



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 120 OF 2012**

***(An appeal from the Judgment and Decree of the Chief Magistrate, Embu in CMCC No. 66 of 2011 dated 12/10/2012)***

HELLEN KARIMI NJERU (Suing as the legal representative of

SAMUEL NJERU IRERI – DCD) .....APPELLANT

**VERSUS**

MOHAMED AHMED MOHAMED..... 1ST RESPONDENT

HAWA ABDI JUMA.....2ND RESPONDENT

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

This is an appeal against the judgment and decree of the Embu Chief Magistrate in Civil Case No.66 of 2014 whereas the judgment was delivered on 12/10/2012. The appellant sued the respondents for damages under the Law reform Act and Fatal Accidents Act arising from an accident which occurred on the 21/5/2010 along Embu - Meru road at Nembure involving motor vehicle registration No. KBK 167 Z Toyota Probox. It was alleged that the 1st respondent negligently and carelessly drove the vehicle belonging to the 2nd respondent causing it to veer off the road where it knocked the deceased and occasioned him fatal bodily injuries. The trial magistrate found that liability had not been established against the respondents and dismissed the case.

The grounds in the memorandum of appeal may be summarized as follows:-

1. *That the magistrate erred in dismissing the suit without considering the fact that the appellant's evidence was unchallenged.*
2. *He magistrate erred in disregarding the evidence of PW2 and PW3 to the effect that the 1st respondent drove the vehicle of the 2nd respondent in a dangerous manner thereby causing the accident.*
3. *The magistrate erred in failing to consider that the respondents did not adduce any evidence to controvert that of the appellant regarding the ownership of the motor vehicle.*
4. *The magistrate erred in failing to find that the police abstract was enough proof to the ownership of the motor vehicle which evidence was not controverted by the respondents.*
5. *The magistrate erred in finding that the appellant was not entitled to an award of damages as quantified by the court.*

The appeal was disposed of by way of written submissions. The appellant was represented by Njeru

Ithiga & Company while J.K. Kibicho appeared for the respondents.

The appellant argued that the evidence of PW2 was that the motor vehicle was being driven at a high speed when it hit the motor cyclist. PW3 the police officer who produced the police abstract testified that the scene of the accident was at a corner and that the motor vehicle was overtaking dangerously when it hit the deceased. It was argued that this evidence was remained unchallenged since the respondents did not call any witness. On the ownership of the motor vehicle, it was contended that the police abstract showed that the vehicle belonged to the 2nd respondent. The appellant further argued that the 1st respondent testified before Runyenjes Court in the traffic case against him and confirmed that the vehicle belonged to the 2nd respondent.

The appellant relied on four (4) decisions in support of his argument:-

1. **GRACE KATHINJ KALOLA VS JOSHUA & 2 OTHERS [2006] eKLR** where the court held that there was no evidence to controvert the evidence contained in the police file and that as such the plaintiffs case had been proved.
2. **PAUL MACHARIA WAGUNYA VS JAMES MURAGORI KIMANI Nairobi Civil Appeal No. 511 of 2003** where the court held that the court of appeal case of **THURANIRA KARAUARI VS AGNES NCHENCHE KLR 1995** was distinguishable as the defendants in that case produced a copy of record to prove who the true owner of the motor vehicle was. The court in the case Paul Macharia held that the defendants did not produce evidence in the court.
3. **SIMON HUNGU & ANOTHER VS VINCENT BARASA WAFULA & ANOTHER [2014] eKLR** in which the court cited the case of **JOEL OPIJA VS EAST AFRICAN SEA FOOD LTD [2013] EKLR** where it was stated that the best way to prove ownership of a motor vehicle is to produce a copy of records but when the abstract is not challenged and is produced in court without any objection, its contents cannot be denied later.
4. **SUPER FORM LTD & ANOTHER VS GLADYS NCHORORE MBERO [2014] eKLR** where it held that where the police abstract and there is no evidence to rebut it and not even cross examination challenged it, the police abstract could be relied on as proof of ownership in absence of anything else as proof. However if it is challenged in cross examination, the plaintiff would have to produce a certificate from registrar of motor vehicle.

The respondents argued that the ownership of the motor vehicle was denied in the defence. It was incumbent for the appellant to produce a copy of records to prove that the 2nd respondent was the registered owner. It was further argued that the 1st respondent was acquitted of the Runyenjes traffic case after a lengthy trial. The respondent argued that the trial magistrate was right to find that ownership of the motor vehicle was not established.

The following cases were relied on by the respondents in support of their submissions.

1. **THURANIRA KARAUARI VS AGNES NDECHE NYERI CIVIL APPEAL NO, 192 OF 1996** where the court held that the plaintiff was under an obligation to prove defendants ownership by producing a certificate of search signed by the registrar of motor vehicle. A police abstract stating that the defendant was the owner of the motor vehicle was held not to be sufficient proof of ownership.
2. **AJIWA SHAMJI LTD VS MARSELA KIPKEMOI [2009] eKLR** where the court held that a police abstract is proof of the fact that an accident was reported to police and no more. Where a party states that the vehicle was registered in the name of the defendant which the defendant has denied he has to produce evidence of that registration.
3. **MUMIAS AGRICULTURAL TRANSPORTERS VS HARRISON NAMULANDA [2011] eKLR** where the court held that since the defendant had denied ownership in the defence, it was a triable issue and the respondent was liable to prove that issue on a balance of probability.
4. **PHILIP MUNGAI VS KINDARUMA LIMITED [2010] eKLR** where the issue of ownership remained unresolved as the defendant had denied ownership in the defence and the plaintiff did not provide a certificate from the registrar of motor vehicle. Ownership was therefore not proved on a balance of probability.

