



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 16 OF 2012

SIMON NGURE KIRONJO (appealing as the Legal Representative of the Estate of PHILISILA NYAMBURA CYRUS KIRONJO.....APPELLANT

VERSUS

JOHN MUHIA KANOTHA.....RESPONDENT

Being an appeal from the judgment and decree of the Principal Magistrate's Court (B. M. Ochoi) Civil Case Number 96 of 2011 delivered on 13th March, 2011)

JUDGMENT

1. **SIMON NGURE KIRONJO** is the appellant herein appealing on a representative capacity as the legal representative of the estate of **PHILISILA NYAMBURA CYRUS KIRONJO** and has appealed against the judgment and decree of Hon. B. M. OCHOI Principal Magistrate Wanguru Court delivered on 13th March, 2012 in **Wanguru Principal Magistrate's Court Civil Case No. 96 of 2011.**
2. The appellant had sued the Respondent owing to a road traffic accident involving motor vehicle Registration No. KAP 483H and motor cycle KMCA 850N along Karatina-Makutano road which claimed the life of Philisila Nyambura Cyrus Kironjo. The Respondent was sued as the owner of the said motor vehicle but denied ownership. After trial the subordinate court found for the Respondent and dismissed the Appellant's case on account that ownership of the accident vehicle had not been proved to the required standard.
3. The Appellant was dissatisfied with the judgment and preferred this appeal citing the following grounds in his Memorandum of Appeal.
 - i. ***That the trial learned magistrate erred in law and in fact in holding that the defendant was not the lawful owner of motor vehicle registration No. KAP 483 H.***
 - ii. ***That the trial learned magistrate erred in law and fact in dismissing the plaintiff's evidence on ownership.***
 - iii. ***That the trial learned magistrate erred in law and fact in relying on oral evidence which was inconsistent with the official records held and produced by the police.; and***
 - iv. ***That the trial magistrate erred in law and fact in failing to appreciate that the defendant did not take out 3rd party proceedings against alleged owner of the accident motor vehicle.***
4. The main contention in this appeal which was directed to be disposed of by way of written submissions, was whether the Appellant proved the ownership of the accident vehicle to the required standard at the trial. The Appellant has faulted the trial magistrate's view that failure to avail a copy of record from the Registrar of Motor Vehicles was fatal to the Appellant's case. On this contention he relied on the following authorities which were cited at the subordinate court:

1. **Samuel Mukunya Kamunge – Vs – John Mwangi Kamuru (Nyeri H.C.C.A. No. 34 of 2002)**
2. **Margaret Gicugu – Vs – Simon Gitonga Kingendo (Embu H.C.C.A. no. 17 of 2010)**

I will consider these authorities later in this judgment.

5. The Appellant has argued in his written submissions that he produced a Police Abstract at the trial court which was sufficient proof of ownership in his view. He has also pointed out that the driver of the ill-fated vehicle testified at the subordinate court and confirmed to court that the Respondent owned the vehicle and had given him the vehicle.
6. He has further argued that the Respondent could not controvert the documentary evidence (police Abstract) through oral evidence adduced by the Respondent. He has urged this Court to find that the Respondent was the owner of the motor vehicle and thus liable for the accident.
7. The Respondent has opposed this appeal vide his written submissions dated 20th November, 2014. The Respondent has argued that ownership of the motor vehicle that was involved in the accident was challenged at the subordinate court and it was therefore imperative in his view for the Appellant to produce a certificate of ownership. According to the Respondent a Police Abstract only suffices as evidence of ownership in the absence of a rebuttal from a defendant regarding the use of a Police Abstract he relied on the decision in **JOEL MUGA OPIJA -VS- EAST AFRICA SEA FOOD LTD. [2013] eKLR** to support this contention.
8. It is further contended that a Police Abstract can only be produced as evidence of ownership if it is neither contested nor controverted. He has cited the decisions in the following authorities to back up his submissions on that score;

1. **RUTH WANJIKU MUTHAE –VS- KENYA SUGAR BOARD [2014]eKLR.**
2. **LAKE FLOWERS LTD –VS- CILA FRANKLYLN ONYANGO NGONGA & ANOR [2008] eKLR.**

