REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 26 OF 2017

PHILISILA MBUYA NJIRU.....APPELLANT

VERSUS

ROSEMARY KANAMBIU.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement and decree of the Honourable Senior Principal Magistrate in Siakago SPMCC No. 45 of 2015 which was delivered on the 27th April 2017.

2. The appellant had filed a suit for compensation in terms of special and general damages for injuries sustained arising out of a motor vehicle accident. The case was dismissed with costs on grounds that it had not been proved to the standards required. The magistrate assessed the general damages Kshs. 150,000/= in the event that the suit would have been successful.

3. The appellant filed an amended memorandum of appeal seeking to set aside the judgement of the trial court. The appeal is grounded on 7 grounds that can be summarised as follows: -

> **1)** ***That the trial magistrate erred in law and in fact by concluding that the appellant had failed to prove that the respondent was the owner of motor vehicle KBJ 753Y as at the time of the accident.***
>
> **2)** ***That the learned trial magistrate erred in law and in fact by concluding that the owner of motor vehicle KBJ 753Y was liable for the accident caused on the 11th May 2015.***

4. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

5. It is the appellant's submission that the trial court erred in concluding that the appellant had failed to establish the respondent as the owner of motor vehicle KBJ 753Y whereas there was uncontroverted evidence by the appellant through PW1, in the form of several police abstracts issued in regard to the accident to various victims that clearly listed the respondent as the owner of the vehicle. The appellant submits that the trial magistrate failed to appreciate the provisions of **Section 8 of the Traffic Act and Sections 107, 112, 116 & 119 of the Evidence Act**.

6. The appellant further submits that the trial court's reliance on the case of **Thuranira Karauri Vs Agnes Ncheche [1997] eKLR** was wrong as the Court of Appeal sitting then never held that ownership of a vehicle must be proved only by way of copy of records and further that the Court did not allow the appeal because of lack of proof of ownership but for being time barred.

7. The appellant in his submissions relies on the cases of **Ibrahim Wandera v P.N. Mashru [2007] eKLR, Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR, Joel Muga Opija v East African Sea Food Ltd [2013] eKLR, Samuel Mukunya Kamunge v John Mwangi [2005] eKLR** and **Joseph Kahinda v Evans Mwaura [2014] eKLR.**

8. As to whether the appellants proved her case on a balance of probability that the respondent's driver was negligent and thus hold the respondent liable, the appellant submitted that all the testimony pointed towards the negligence of the respondent's driver whereas the respondent never testified and thus the said evidence was neither contradicted nor controverted and consequently she discharged her onus. She relied on the cases of **Simon Muchemi Atako & Anor v Gordon Osore [2013] eKLR, Khan v Cooke & Others Mombasa C.A. 45 of 1975, Patel v Republic EALR [1968]** and **Lake Flowers v Cila Franklyn Onyango Ngonga & Anor [2008] eKLR.**

C. Respondents Case

9. On liability, the respondent submitted that the appellant did not prove the allegation of negligence against them to the required standard as established in the case of **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR** as the mere fact that an accident occurred did not prove that a person had driven negligently as was held in **Jamal Ramadhan Yusuf v Ruth Achieng Onditi & Anor [2010] eKLR.**

10. The respondent further submitted that that the trial court was right in holding that the appellant had not proved ownership of the motor vehicle and its reliance on the **Thuranira (supra)** case as the police abstracts the appellant sought to rely on as prove of ownership were not valid as the police were not present at the scene when the accident occurred.

11. It was further submitted that the appellant had not proved negligence on the respondent's part and thus the claim of negligence had to fail and relied on the case of **East Produce (K) limited v Christopher Astiado Osiro C.A. No. 43 of 2001.** The respondent further submitted that the appellant admitted in testimony that she was not wearing a seat belt and further that she the seatbelts in the car were few and as such knew of the risks of boarding the car.

12. The respondent further submitted that the doctrine of *res ipsa loquitor* was not applicable in this case as she had proven that the car did not belong to her and could not be applicable where the appellant accused the respondent of causing the accident through his negligence. She relied on the case of **Jeremiah Maina Kangema v Kenya Power and Lighting Co. Ltd [2011] eKLR.**

13. On quantum, the respondent agreed with the trial magistrate that an award of Kshs. 150,000, as is upheld by the case of **Arrow Car Ltd v Elija Shamalla Bimemo & Others C.A. No. 344 of 2001,** would have been sufficient had the appellant proved liability. On special damages, the respondent urged the court to award only what had been proven.

