs.803,550/=

RESPONDENT’S SUBMISSION

13. This being the 1st appeal this Honourable Court is duty bound to analyse the whole evidence on record from the trial court. Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. As you analyse the evidence on record finds that has not been proved of balance of probabilities whether the Respondent is the beneficial owner or the driver of the said motor vehicle.

14. At page 10 para 10 of the record of Appeal the Appellant testified that they boarded a lorry belonging to the Respondent which he used as a matatu, in cross examination at page 49 para 10 of the record of appeal the Appellant testified that the vehicle in question was bearing

registration number KZP 627 and stated that the Respondent was operating as a conductor and the lorry belonged to him and the evidence she had was from the police.

15. In examining the proceedings from the lower court find at page 51 of the record of appeal the evidence of PW2 one No. 66864 Corporal William Keter testified that the Respondent one Kyania Masua was the owner of Motor vehicle registration number KZD 627 and that at the scene he did not find him, he further testified that the driver was present and his investigations established the driver as one Kyania Masua.

16. The two witnesses called did not prove the ownership of the lorry for the Appellant testified that the Respondent was the conductor while the PW2 said the Respondent was the owner and was not present at the scene and again that he was the driver and was present at the scene.

17. Therefore, in considering the evidence on record, there is no probability that was probable in the circumstances considering the evidence on record. Having regard of the evidence on record the Appellant did not prove her case on a balance of probabilities.

18. In conclusion therefore, it is the Respondent's humble submission that the appeal filed herein is not merited at all and the same ought to be dismissed with costs to the Respondent.

EVIDENCE TENDERED

19. The appellant's case was as follows. PW1 Josphine Kadzo informed the court that on 9/3/2013 she boarded a lorry owned by the Respondent on her way home from the market, the Respondent was using the lorry as a matatu, they were about 20 people. PW1 further informed the court that on their way home, lights went off and they entered into a ditch, she was rescued by a boda boda rider and taken to Mutomo Mission Hospital for treatment. She was injured on the ribs and chest. She produced the treatment notes as Exh1 and the P3form as Exh2.

20. The matter was reported to the police and a police abstract issued, police abstract dated 26/10/2016 produced as Exh3.

21. PW1 further informed the court that she was treated by Dr. John Mutunga who prepared a medical report, Exh 4 and she paid Kshs.3000/=. She produced a payment receipt as Exh5. She also produced a demand letter as Exh6. She further informed the court that she did a search for the vehicle, she paid Kshs.500/=. She produced a payment receipt as Exh7.

22. PW1 further informed the court that she blamed the driver for the accident there were no other vehicle on the road. She prayed for compensation, costs and interest.

23. PW2 No. 66864 Corp. William Keter informed the court that on 9/3/2013 an accident was reported at the police station involving an Isuzu canter, he visited the scene in the company of PC Anguka (retired) the Appellant was a passenger, he issued the Appellant with a P3 form and a police abstract.

24. PW2 further informed the court that the motor vehicle was owned by the Respondent, at the scene they did not find the Respondent but they found the driver, he found other people at the scene who recorded their statements. He produced the police abstract as Exh3.

25. From his investigations he established that the vehicle veered off the road and landed in a ditch. The Appellant closed her case and the matter was fixed for defence hearing.

26. The defence case was as follows. DW1 Kyania Masua informed the court that the Appellant had failed to produce any document from KRA showing that he is the owner of the motor vehicle in question. That the passenger did not produce any ticket showing that she was a passenger in the said vehicle. DW1 further informed the court that the Appellant did not avail any witnesses to confirm that she was a passenger in the vehicle in question.

27. DW1 further informed the court that the investigations from the police did not show who was the driver of the vehicle. DW1 further informed the court that the Appellant is a football player and the injuries complainant of may have been sustained during a football match, he prayed that the case be dismissed with costs.

ISSUES, ANALYSIS AND DETERMINATION

28. After going through the evidence on record and the parties' submissions, I find the issues are; **whether the appellant proved his case on balance of probabilities on liability? If above in affirmative, what is the quantum? That is the order as to costs?**

29. The court has perused document No.3 from the Appellant list of documents, a document from the National Transport and Safety Authority and confirms that the motor vehicle registration No. KZD 627 was registered in the name of one Isabella Omari Achochi and not the Respondent.

30. However, PW2 a police officer who visited scene and filled police abstract testified that, the motor vehicle was owned by the Respondent, and when he visited scene of accident, him and another police officer did not find the Respondent but they found the driver, and other people who recorded their statements. He produced the police abstract as Exh3 which showed respondent was the owner of the motor vehicle.

31. He further testified and confirmed that he released the vehicle to the Respondent herein Kyania Masua who was the beneficial owner as

he agreed at the police station to compensate the victims of the accident and there was no evidence from defence to controvert this position hence the trial magistrate erred in law in holding that the Appellant had not proved that Respondent was the beneficial owner.