9. The Respondent has faulted the Appellant for failing to lead the witness on the Police Abstract and this in his view rendered the document mere hearsay and worthless in evidence. It has been submitted that the Appellant's evidence in regard to ownership of the accident vehicle was controverted.
10. In response to the Appellant's contention that the trial learned magistrate relied on oral evidence when there was documentary evidence proving ownership, the respondent argued that the Police officer called by the Appellant to produce the Police Abstract forgot to come to court with the Police file and so in his view he could not be cross-examined on the Abstract. He faulted the Appellant for not seeking time to avail the Police file and that the claims of ownership against him remained unsubstantiated and that the Appellant could not claim damages against him based on unproven allegations of ownership. The Respondent has further argued that the Appellant had the burden to prove his claims and failure on his part to call witnesses to prove his claims against the Respondent made his case weak.
11. Finally the Respondent submitted the Appellant did not lead evidence on the Police Abstract despite the same being produced and that he failed to establish liability against him which could have led to quantifying of damages. He has therefore submitted that this appeal lacks in merit.
12. Before I consider the issues before this Court, I have to consider the pleadings filed before the trial court. The Appellant in his plaint in that court brought the action in a representative capacity for the estate of the late **Philisila Nyambura Cyrus Kironjo** and capacity was not an issue at the trial or in this appeal. The Respondent was sued as the lawful owner of motor vehicle Registration No. KAP 483H Toyota Pick up. In his defence, the Appellant herein strictly denied ownership of the said motor vehicle and put the Appellant to strict proof. He further laid blame on the rider of motor cycle Registration Number KMCA 850 N who was killed during the accident and that the accident was inevitable and sought to rely on the doctrine of "*Res ipsa loquitor.*"
13. The appeal before Court therefore raises two issues; They are as follows:

- I. Whether the evidence adduced by the Appellant was sufficient to prove ownership of the motor vehicle and hence liability of the Respondent.
- II. If so what was the quantum of damages.

14. It is evident in this appeal given the amount of efforts put by both counsels in their respective submissions complete with the cited authorities that the ownership of motor vehicle Registration Number KAP 483 H is a critical issue in this appeal just as it was at the trial. The Appellant maintains that the Police Abstract produced was sufficient proof on a balance of probability that the motor vehicle in question belonged to the Respondent and hence liable for the accident. I have considered the decision of Hon. Judge H. M. Okwengu in the cited case of **SAMUEL MUKUNYA KAMUNGE -VS- JOHN MWANGI KAMURU (SUPRA)** where she made the following observations:

“I find that a police Abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264 A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle, and the respondent having offered no evidence to contradict the information on the Police Abstract report, the appellant had established on a balance of probability that the motor vehicle KAH 264H was owned by the respondent.”

The facts and the pleadings in the above case in regard to the issue of ownership were similar to the facts in this present appeal. The Respondent in this appeal has however, raised a new angle in his response. He has contended that the Appellant never led evidence on the contents of the Police Abstract that was produced as P. Exhibit No. 4. I have evaluated the proceedings from the trial court and it shows that the Appellant called one **KEAH RASHID**, traffic Police officer from Sagana Traffic Base (P.W. 3) as a witness and the said witness despite admitting that he had inadvertently brought a wrong police, produced the correct Police Abstract in respect to the accident the subject matter at the trial. The Respondent did not object to the production of the Police Abstract. In fact he through counsel cross-examined the witness about the contents of the Abstract in regard to the ownership of the motor vehicle. The witness told the trial court that it was **JOHN MUHIA KANOTHA**, the Respondent herein though he could not tell how the name was inserted on the Police Abstract but in his view the details of the owner was either given by the owner himself or the same details of ownership was based on the insurance sticker on the motor vehicle. The Respondent has submitted that the evidence on the Police Abstract amounted to hearsay but I am not persuaded by that argument. The Police Abstract was produced by a Police officer called as a witness by the Appellant and having produced documentary evidence in his possession to establish ownership, the Respondent could not possibly turn around and challenge the same through oral evidence. The Respondent called on witness **GIKONYO CEASER GACHA** who attributed ownership of the motor vehicle to a 3rd party. The rebuttal in my considered view was not good enough to displace the evidence placed before the trial court by the Appellant. I will shortly come back to the reasons that underpins my opinion.

15. It is perhaps important first to consider the circumstances under which a court considers a Police Abstract sufficient proof of ownership. The position taken by various courts as conceded by both parties in this appeal is that a Police Abstract when produced as evidence is sufficient proof of ownership save where it is successfully challenged. In the case quoted by the Respondents herein, **JOEL MUGA OPIJA – VS- EAST AFRICANT SEA FOODS LTD. [2013] eKLR** the court in affirming this position held as follows:

“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 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.”

16. The same court before arriving at the above finding had quoted with approval another court of appeal decision in the case of IBRAHIM WANDERA -VS- P.N. MASHRU LTD. (KSM C.A. CIVIL APPEAL NO. 333 OF 2003 (unreported) where the court made the following observations;

“The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J., proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned judge with respect to him, did not at all make any reference to the police abstract report which the appellant had tendered in evidence. In that document the accident bus is shown as KAJ 968W with Mashiru of P. O. Box 98728 Mombasa as owner. This fact was not challenged.....”

