



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 39 OF 2013**

**DUNCAN MAWEU MUTISO.....APPELLANT**

**VERSUS**

**EDWIN OWITI OWANGA.....RESPONDENT**

**J U D G M E N T**

1. On 15/01/2013, Hon. D M Machage, (PM), sitting at Mariakani Law Courts in PMCC No. 170 of 2011 between the Appellant here as a plaintiff and Respondent, delivered a ruling by which he dismissed the Appellants suit on two grounds being that; the appellant boarded the motor vehicle with full knowledge that it was not a passenger transport vehicle but a goods motor vehicles and that Appellant had failed to prove that the Respondent was the Registered owner of the motor vehicle by evidence for the Registrar of motor vehicles or by copy of the log book. For the two reasons the trial court found that the appellant had on a balance of probabilities failed to prove his case against the Respondent and had the same dismissed with costs.

2. That decision he provoked the present appeal in which the Appellant has raised some 7 grounds of appeal crafted as follows:-

**i) THAT the Learned Magistrate erred in law and infact by failing to appreciate that the appellant had proved his case on a balance of probabilities against the Respondent.**

**ii) THAT the Learned Magistrate erred in law and infact in dismissing the plaintiff case on grounds that he never produced records of Registrar of Motor Vehicle and or copy of logbook to prove BENEFICIAL OWNERSHIP OF THE SUBJECT MOTOR VEHICLE.**

**iii) THAT the Learned Magistrates erred in his conclusion that the appellant could only prove ownership and or beneficial ownership of the subject motor vehicle by way of records from Registrar of motor vehicle and or copy of logbook.**

**iv) THAT the Learned Magistrates erred in failing to appreciate the issue of ownership of the subject motor vehicle of the suit was not disputed and was admitted in both witness statement and evidence adduced in court.**

**v) THAT the Learned Magistrates erred in disregarding well settled judicial decisions on issue of ownership of motor vehicle especially the case of SECURICOR KENYA LTD VS KYUMBA HOLDINGS LTD CIVIL APPEAL NO. 7 OF 2002 (NAIROBI).**

**vi) THAT the Learned Magistrate erred in law and infact by failing to appreciate the plaintiffs boarded the vehicle with full authority of the owner of the vehicle, and therefore the owner owed the plaintiff a duty of care.**

**vii) THAT the Learned Magistrates largely contradicted himself in the judgment.**

3. All the grounds challenge the decision that the appellant did not prove his case on a balance of probabilities to merit a judgment in his favour. Accordingly, the only issue this court must interrogate and determine is whether or not the case against by Respondent by the Appellant was proved.

4. I propose to determine that question on two questions by seeking provide answers to the following

- **Did the Appellant assume any risk by boarding a motor vehicle not otherwise meant for passenger transport?**
- **Was the ownership of the motor vehicle deemed or made an issue for determination by the court?**

5. To determine the two issues on the special, the court must of Necessity review the pleadings filed and evidence led and relate Same with the findings by the trial court.

#### **Analysis of the pleadings and evidence adduced**

6. At trial, the Appellant filed a plaint dated 27/10/2011 together with a witness statement and a list of some 6 documents. In the plaint, it is pleaded that on the material day, the Appellant was lawfully travelling in motor vehicle KAM 040R Mitsubishi canter, registered in the name of the Respondent when the vehicle rolled owing to a tyre-burst and the plaintiff sustained serious injuries. There was police abstract which revealed the Respondent as the registered owner.

7. On his side the Respondent filed a statement of defense in which the Accident and ownership of the motor vehicle were denied with an alternative prayer that the accident, if it ever occurred, was contributed to by the plaintiff by failure to fasten the safety belt, thereby suggesting that the appellant was on the motor vehicle but ignored to take care of himself.

8. By way of evidence, the Appellant gave evidence to the effect that being a business man on the 30/6/2011 he boarded a motor vehicle KAM 040R, a canter with his luggage for Silaloni Market. For his travel he said he paid for himself on the luggage. That evidence was silent on the ownership of the motor vehicle and whether the vehicle had seat belts for passengers.