32. In the case of **Samuel Mukunya Kamungu vs John Mwangi Kamuru Nyeri HCCA No. 34 of 2002** the court held as follows;-

“A police abstract is sufficient proof of ownership of a motor vehicle if not controverted. Though a certificate of search from the registrar of motor vehicle would show who was the registered owner of motor vehicle according 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 8of the Traffic Act provides that the contrary can be proved as vehicles often times change hands but the records are not amended”.... was presented before the trial magistrate who opted to reject the decision held by superior court without justification.”

33. Further in the case of **Joel Muga Opija vs East African Sea Food Limited [2013] eKLR** where the court of appeal stated as follows;-

“In any case in our view an Exhibit is evidence and in this case, the Appellant’s evidence that the police recorded the Respondents as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with the words to the effect that the owner was East African Sea Food was not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. 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.”

34. The police abstract in the present case was never challenged by the Respondent hence the findings of the trial court to hold otherwise was not justifiable. Similar position was reiterated in the case of **Petrocity Enterprises Ltd vs Fredrick Okello Opiyo & 2 Others [2016] eKLR** where he held as follows;-

“Appellant had, without raising objection or question, accepted the production of a police abstract indicating that it was the owner of the trailer and truck head. There was also evidence, not seriously denied by the defence witness, that the body of the Trailer and Truck Head bore the name of the Appellant. It is on the basis of this evidence that the trial magistrate held that the Appellant needed to do more to disassociate itself with the Trailer and Truck Head than to raise a simple denial. I would have to agree with the trial court. The Appellant needed to place before court sufficient evidence that could displace the evidence of the police abstract and the writings on the vehicle. This court finds that the 1st Respondent successfully proved that the Appellant was the beneficial owner of both the Trailer and Truck Head.”

35. In view of the above the court finds that the motor vehicle subject of the instant matter was beneficiary owned by the respondent. The respondent did not rebut the appellant and PW2 evidence that the same motor vehicle was being driven by his driver and for his own benefit and in the course of the course of the driver’s employment. Thus he was vicariously liable. Thus the respondent was 100% liable.

36. On quantum the appellant has made submissions as follows;

Liability: Enter judgment 100% in favour of the Appellant as against the Respondent.

Quantum: General Damages for pain suffering and

loss of amenities Kshs.....Kshs.800,000/=

Special damages.....Kshs 3,550/=

TOTAL.....Kshs.803,550/=

37. The appellant does not cite any authorities to support the proposal. On the respondent side, no submission was proffered on quantum.

38. Appellant sustained the following injuries also as stated in the plaint and further confirmed by Doctor John Mutunga. Fracture of ribs, Enlargement of the heart and Dislocation of sternoclavicular joint.

39. In **Edward Mzamili Katana vs CMC Motors Group Ltd [2006] eKLR** the claimant was awarded Kshs. 1,300,000/- for :-a. Head injury leading to concussion, cut wound and bruises of the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injury with multiple fractures of left 5th, 6th and 7th ribs, Fracture of the left femur upper 1/3 shaft.

40. These were far more serious than the ones sustained by the appellant herein. Whereas in **Francis Mwangi Muchiri vs Francis Kimani Mbugua Nairobi HCC No. 2637 of 1994** where the court awarded Kshs. 100,000/- for 25% disability after finding that the appellant had old fractures.

41. Other cases this court has considered are as follows; **Yunis Malik vs Eliud Muriithi & Another Nakuru Hccc No 354 of 2000**. An award of the Kshs.400,000/= was given where the appellant sustained fracture of three ribs and the femur.

42. In **Joseph Ndumia Murage vs David Kamande Ndung'u Nakuru HCCC No. 101 of 1996**, an award of Kshs.500,000/= was given for fracture of six ribs and soft tissue injuries – in 2004.

43. And also the court has considered the case **Dickson Ndung'u Kirembe & Another -vs- Thereisia Atieno & 4 Others (20140 KLR)**. The third respondent (Esther Akinyi Ochieng) who had sustained injuries to the head, chest left ankle, bruises on forearm and compound fracture of the left tibia/fibula was awarded Kshs.600,000/= which was reduced to Kshs.400,000/= on appeal in March 2014.

44. Doing the best I can in the circumstances, I award the appellant a figure of Kshs. 400,000/= as general damages for pain and suffering plus pleaded and proved special damages Kshs. 3,550/=.

45. Thus the court allows the appeal and makes the following orders;

i) Court enters judgement for the appellant against respondent on liability 100%.

ii) On quantum – general damages for pain and suffering Kshs. 400,000/= and special damages Kshs. 3,550/= total Ksh.403,550/=.

iii) Costs to the appellant both in the lower court suit and this appeal plus interest at court rate.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

.....

C. KARIUKI

JUDGE