The court found that the contents of a Police Abstract is sufficient to establish ownership of a motor vehicle.

17. It is also important to note that in civil cases the standard of proof is that of balance of probabilities. When an issue of ownership of a subject matter in a suit arises, a plaintiff or a party alleging it is required by law to prove the fact on a balance of probabilities. This is unlike the position in criminal law where the standard is higher to beyond reasonable doubt. In my view forcing a litigant in civil cases to produce a certificate of ownership from Registrar of Motor Vehicles is, unless circumstances so demand, unnecessary and elevates the standard of proof to unnecessarily high levels of proof. In the case of SUPERFOAM LTD & ANOR -VS- GLADYS NCHORORO MBERO [2014]eKLR Hon. Justice Makau in Meru High Court quoted in approval a Court of Appeal decision in WELLINGTON NGANGA MATHIORA -VS- AKAMBA PUBLIC ROAD SERVICES LTD & ANOR [2010]eKLR where it was held as follows:

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even.....challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as a proof of ownership in the absence of anything else as proof in civil cases was within the standard of probability and not beyond reasonable doubt as in criminal cases.....”

18. This Court also had occasion to read a decision in the case of NANCY AYEMBA NGAIRA – VS- ABDI ALI (2010)eKLR where Hon. Justice J. B. OJWANG as he then was, stated that a trial court has no legal basis for limiting ownership of a motor vehicle to only those persons whose name appear on the certificate of registration from Registrar of Motor Vehicles. His opinion was based on the following observations he made in the judgment;

“There is no doubt that the registration certificate obtained from the Registrar of Motor Vehicles will show the name of the registered owner of a motor vehicle. But the indications thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person or different other persons may be de facto owners of the motor vehicle, and so the Act has an opening for any evidence in proof of such different ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership, may for practical purposes be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level it had been pleaded that there was such alternative kind of ownership. Indeed the evidence adduced in the form of the police abstract showed on a balance of probabilities that the 1st defendant was one of the owners of the matatu in question.”

19. The Respondent has submitted that the Appellant’s evidence on ownership was controverted. However, I find that what the Respondent’s witness told the trial court under cross-examination to some extent revealed who the owner of the accident motor vehicle was. This is what he told the trial court;

“I had been given the vehicle by John Muhia the defendant. He is the owner of the company that owns the motor vehicle. The vehicle was released to John Muhia.....”

20. The above evidence is consistent with the contents of the Police Abstract tendered by the appellant as P Exhibit 4 which indicated that the owner was **JOHN MUHIA KANOTHA**, the Respondent herein. The trial court failed to address itself on this crucial aspect and had it done so the finding on liability of the Respondent in the accident could have perhaps been different.
21. This court finds that the trial learned magistrate misdirected himself on the failure of the Appellant’s witness to bring the correct police file in court during trial because although the Appellant could have done a better job by recalling the witness to the dock with the correct file to appraise the court on the details of the accident, this Court nonetheless finds that the witness did tender in court a crucial document, a police abstract whose contents were not seriously challenged by the Respondent. The only witness called by the Respondent as I have said above though he attributed ownership of the accident vehicle to a 3rd party in examination in chief, under cross examination, he conceded that the Respondent was the owner and that he was the one whom the police released the said motor vehicle to. This evidence in my view demonstrated on a balance of probability that the Respondent was indeed the owner of the said vehicle. Interestingly this Court has noted that the Appellant after the dismissal of the case, belatedly made attempts in vain to introduce new evidence from the Registrar of Motor Vehicles which clearly showed that the Respondent was the owner. The new evidence was of course not available to the trial learned magistrate during trial to be fair to him but the information is available to this Court now and this Court despite technicalities cannot overlook it. This is because, despite strong submissions made by the Respondent that we are in an adversarial system of law, sight should not be lost on the wider interest of justice, the kind of justice that Wanjiku in her wisdom enshrined it under **Article 159(2)(d)** of the **Constitution**. This, in my view introduced a new paradigm shift in the determination of cases presented in court. A wider approach is necessary with a view to dispensing substantial justice rather than over reliance on technicalities.

I must however, make it clear that the consideration of the new

evidence would not on its own, have changed the direction of this decision in the light of the findings which I have made above and the authorities cited. The consideration of the new evidence that was tendered to court belatedly through an application for review by the appellant has just served in emboldening the findings of this court and showing the importance of applying the correct standard of proof applicable in civil cases.

22. This Court has taken this approach in order to show the parties herein that this Court has considered all the aspects in this appeal. Having taken everything into consideration, I am satisfied that this appeal is merited. The finding of the trial court on liability was erroneous as the court did not take into consideration the correct legal position on the police Abstract tendered in evidence and the evidence adduced in court in totality as aforesaid. The finding of the subordinate court on liability is therefore set aside. This Court finds that the Respondent was the owner of the accident vehicle and cannot run away from responsibility. He is 100% liable and this Court finds him so.