9. It is important to note that in cross examination the Respondents counsel did not hint to the witness that he had entered the vehicle without permission or knowledge of the driver.

10. In law a party is not permitted to ambush the other by evidence not on the pleadings and not hinted at cross examination. The law is that a defendant is bound to put the substance of their defense to the plaintiff witness so that there would be an opportunity for the plaintiff to respond before the case of its[1].

11. Additionally the question how the plaintiff got into the motor vehicle was never pleaded so as to entitle the Respondent to lead evidence on it just as much it could thus not be an issue for determination by the court in compliance and accordance with order 15 civil Procedure Rules.

12. In law an issue arises for determination by the court when a material proposition of fact, which a party alleging must prove to a right to sue or constitute a defense, is affirmed by one side and denied by the other party. In this matter the plaintiff unequivocally pleaded that he was a lawful passenger in the motor vehicle declared. That affirmation was never strictly denied by the defendant in the defense but in evidence expressly admitted when the defendants witness, DW 1 JACOB MZEE MKUA said:-

**“On 30/6/2012 I recall, I woke up checked the vehicle, light transport all was well at 8.30am. Then was to move from Samburu to Silaloni when two people engaged me. They were Duncan Mwaweu & Mbotela wanted me to take them to the market. I was led to go see luggage, we talked, asked then to pay 250.**

**They were to pay me later on arrival. I loaded the luggage. It was 8.30am, I started off, I was with my turnboy at the time”.**

13. With such evidence, I wonder what other evidence was requisite to show that the Respondents driver, DW 1 allowed the Appellant into the motor vehicle.

14. It was therefore a matter not in a consonance with the evidence adduced when the trial court held that the plaintiff was not an authorised passenger. More critical was the finding by the court at page 16 line 11 that “ *in my considered view this was a cost cutting measure agreed between the plaintiffs and the driver and his turn boy. It was only unfortunate that the accident occurred*”.

15. Having found that the driver agreed that the Appellant boards, as a way of cost cutting, was it open for the court to find that the Appellant was an authorized driver? I do not think so. I do not so think because, there was never evidence that DW 1 was not employed by the owner of the motor vehicle. In any event having not been a party to the suit at whose behest and instance was he giving evidence? How did he walk into the controversy involving a party he was not related to?

16. In addition, the evidence given by DW 1 gives the irresistible impression that the vehicle was for hire and reward and the appellant actually paid or at least negotiated payment with DW 1 who must have been an employee of the owner of the motor vehicle, who sent him to give evidence. Being such employee he acted for and to the benefit of the employer and his agreement with the Appellant was in the cause of his duty and within the scope of his authority.

17. Consequently, the trial court was evidently and obviously in error when it held that the Appellant was not an authorized passenger.

There was never any evidence that the driver was limited in his scope and method or carrying out his work.

18. In *Mary Waitherero vs Chilla [2006] eKLR* the court had this to say, and I find that to be the proper position of the law applicable:-

**“It is well settled law that a master is liable even for acts which he has not authorized provided that they be so connected with the acts which he has authorized that they may be regarded as modes, though improper, of doing them on the other hand. If the unauthorized and unlawful acts of the servant is not so connected with the authorized acts as to be the mode of doing it but is an independent act, the master is not responsible for in such a case the servant is not acting in the cause of the employment but has gone outside it”.**

19. Here I do find that the carriage of goods for hire and reward was the authorized mode of DW 1 performing his duty to the employer and that when he negotiated to carry luggage and the owners thereof, that was an authorised way of performing his work.

20. Having reviewed the entire evidence upon pleadings filed and being guided by the trite law that a party is not permitted to lead evidence on an un-pleaded issue, I do find that the trial court was in error in its determination in so far as it relied on evidence that was not receivable nor admissible from the Respondent for reason that the same was never pleaded.

