



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 53 OF 2008

Arising from the Judgment of Hon J.N Ndubi in Meru CMCC NO. 440 of 2007, delivered on 21st May 2008

(CORAM: F. GIKONYO J.)

**LYDIA NKUENE KINOTI (Suing as the Legal Administratrix of the Estate of JOHN KINOTI GIKUNDA (Deceased)).....
.....APPELLANT**

VERSUS

DAVID JAMES RWITO.....RESPONDENT

JUDGMENT.

[1] This Appeal arises from the Judgment of Hon J.N Ndubi in Meru Civil Case no. 440 of 2007, delivered on 21st May 2008, in which the Learned Trial Magistrate dismissed the Appellant's suit; the suit claimed damages for death of the deceased who died in a road traffic accident that occurred 12th March 2006.

[2] The Appellant filed a memorandum of appeal on 19th June 2008, raising the following grounds of appeal;

a). The Learned Magistrate erred in law and fact in finding that he held that it was upon the appellant to produce a certificate of search from the registrar vehicles whereas the Respondent was sued both as a driver and owner of motor vehicle registration number KQZ 729 and was therefore liable as the driver of the said motor vehicle.

b). The Learned Trial Magistrate erred in law and fact in that he did not find that the Respondent did not file an amended defence to the amended plaint and therefore the pleadings in the amended plaint remained unchallenged.

c). The Learned Trial Magistrate further erred in law and fact in that he disregarded the Appellant's evidence on record despite the fact that the Respondent did not adduce any evidence in court and did also not attend the court during the hearing of the suit.

d). That the Learned Trial Magistrate erred in law and fact in that disregarded the evidence of PW2 eye witness which was to the effect that the Respondent was indeed the driver of the subject motor vehicle and PW2 actually indentified him at the time of the accident.

e). The Learned Trial Magistrate further erred in law and fact in that he found that the Respondent was not charged with a traffic offence whereas in civil cases such an eventuality was not necessary as the burden of proof is on a balance of probabilities.

f). The Learned Trial Magistrate erred in law and fact in that he disregarded the Appellant's submission both on liability and quantum of damages with the resultant miscarriage of justice to the Appellant.

g). The Learned Trial Magistrate erred in law and fact by arriving at a decision on quantum of damages, should the Appellant's case have succeeded which was manifestly low and completely unsupported by the evidence on record and the judicial authorities thereof.

h). The lower court's decision is against the weight of the evidence and the same was bad in law as it was arrived on wring principles of law with a resultant miscarriage of justice to the Appellant in view of the claim before the court.

[3] I note that the grounds are quite descriptive. No wonder, the Appellant's submissions merely reiterated the grounds of appeal as set out in the memo of appeal. I need not therefore reproduce them. On the basis of the arguments stated, the Appellant urged the court to allow the appeal and award her the costs of the appeal and the court below. Despite having been given ample time, the Respondent did not file submissions. Nonetheless, I will determine the appeal on merit.

My duty

[4] This being a first appeal, the court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. See Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348.

[5] The Appellant in her evidence in chief stated that she did not witness the accident. She however produced a police abstract reflecting that the owner of the subject motor vehicle as at the time of the accident was the Respondent. Her evidence towards this respect remained uncontroverted and unchallenged throughout the trial as the Respondent did not challenge the contents of the police abstract nor cross examine her on it or call evidence in rebuttal. PW2 who was an eye witness testified that the subject motor vehicle was owned by the Respondent and that he was the one driving it at the time of the accident. His evidence towards this respect similarly remained unchallenged.

[6] The crux of the matter is that the Learned Trial Magistrate in his judgment stated inter alia that ownership of the subject motor vehicle having been vehemently denied, it was incumbent on the plaintiff to produce a certificate of search from the registrar of motor vehicles so as to prove ownership on part of the defendant. The trial magistrate dismissed the police abstract and held that ownership of motor vehicle could only be proved by official search certificate. What is the law on this subject?

[7] It has been held that, whereas the Police Abstract Report is not, on its own, proof of ownership of a motor vehicle if, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership has been proved. This point is replete with judicial decisions such as the case of **CHARLES NYAMBUTO MAGETO vs. PETER NJUGUNA NJATHI NKU HCCA NO. 4 OF 2009 [2013] eKLR** where it was stated thus;

From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say, actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuraira and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof of ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership.

[8] Faced with a similar situation, Warsame J., (as he then was) in **JOTHAM MUGALO vs. TELKOM (K) LTD KISUMU HCCC NO. 166 OF 2001[2005] eKLR** 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.

[9]. Similarly, Okwengu J., (as she then was) in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru Nyeri HCCA No. 34 of 2002[2005] eKLR** expressed the view that:

It is true that a certificate of search from registrar of motor vehicles would have shown who was registered owner of the 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.

[10] In light of the law, the trial magistrate clearly fell into error in holding that the only way of proving ownership of the subject motor vehicle was by production of a certificate of search from the Registrar of motor vehicles. The contents of the police abstract were not controverted. In fact no rebuttal evidence was adduced by the Respondent. The evidence by the plaintiff and her witness augments the contents of the abstract and comforts the court in making the conclusion that ownership of the vehicle was proved. Upon consideration of the evidence adduced, the Respondent was both the owner and driver of the subject motor vehicle herein as at the time of the accident. Similarly, in light of the evidence, I am of considered opinion that liability attaches to and I find the Respondent to be 100% liable for the accident herein. The judgment of the lower court is hereby set aside.

Quantum

[11] I now move to assess quantum of damages. For Loss of Dependency, it was submitted before the trial court that the deceased died at the prime age of 26 years. He was married and maintained his family. By his death, the family has been deprived of the said support. All these were narrated by PW1. It was also submitted that the deceased was an energetic farmer who was also working in a quarry, but, in the absence of documents to support his income, the appellant urged the court to be guided by the case of **JACOB AYIGA MURUJA & FRANCIS KARANI V SIMEON OBAYO** and adopt the sum of KShs 2,000 per month in computing his net earnings and a multiplier of 20 years which is reasonable and fair in the circumstances. The Appellant worked out dependency thus;

20x12x2, 000x2/3=320,000/=

[12] On my part, dependency was proved by PW1. The deceased was married and his family now does not have the support the deceased used to give them. He was aged 26 years; young and energetic. He was a farmer and a quarry worker. Even if there are no documents to prove income, the sum of Kshs. 2000 per month which has been suggested by the appellant is quite modest. A global sum would still be around 350,000 to 500,000. Therefore, I find the sum of Kshs. 320,000 for loss of dependency to be fair and reasonable. And I award loss of dependency of Kshs. 320,000.

[13] On loss of expectation of life, the court was urged to award a conventional figure of Kshs 100,000 and Kshs 20,000 for pain and suffering as the deceased died instantly. I so award. Special damages were also proved and I award them.

[14] In the upshot, I allow this appeal and enter judgment for the Appellant as follows;

1. Special damages	Kshs 15,350
2. Loss of Expectation of Life.....	Kshs 100,000
3. Pain and suffering	Kshs 20,000
4. Loss of Dependency	Kshs 320,000
TOTAL	Kshs 455,350

[15] The Appellant will also have the costs of this appeal and in the lower court. She will also get interest at court rates. It is so ordered.

Dated, signed and delivered in open court at Meru this 22nd day of November 2018

F. GIKONYO

JUDGE

In presence of

Kariuki for Kiogora for Applicant

No Appearance for Respondent

F. GIKONYO

JUDGE