On the question of quantum the Appellant urged this Court to assess damages payable as per his submissions in the trial court. The Appellant has submitted that damages be assessed as follows:

- | | | |
|---|---|-----------------------|
| i. Special damages | - | Kshs.80,050/=. |
| ii. Pain and Suffering | - | Kshs.25,000/= |
| iii. Loss of expectation of life | - | Kshs.150,000/= |
| iv. Loss of dependency | - | Kshs.320,000/= |

23. I have looked at the plaint filed in the lower court in so far as the claim on quantum is concerned.

It has to be noted that any claim in a suit is based on what is pleaded therein and a party is bound by law to what has been pleaded. Any claim in the nature of special damages must not only be specifically pleaded but must be specifically proved during trial to be awarded.

24. I have looked at the claim made under the heading of special damages in the plaint and find that the Appellant specifically pleaded for Kshs.80,000/=. I am satisfied that the same was specifically proved vide production of receipts as follows:

i. <i>P. Exhibit 2 a</i>	-	<i>Kshs.30,000/=.</i>
ii. <i>P. Exhibit 2 b</i>	-	<i>Kshs.20,000/=</i>
iii. <i>P. Exhibit 2 c</i>	-	<i>Kshs. 15,000/=</i>
iv. <i>P. Exhibit 3 b</i>	-	<i>Kshs.15,000/=</i>
v. <i>Death certificate</i>	-	<i><u>Kshs. 50/=</u></i>
Total	-	<i><u>Kshs.80,050/=</u></i>

The Appellant was therefore entitled to be awarded special damages of Kshs.80,050/= as proved at the hearing.

25. On the question of loss of dependency, I do find that although the Appellant claimed under paragraph 10 in his plaint for loss of dependency, the particulars are not provided. When the Appellant filed his suit he knew before hand the age of the deceased and what she used to earn. The Respondent and the trial court needed to know in detail the nature of or the size of the claim for purposes of determining the issue of jurisdiction and multiplicand appropriate to be used in assessing the loss of dependency under the provisions of ***Fatal Accidents Act***. The provisions of ***Order 2 rule 4*** of the ***Civil Procedure Rules*** required the Appellant to provide the particulars of the claim under loss of dependency in order not to take the opposite party by surprise at the trial. That is why the provisions of ***Order 3 Rule 2*** of the ***Civil Procedure Rules*** requires that when a suit is filed it has to be accompanied with all the documents in support of the claim in order to enable the defendant (s) properly defend themselves or know before hand what he/she/they are up against.

26. This Court finds that the claims made on submissions under the heading loss of dependency, pain and suffering was not pleaded and the omission was fatal to the plaintiff's claim. The awards could not be awarded under general damages. The Appellant was required under the law to plead what the deceased used to do and earn. He should have also pleaded the percentage or ratio of support the deceased used to provide the family in order to give a clear direction of what calculations would apply in assessing the loss of dependency.

27. This Court also finds that although the claim on pain and suffering was not pleaded this Court is inclined to award the claim under general damages because the deceased must have suffered some measure of pain and suffering after the accident. The evidence adduced at the trial indicated that the deceased died soon after the accident. I find that the amount submitted by the Appellant of kshs.25,000/= to be unjustified in the circumstances. I, however, exercise my discretion and award a conventional figure of Kshs.10,000/=. I also find that the claim of loss of expectation of life, of Kshs.150,000/= is justified and available under general damages.

28. The upshot of this is that I find merit in this appeal. The same is allowed. The judgment of the subordinate court dated 13th March, 2012 is set aside and in its place judgment is entered for the Appellant against the Respondent at 100% liability. The appellant is hereby awarded the following on quantum:

i. Special damages	-	<i>Kshs.80,050/=.</i>
ii. Pain and suffering	-	<i>Kshs.10,000/=.</i>
iii. Loss of expectation of life	-	<i><u>Kshs.150,000/=.</u></i>
Total	-	<i><u>Kshs.246,050/=.</u></i>

The Appellant shall have costs and interests in the subordinate court and costs of this appeal as well.

Dated and delivered at Kerugoya this 9th day of March, 2016.

R. K. LIMO

JUDGE

9.3.2016 Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Macharia holding brief for Kinyua Kiama for appellant present.

Kahiga holding brief for Oraro for Respondent.

COURT: Judgment dated, signed and delivered in the open court in the presence of Macharia holding brief Kinyua Kiama for appellant and Kahiga holding brief for Oraro for Respondent.

R. K. LIMO

JUDGE

9.3.2016