**Was ownership by the Respondent proved?**

21. It is not disputed that the defendant specifically denied having been the registered owner of the motor vehicle pleaded. However in evidence the Appellant called PW 1, DANIEL OTIENO, a police officer stationed in Taru and in-charge of Traffic services. That witness produced the police file as exhibit IV. That file was the foundation of the police abstract produced by PW III as exhibit P7. That exhibit P7, police abstract, at entry November 1a disclosed the Respondent as the owner of the motor vehicle KAM 040R. In cross examination the defendants did not raise any issue with that entry at all just like no question on ownership was raised with PW 2. That evidence thus remained wholly uncontroverted. In legal parlance it was evidence showing on a preponderance basis that the Respondent was the owner of the motor vehicle.

The Court of Appeal in **JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED CIVIL APPEAL NO. 309 OF 2010[2013] eKLR** observed that:

**“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 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.”**

22. On the evidence before the trial court, there was sufficient proof by way off the police abstract who the owner of the motor vehicle was. That the police can get by either getting information from the driver or just inspection of the motor vehicle. By Rule 55 of the Traffic Rules, it is mandatory that every owner of a motor is obligated to have painted of the motor vehicle on the right or offside and in a conspicuous position, the name and address of the owner of the motor vehicle. That is a legal requirement and when a public document in the nature of police abstract is produced and no challenge is made to its content, the court had no otherwise but to accept it.

In *Nany Ayieiba Wgaira vs Abdi Ali, [2010] eKLR* where the Court of Appeal said:-

**“And in judicial practice, concepts have arisen to describe such alternative forms of ownership; beneficial; possessory; actual ownership. A person who enjoys any such other category of ownership may for practical purposes be such more relevant than the person whose names appears in the certificate of registrations; and in the instant case at the trial level, it has been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of police abstract showed on a balance of probabilities that the 1<sup>st</sup> defendant was one of the owners of the mentioned in question”.**

23. The same court repeated the same position in *Joel Mugo vs E.A. Sea Foods Ltd [2013] eKLR*:

**“...when the abstract is not challenged and is produced in court without any objection, its content cannot later be denied”.**

24. It was thus not right for the trial court to say that the Respondent having denied ownership of the motor vehicle the Appellant was *bound to show by way of certificate of registration or by way of a copy of the logbook*. In so finding the trial court was demanding of the Appellant a burden higher than on a balance of probability and therefore misapprehended the law applicable and has made itself amenable to being reversed on appeal.

25. I therefore find for the Appellant, reverse the finding by the trial court that the Appellant did not prove his case against the Respondent, and in the place of such finding declare that the case was proved to the requisite standard rules.

26. The court had no right to allow the Respondent deny the content of the Exhibit P7 produced without contestation. Its content on the ownership had gone into evidence and record of the court and the court in disregarding it failed to take into account a critical and crucial evidence and to that extent was clearly wrong.

27. There was no challenge on the finding of the trial court on apportionment of liability had the court found for the respondent, but this being a first appeal in which I am bound re-evaluate the entire evidence and come to own conclusions, I do find that there was no evidence for the court to have found that the Appellant choose to hang on to the lorry on top of their luggage and thereby find them 80% liable. That is yet another finding not supported by evidence which cannot be allowed to stand.

28. On quantum of damages awarded, I am guided that my mandate does not extend to substituting my discretion for that of the trial court and I decline to interfere with the sum awarded.

29. The upshot is that the decision of the trial court dismissing the Appellants case with costs is set aside and in its place substituted a

decision finding the Respondent liable to the Appellant at 100%. The award of general damage as well as special damages are upheld in the sum of Kshs.100,000/= and 1,600/= respectively.

30. Such damages shall attract interest at court rates from the date of judgment of the lower, 15/01/2013, till payment in full.

31. I also award to the Appellant the costs of the trial in the court below as well as the costs of this appeal.

**Dated and delivered at Mombasa this 6th day of July 2018.**

**P.J.O. OTIENO**

**JUDGE**

---

**[1] Browne vs Dunn [1893] 6 R. 67 HL quoted with approval in David Kahuruka Gitau & Another vs Nancy Anne Wathiethi[2016] eKLR where the court said:** *"... I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."*