D. Analysis & Determination

14. Having looked at the Appellant's grounds of appeal and the parties' respective submissions, it is clear that the only issues for consideration and determination are as follows: -

> ***i. Whether the trial court erred in holding that the appellant had proven the respondent owned motor vehicle KBJ 753Y;***
>
> ***ii. Whether it was proved that the respondent was liable for the accident; and***
>
> ***iii. If the answer on (ii) is in the affirmative, the quantum of damages to be awarded be assessed.***

15. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions bearing in mind that I did not have the opportunity of seeing and hearing the witnesses.

16. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others [1968] EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*)."***

17. The appellant submitted that the evidence of PW1, in the form of several police abstracts in regard to the accident, clearly listed the respondent as the owner of the vehicle, evidence which the respondent failed to controvert. Conversely, the respondent submitted that that the trial court was right in holding that the appellant had not proved ownership of the motor vehicle.

18. In **Thuranira (supra)** case relied on by the appellant, the Court of Appeal expressed itself thus;

> ***"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."***

19. I do note that in the aforementioned case the appeal was allowed for the reason that the claim by the Plaintiff was time barred, which rendered the suit incompetent. The **Thuranira** case was a case decided in 1996 but the decision has been overtaken by more recent cases.

20. Wellington Nganga Muthiora V Akamba Public Road Services Ltd & Another CA NO. 260 of 2004 [2010] eKLR Court of Appeal sitting at Kisumu held:

> ***"Where 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"

21. From the court record, it is clear that the respondent did not challenge the testimony of PW1 police officer who produced six (6) abstracts issued to the victims of the accident during cross-examination as relates to ownership of the vehicle. Instead he questioned PW1 on issues alluding to liability as well as the number of abstracts issued in relation to the accident by the police. The issue of ownership of the vehicle did not arise in cross-examination.

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

"Whereas it is true that it is the responsibility of the plaintiff to prove that the 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."

23. Similarly, **Okwengu, J** (as she 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."

24. Section 8 of the Traffic Act provides: -

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

25. I am guided by the foregoing law and authorities. I am of the considered opinion that the police abstracts were sufficient evidence that motor vehicle KBJ 753Y was owned by the respondent. Under Section 8 of the Act, the respondent proved "the contrary" in her uncontroverted evidence.

26. On liability, I refer to the testimony of the appellant to the effect that the respondent's driver was driving at a high speed at a corner. He further testified that the passengers in the motor vehicle shouted in protest to the driver. The appellant admitted that she was not wearing a seatbelt at the material time.

27. Although the respondent tended to blame the appellant for failing to fasten the seat belt, and further boarding a vehicle with few seatbelts, it is clear that fastening of a seat belt is not related to the occurrence of an accident. Neither can failure to fasten a seat belt contribute to the cause of an accident. It can only mitigate the injuries or guide the court in apportioning liability. I am convinced that had the respondent not been driving very fast at a corner, the accident would have not occurred. This evidence was not controverted.

28. It is for the above reasons that I find that the appellant proved on a balance of probabilities that the respondent was driving without due care and attention. Fastening a seat belt is a legal requirement and so the appellant has to bear some liability for the injuries sustained.

29. Consequently, it is my opinion that the appellant bares 10% liability. I am persuaded by the Court of Appeal decision in **Oscar Omondi Onoka v H. S. Amin & Co Ltd [2011] eKLR.**

30. Having determined that the appellant proved ownership of the motor vehicle to the respondent as well as the issue of liability, I turn now to the issue of damages. It is not disputed that the appellant is entitled to special damages of Kshs. 6,500/= as receipted for the Kshs. 3,000/= and 3,500 respectively for medical report by Dr. Njiru G.N. and subsequent court attendance by the doctor.

31. On quantum for damages, I note that the respondents never filed their submissions on this damage head for reasons known to her.

32. It is not in dispute that as a result of the accident, the appellant suffered what her doctor under cross examination referred to as soft tissue injuries.

33. In the case of **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR,** the Court allowed an appeal that sought to lower damages of quantum awarded from Kshs. 300,000/= -150,000/= for soft tissue injuries to the lower right leg and to the back. I will similarly award the appellant Kshs. 150,000/= for general damages.

34. The upshot of the above is that the trial court's judgement is wholly set aside and replaced with judgment in favour of the appellant on liability at the ratio of 90:10.

35. The following is the summary of damages payable to the appellant:

i. Special Damages Kshs. 6,500

ii. General Damages Kshs. 150,000

Total Kshs. 156,500

Less 10% Liability Kshs. 15,500

NET **Kshs. 141,000**

36. I award the appellant costs of this appeal as well as those of the court below.

37. The appeal stands allowed.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of; -

Ms. Maroko for Ogweno for Respondent