



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 28 OF 2016

(Being an appeal arising from Judgment and decree in Kitale Magistrate's Civil Suit No. 91 of 2008 by Hon. V.W. Wandera Chief Magistrate delivered on 24/2/2016)

AGNES CHEPUS (SUING AS THE ADMISNTRATOR OF THE ESTATE OF

Chege Gerishom Alfayo) - DECEASED.....APPELLANT

VERSUS

MARGARET GUKO.....RESPONDENT

J U D G M E N T

1. There is no dispute that the decease met his death on the 29th July 2007 at Kesogon along Kitale-Kapenguria road when he was hit by motor vehicle Registration No. KAH 127D. The details are contained in the plaint as well as the evidence on record.
2. The matter proceeded to full hearing and after the appellant closed her case, the Respondent on his part did not tender any evidence. The trial court proceeded to deliver its judgment which it dismissed the appellant's case on the ground that she did not proof that the Respondent was the registered owner of the motor vehicle. The trial court also found that the suit was fatal for the simple reason that the driver of the motor vehicle was not sued.
3. The appellant has anchored her grounds of appeal on the two grounds with a 3rd one on the issue of quantum which she claims that the trial court failed to consider the appropriate elements when assessing the quantum.
4. The parties agreed that this matter was to be determined by way of written submissions which they did and I have heard the benefit of perusing them. I have equally perused the proceedings as presented during trial.
5. The two elements of ownership and failure to enjoin the driver have formed the issues in this appeal. The Respondent on her part agrees with the trial court that failure to proof ownership contravened the provisions of Section 8 of the Traffic Act. She relied on the case of *Charles Mageto and Another versus Peter Njuguna Njathi – Nakuru HCA No. 4/2008* as well as *Thuranira Karauri vs Agnes Ncheche Nairobi CA No. 192/1996*.
6. On her part the appellant insisted that the ownership was proven by the production of Police Abstract which showed the details of the owner and that the Respondent on her part did not deny this through her evidence despite denying it in her defence on record.
7. Looking at the evidence produced, it is clear that the police abstract showed the date of the accident and PW3 the Base Commander testified and produced the same. He confirmed that the Respondent was the owner of the Motor vehicle.
8. The parties herein relied on several opposing authorities which I have perused. Section 9 of the Traffic Act provides that;

“ The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
9. Clearly the proof of ownership of the vehicle shall be registration documents unless proved otherwise. In the case at hand, the only document shown is the police abstract produced by PW3. The same was not contested. The Respondent had a chance to cross-examine the said witness. It showed the Respondent to be the owner as well as Philip Njoroge Kariuki as the driver.
10. The Respondent did not provide any evidence to contradict the line of evidence taken by the appellant.

11. There have been nevertheless myriad of authorities which suggest that it was not fatal not to produce the certificate for the Registrar of Motor vehicles showing the registered owner of the motor vehicle. I think the jurisprudence developed around this area is because of the usual circumstances obtaining in the daily commercial transactions involving sale and purchase of motor vehicles. Infact it is common to sometimes that a vehicle can oscilate around 2 or more people without having it transferred formally as required so as to effect change in the register at the Registrar of motor vehicles.

12. In variably, problems do arise when the said motor vehicle is involved in breach of the law for instance in accidents or theft.

13. The court of Appeal in *Joel Munga Opija Vs East African Sea food Ltd Civil App No. 309/2010 (2013) eKLR* relied on and quoted extensively by the applicant is states interalia that;

“ ----- It is noteworthy, that Bosire J.A sat in Thuraniira’s case (supra), Wandera case (supra) and in the Lake Flowers case. It would appear that like us, he treated the comments in Thuraniira case as Orbiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuraniira’s case. In any case in our view an exhibit is evidence and in this case, the appellants 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 Africa 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.”

14. I think the position obtained in this matter. Infact it would have been prudent for the Respondent to not only produce evidence to the contrary or at least bring one Joaz K. Koros as a 3rd party. To simply deny the same in the defence and leave it to the court to rely on the defence was too simplistic. Nothing was produced to counter the police abstract. Needless to say, being a civil matter the burden of proof was within the balance of probability.

15. In the premises I do find that this ground succeeds. There was sufficient evidence which was not rebutted that at the time of the accident the Respondent was an “actual” beneficial or possessory owner of the said motor vehicle. See Ojwang J (as he then was) in *Nancy Ayemba Ngaira Vs Abdi Ali Civil Appeal No. 107/2008 (2010) Eklr*).

16. The next issue is the failure to enjoin the driver as a party in this case. It is not contented that at the time of the accident Philip Njoroge Kariuki was driving the same. He was convicted and sentenced appropriately. If then he was driving the said vehicle, was the lack of inclusion as a party fatal?

17. In *Karisa Vs Solanki (1969) EA 316*, the court stated in a similar situation that;

“ Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person fro whose negligence the owner is responsible (See Benard Vs Suty (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possiblity that it was still being driven for the joint benefit of the owner and the driver.”

18. In the case at hand, the same was a public service vehicle (Matatu). It was owned by the Respondent. The driver admitted the offence. It must have been driven for the benefit of the Respondent. In any case she did not bother to enjoin him as a 3rd party.

19. The same position was held by the Court of Appeal in *Harrison Genta Vs Twiga Chemicals Ltd (2014) eKLR*, which this court is bound to follow. On the above ground the appeal succeeds.

20. Finally, did the trial court erred in assessment of quantum and on liability? On the question of liability, I have studied the sketch map produced by PW3 the base Commander. It appears that the point of impact was almost at the edge of the road. No eye witness was called and neither was the driver of the vehicle called. His admission however before the Traffic court lends credence to his culpability. I shall therefore conclude that the Respondents agent and or driver was 100% liable for the accident.

21. On the question of quantum the trial court awarded the appellant a sum of kshs 240,000 being general damages. The court has perused the authorities relied on by the parties at the trial court. No doubt the man was 51 years old with a wife and a 5 year old child by then. His income according to the appellant was about kshs 15,000 per month which was derived from farming. No documentary proof was produced, and neither did she produce any evidence to show the kind and size of land they owned. In the premises I do take it that he was an ordinary peasant farmer.

22. The figure of Kshs 15,000/= per month in my view would be on the higher side. I find that a modest sum of kshs 10,000/= per month would be appropriate.

23. Retiring in farming is in the ordinary sense not feasible. As much as the retirement age in Kenya is considered at 60 years for those formerly employed. Infact the employed folks would retire and would engage themselves in farming most probably for the rest of their active lives.

24. Consequently I would give active period of upto 70 years had the deceased lived.

25. Obviously the deceased must have suffered pain during the accident. Clearly the same must be awarded as no contrary evidence was adduced.

26. For the foregoing reasons I find that the deceased would have perhaps been active for about 19 years of his life.

27. In the final analysis I shall compute the quantum as follow;

1. Loss of dependency $10,000 \times \frac{2}{3} \times 12 \times 19 = 1,520,000$.

2. Pain and suffering Kshs 50,000.

Total Kshs 1,570,000/=

28. The appeal is hereby allowed as follows;

(1) General damages as computed above.

(2) Costs and interest calculated from the date of judgment in the lower court till payment in full

(3) Costs of this appeal and in the lower court to the appellant.

Order accordingly.

Delivered, signed and dated at Kitale this 17th day of October, 2018.

H.K. CHEMITEI

JUDGE

17/10/18

In the presence of:

Masinde for Appellant

Prof. Sifuna for Kiarie for Respondent

Court Assistant – Kirong

Judgment read in open court.