



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 98 OF 2016.

DOUGLAS GISEMBA OMWONGA.....APPELLANT

VERSUS

RICHARD MUTWOL KIPYEGON.....RESPONDENT

(Being an Appeal from the judgment /decree of the principal Magistrate Hon. M. K. N. Maroro

delivered on 17th August 2016 in Nakuru CMCC No. 528 of 2014.)

JUDGMENT

BACKGROUND

1. This appeal arises from suit filed by the appellant seeking damages from the respondent for the injuries he sustained from an accident which occurred on the 21st day of February 2014 along Eldoret-Nakuru road involving motor vehicle registration number KAC 353T and a Tuk Tuk registration number KTWA 857S. The trial magistrate found that the plaintiff did not prove his case on a balance of probability by failing to avail a copy of search certificate to prove ownership of the vehicle; on that ground, he dismissed the plaintiff's claim with costs to the defendant. He assessed general damages which he would have awarded if the claim was proved at kshs 150,000 and special damages of kshs 13,440.

2. The appellant being aggrieved by the judgment and finding of the trial magistrate filed this appeal seeking the honourable court to set aside, review and/or revise and/or be substitute with the judgment of the honourable court. The respondent failed to file response to this appeal.

3. In the memorandum of appeal dated 16th of September 2016 appealing on 5 grounds of appeal are as set out hereunder: -

i. *The learned trial magistrate erred and misdirected herself in law and in fact in dismissing the appellant's case for the reason that the appellant had not proved ownership of the motor vehicle KAC 353T.*

ii. *The trial magistrate erred and misdirected herself in law and in fact in 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.*

iii. *The learned trial magistrate erred in law and in fact in considering facts that were mere allegations and were not proved by the respondent in evidence.*

iv. *The trial magistrate erred in law and in fact by failing to consider the evidence by the appellant, the evidence on record and the submissions.*

v. *The learned trial magistrate erred in law and in facts by not appreciating the fundamental principles of the rules of evidence, that if the Respondent was opposed to being the owner it was upon him to give evidence to the contrary.*

APPELLANT'S SUBMISSIONS

4. In submissions dated 26th June 2019 and filed on 28th June 2019, the appellant submitted that the main contention in the appeal is whether the appellant proved the ownership of the motor vehicle registration no. KAC 353T as the lower court's suit was dismissed by the trial magistrate for failure by the plaintiff/appellant to prove the ownership of the motor vehicle involved in the accident on a balance of

probability. No copy of record was produced at the trial court to prove ownership. The appellant submitted that the trial magistrate erred in holding that the appellant did not prove that the respondent was the owner of the motor vehicle yet a police abstract exhibit 3(a) was produced by consent of the parties without any objection by the respondent.

5. The appellant submitted that the police abstract showed that the respondent was the owner of the motor vehicle thus its contents cannot be denied later. Further that it is not mandatory that a copy of record be produced to prove ownership of motor vehicle as long as there is a police abstract to prove ownership; that the ownership of the motor vehicle was not controverted by the respondent and did not produce any document proving that he was not the owner.

6. The appellant cited the case of **Joel Muga Opija V East African Sea Food Limited (2013) eKLR** where the court held 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 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 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.”

7. Further in the case of **Nancy Ayemba Ngaira V Abdi Ali (2010) eKLR:-**

“...There is no doubt that the registered certificate obtained from the registrar of motor vehicle will show the name of the registered owner of the 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 fully recognizant 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 has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have risen to describe such alternative forms of ownership. A person who enjoys any of such other categories of ownership; actual ownership; beneficial ownership; 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 the police abstract, showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question.”

8. ANALYSIS AND DETERMINATION.

I note that the respondent herein never filed response to the appeal despite having participated in the lower court hearing. Record show the appellant’s advocated effected service on the respondent through their advocate **Matiri Mburu & Chepkemboi Advocates** on two occasions with mentions notices as per the affidavits of service on the 8th of April 2019 and 24th June 2019. On both occasions the notices were received under protest on ground that they longer acted for **Invesco Assurance Co. Ltd.** On 18th of June 2020 the respondent was represented by **Matiri Mburu advocate. Ms. Chelangat** who held brief for **Ombui** stated to the Court they had served the respondent in person through registered post and filed a receipt of postage though the same is not in the Court file. From the foregoing, there is therefore no doubt that the respondent was notified of the appeal and they failed to file response nor attend Court for hearing of the appeal. The appeal proceeded exparte.

8. This being the first Appellate Court, I am required to re-evaluate and analyse evidence adduced before the trial court and arrive at an independent determination. This I do knowing that unlike the trial court, I never got the opportunity to take evidence first hand and observe demeanour of witnesses. In respect to the role of the first Appellate Court, the Court of Appeal in the case of **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR**, held as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. In view of the above, I have perused the lower court record and identified the following as issues for determination is whether the Appellant proved the ownership of the motor vehicle KCA 353T.

10. Whether the Appellant proved the ownership of the motor vehicle KCA 353T.

The Appellant submitted the trial magistrate erred by holding the appellant had failed to prove the ownership of the motor vehicle registration no. KCA 353T yet they produced a police abstract which showed the respondent was the owner of the said motor vehicle at the time of the accident. The appellant in the lower court and in this appeal relied on the contents of the police abstract to prove ownership of the vehicle.

11. In respect to evidentiary value of a police abstract as regards proof of ownership of a motor vehicle, in the case of **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another,(2010) eKLR** the Court of Appeal held as follows:-

“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 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”

12. Further in the case of **Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003** the Court of Appeal expressed itself as follows:

“The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent.”

And **Warsame J.** (as he then was) in the case of **Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001** held as follows:

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

13. The owner of the Tuktuk KTW 857 Piaggio which collided with the vehicle is indicated to be John Gitau Karanja and below is registration number of the vehicle KAC 355T followed by insurance policy number, INVESCO insurance and the respondents name Richard Mutwol Kipyegon and his box number as 10762 Nakuru. It is not indicated who he is but in paragraph 1(a) of the police abstract space provided is for one vehicle and that is where the Tuk Tuk and its owner are indicated.

14. On perusal of the lower court record, I do confirm that PW3 a police officer produced police abstract in Court as exhibit 4 (a). Counsel for the defendant/respondent never raised any objection to the production of the police abstract neither did he cross examine the witness on it. The document therefore became part of exhibits produced and its contents unchallenged evidence in prove of the plaintiff's/appellant's case. The person registered as owner of the vehicle registration number KAC 355T is **Richard Mutwol Kipyegon** insured by INVESCO. I do not therefore do not see the reason as to why the trial magistrate would doubt ownership yet the contents of the police document which is a government public document was not challenged by the respondent who fully participated in the trial in the lower court.

15. From the foregoing I find that the trial magistrate erred in holding that police abstract cannot be prove of ownership of the vehicle was not proved.

16. On liability, the plaintiff/appellant testified that he was a fare paying passenger in Tuk Tuk registration number KTW 857S. She blamed the driver of the vehicle for the accident. The respondent/defendant did not enjoin the rider of Tuk Tuk in the proceeding. I therefore hold the defendant/respondent 100% liable.

17. In respect to damages, the appellant to be paid damages as assessed by the trial magistrate

18. **FINAL ORDER**

1. **Appeal is allowed.**
2. **The respondent to shoulder 100% liability.**
3. **Judgment is entered for appellant/plaintiff against the respondent/defendant for kshs 163,440.**
4. **Cost to the appellant.**

Judgment dated, signed and delivered via zoom at Nakuru

This 24th day of September, 2020

.....
RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Ms. Obura for the Appellant

Respondent in person