



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 109 OF 2007**

**JOSEPH KIONGERA NJEHU**

**T/A ANNDY ENTERPRISES .....1<sup>ST</sup> APPELLANT**

**VERSUS**

**ANNE M. MUGAMBI.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 6<sup>th</sup> April, 2005 by Hon. Mr. El Kindy (Principal Magistrate) Milimani Commercial Courts in CMCC No. 6178 of 2002).**

**JUDGMENT**

1. The Respondent, Anne M. Mugambi was the Plaintiff in the Lower Court. The Respondent's claim was for the sum of Ksh.128,405/= damages suffered when her motor vehicle Registration No. KAU 247M was involved in an accident with motor vehicle Registration No. KAA 332U on 18<sup>th</sup> August, 1999. The Respondent attributed the accident to the negligence of the driver (2<sup>nd</sup> Defendant) of motor vehicle KAA 332U.
2. The Appellant, Joseph Kiongera Njehu T/a Anndy Enterprises denied the claim. The Appellant who was the 1<sup>st</sup> Defendant in the Lower Court blamed the accident on another motor vehicle which was operating in Nairobi and was bearing the same Registration No. KAA 332U. It was further stated that one Paul Gikurumi Waiganjo was arrested and charged with a criminal offence of forgery and obtaining money by false pretenses.
3. The Lower Court record does not reflect any entry of appearance or filing of defence by the 2<sup>nd</sup> Defendant. No interlocutory judgment was entered against him. The claim against the 2<sup>nd</sup> Defendant therefore seems to have been abandoned.
4. At the conclusion of the trial, judgment was entered in favour of the Plaintiff against the Defendants as prayed in the plaint.
5. The Appellant was dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:
  - (a) Whether there was proof of ownership of motor vehicle registration No. KAA 334U.
  - (b) Whether the claim of Ksh.128,405/= was proved.
  - (c) whether the Plaintiff's/Respondent's case was proved.
6. The Appeal was heard by way of written submissions which I have considered.
7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

**“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

8. During the hearing of the case, the Respondent (PW1) stated that she was driving her motor vehicle along Waiyaki way. That a trailer that was ahead of her signaled to change the lane to hers. That she slowed down and it was then that she was hit from behind by motor vehicle Registration No. KAA 332U make Canter, yellow in colour. The accident was reported to the police. The copy of records and the police abstract were produced as exhibits.

9. PW2 Godfrey Njenga from First Assurance Co. Ltd, the Respondent's insurer gave evidence on the reports carried out on the Respondent's motor vehicle. His evidence is that the total expenses amounted to Ksh.128,405/= which they claim under the doctrine of subrogation.

10. On the other hand, DW1 Joseph Kimani who was the driver of the Appellant's motor vehicle denied having been involved in any accident. He stated that in October, 1999 while he was in Gilgil in the cause of his duties as a driver, he spotted another motor vehicle bearing the same Registration No. KAA 332U as the motor vehicle he was driving. That he called members of public to witness the matter but the other driver sped off. That he later reported the matter to his employer. The said driver's evidence was that the motor vehicle he was driving is now white in colour although it used to be Yellow in colour as at 22<sup>nd</sup> May, 1999.

11. The Appellant, Joseph Kiongera Njehu testified that DW1 was his only driver for his motor vehicle KAA 332U Mitsubishi van white in colour. That the motor vehicle had never had an accident. He further stated that in October, 1999 his driver reported to him the issue of another motor vehicle that had the same Registration number as his. That he reported the matter to the police for investigation which culminated in a criminal case at Kibera Law Courts. His further evidence was that he was bonded to testify in the said criminal case but did not. He produced as exhibits the criminal case proceedings in Kibera Cr. No. 1928/00 together with his motor vehicles certificate of insurance from United Insurance Co. Ltd. His evidence was that the other motor vehicle was insured by Blue shield Insurance Co. Ltd.

12. The criminal case proceedings reflect the accused as Paul Gikurumi Waiganjo who was charged with the offence of forgery of a motor vehicle Log book and making a Log book for motor vehicle Registration No KAA 332U make Mitsubishi Canter Van 332U and obtaining money by falsely pretending to sell the said motor vehicle. That the accused was acquitted under Section 210 Criminal Penal Code without the prosecution having tendered any evidence.

13. The police abstract concerning the accident the subject of this suit reflects the driver of the motor vehicle KAA 332U Mitsubishi Canter as Benjamin Kingori Wamunya (2<sup>nd</sup> Defendant) c/o Paul Muiruri Mbugua of P. O. Box 1743 Nyahururu. The insurer is reflected as Blue Shield. It is noted that the Appellant gave evidence that he did not live in Nyahururu and has never lived there. His driver's name is not reflected on the police abstract.

14. The Respondent's evidence as to the ownership of the motor vehicle that hit hers is reflected in the copy of records from Kenya Revenue Authority which reflects the Appellant (Anndy Enterprises) as the registered owner and the address as P.O. Box 3769 Thika. The police abstract as noted above reflects totally different details of the driver. The ownership details are not reflected in the police abstract. The ownership column entry reflects the driver as Benjamin Kingori Wamunya c/o Paul Muiruri Mbugua of P.O. Box 1743, Nyahururu. The police abstract was produced by the Respondent and therefore no light was shed as to the entries therein. However, it is not in dispute that the Appellant is the registered owner of motor vehicle Registration No. KAA 332U make Mitsubishi Van.

15. The evidence from both sides gives a scenario of two Mitsubishi vans bearing the same registration number with different owners and insured by different insurance companies. The question that arises is whether in the circumstances the Respondent proved her case on a balance of probabilities.

16. It is not denied that the Appellant is the owner of motor vehicle KAA 332U make Mitsubishi van. The driver however testified that the motor vehicle he was driving was white in colour. To quote the evidence on record, the driver (DW2) stated as follows **“it was a white colour body. It was Yellow – 1999 22<sup>nd</sup> May.”** The Appellant (DW2) who is the owner of the motor vehicle did not however give evidence on the change of colour of the motor vehicle. All in all, the Appellant's side points out at the difference in colour and the different Insurance companies to support their claim of double registration in addition to the criminal proceedings.

17. The Appellant who is the registered owner of the motor vehicle did not give evidence in the criminal case. His evidence is that he was bonded but he did not testify. No reasons have been given for the failure to testify, yet his evidence is that he made a report of the double registration to the police and he also blames the accident on this other motor vehicle yet no attempts were made to enjoin the owner of this other motor vehicle in the proceedings herein.

18. If the Appellant had enjoined the owner of the other motor vehicle as a party in these proceedings, it would have shed light on the issue of double registration. Order 1 rule 15 (1) Civil Procedure Rules provides for Third Party proceedings as follows:

**“(1) where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)**

**(a) that he is entitled to contribution or indemnity; or**

**(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or**

**(c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the Plaintiff and the**

defendant but as between the plaintiff and defendant and the third party or between any or either of them.

He shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit.”

19. The Appellant is the one who blames the accident on another motor vehicle. He who alleges must prove. The Evidence Act Cap 80 Laws of Kenya stipulates as follows:

Section 109 “**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.**”

Section 112 “**In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**”

20. The facts of this case are rather intriguing. There is the evidence by the Appellant’s side on change of colour of their motor vehicle from yellow to white which is said to have happened a few months prior to the accident; the evidence of double registration complete with same colour of motor vehicle involved in the accident and make; and different registration, ownership and insurance details. The trial magistrate who saw the witnesses testify and observed their demeanour believed the Respondent’s evidence. Having analyzed the evidence herein, I am in agreement with the finding of the trial court that the Respondent proved her case on a balance of probabilities.

21. The breakdown of the repairs carried out as per the evidence of PW2 were as follows:

“1. spare parts	Ksh.34,000.00
2. Colour	Ksh.17,000.00
3. Paint	Ksh.38,000.00
4. Misc. Mechanic	Ksh. 6,000.00
5. Subcontract	Ksh. <u>75,000.00</u>
<b>Total</b>	<b>Ksh.170,000.00</b>

The assessment report was produced as an exhibit together with the payment voucher for Ksh.121,328/= plus a receipt for Ksh.6,980/= assessment fees. The total comes to Ksh.128,405/= which is the amount claimed in the plaint. These figures were not challenged during cross-examination. The claim was specifically pleaded and proved.

22. The upshot is that I find no merits in the appeal and dismiss the same with costs.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of June, 2018**

**B. THURANIRA JADEN**

**JUDGE**