The duty of the first appellate court was explained in the case of **MWANGI VS WAMBUGU [1984] KLR 453:-**

*“A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding, and an appellate court is not bound to accept the trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression is based on the demeanor of a witness is inconsistent with the evidence in the case generally”.*

The appellant’s evidence consisted of 3 witnesses. PW1 the appellant was the widow of the deceased. She did not witness the accident but was informed by someone that deceased had been involved in an accident and was at Embu General Hospital receiving treatment.

PW2 was at the scene selling bananas at the stage. She told the court that at the material time she stood on the right side of the road awaiting to cross to the left side to look for change of KShs.1000 note. As she stood there she saw a matatu, a motor cycle and a probox vehicle following each other. The motor cycle stopped at the junction preparing to cross the road from left to right. It gave the indicator as the matatu moved and stopped at the stage. The Probox vehicle which was being driven at a high speed hit the motor cyclist who was still on his right lane. The cyclist was tossed in the air and fell ahead of the vehicle which sustained a tyre burst as a result of the impact. The cyclist was rushed to hospital by people at the scene. PW2 blamed the vehicle for overtaking when it was not safe to do so.

PW3 testified that on 21/05/ 2010 a road traffic accident was reported at Runyenjes police station where he was stationed. Together with other police officers he visited the scene at Nembure junction a long Meru – Embu road. On arrival he found motor vehicle registration no. KBK 167 Z make Probox and a motor cycle Registration No. GK A 714P Yamaha off the road on the left side facing Embu town. The victim had been rushed to Embu provincial General hospital. He took measurements of the scene and established that the impact was on the right lane facing Embu at the Nembure junction. The victim died while undergoing treatment. He established that the driver of the motor vehicle was overtaking when he hit the cyclist and was to blame for the accident. He further testified that the owner of the vehicle was one Hawal Abdi Juma. The driver Mohammed Hamed Juma was charged with causing death by dangerous driving.

The evidence of PW2 who was an eye witness was that the cyclist had stopped on the right side of the road having given an indicator to turn to the junction. The motor vehicle was at a high speed and it hit the deceased as he was joining the junction. He further testified that the motor vehicle was at a high speed and sustained a tyre burst as a result of impact. The act of losing control after the impact is evidence of high speed. The evidence of PW3 was that investigations revealed that the vehicle was at a dangerous speed. He interviewed witnesses who were at the scene at the material time. However, it was the observation of the magistrate that PW2 said that the vehicle was being driven without due care and attention and that there was no proof of dangerous driving as stated by PW3.

The standard of proof in civil cases is on the balance of probabilities. The meaning of balance of probability was explained in the Court of Appeal case of **JOHN KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR** where the court held that the plaintiff had the burden of proving her case on a balance of probabilities. When the court is faced with two probabilities, it can only decide the case on the balance of probability which was more probable than the other.

The 1st respondent was charged with causing death by dangerous driving after the accident. It was confirmed that he was later acquitted. The burden of proof in criminal cases is higher than in civil cases. It does not necessary follow that when a person is acquitted in a traffic/criminal case, he is absolved of civil liability.

The magistrate in her judgment stated that PW3 talked of dangerous driving while pw2 testified that the

vehicle was driven negligently. He reached a conclusion that there was no prove of either dangerous or negligence driving. The respondent did not call any evidence to rebut the evidence of PW2 and PW3 to the effect that the 1st respondent was driving at a high speed and that he overtook the motor cyclist when it was not safe to do so.

It was held in the case of **PAUL MACHARIA WAGUNYA VS JAMES MURAGURI KIMANI Nairobi Civil Appeal No 511 of 2003** that:-

*“The respondent did not bother to testify or lead some other evidence to controvert the Appellant’s testimony that he was the driver of the accident motor vehicle. The appellant thus proved on a balance of probability that the respondent was the driver. He was liable to the appellant in negligence as such driver. The learned trial magistrate clearly erred in fact and in law in not so holding. I would therefore allow the appeal upon the second ground in the memorandum of appeal”.*

The appellant's evidence on how the accident occurred remained unchallenged. It is my considered opinion that the appellant has established on the balance of probability that the 1st respondent drove the vehicle negligently thereby causing the accident. In the absence of any controverting evidence the respondent, ought to have been found liable. The magistrate erred in holding that the appellant had not proved her case to the standards required.

In regard to the ownership of the motor vehicle, PW3 investigated the accident and issued the police abstract. The particulars of the vehicle and those of the owner were shown in the abstract as Hawa Abdi Juma of post office box 3091, Nairobi, Mobile No. 0722834702. These particulars were given by the 1st respondent when he was interviewed by police and specifically by PW3. During cross – examination of PW3 by the respondent counsel, the issue of ownership of the vehicle was not raised. The respondent denied the ownership of the motor vehicle in their defence but did not pursue it any further. However, the defendant did not object to the production of the police abstract as the evidence.

The appellant produced certified copies of proceedings and judgment in Traffic case No. 270 of 2010. In his defence to the traffic charges the 1st respondent testified that on the 21/5/2010 he was driving vehicle Registration No. KBK 167 Z to Nairobi from Meru and that it was involved in an accident at Nembure. The 1st respondent admitted the occurrence of the accident in the traffic case. He did not testify in this civil case to controvert the particulars of ownership of the motor vehicle which he gave to the police. The details were recorded in the police abstract which was tendered in evidence.

In the case of, **PAUL MACHARIA WAGUNYA (supra)** the Court of Appeal distinguished the facts of in that case from those of **THURANIRA KARAUARI VS AGNES NCHECHE KLR 1995** where the court held that a police abstract was sufficient proof of ownership of motor vehicle unless it was controverted by other evidence.

Similarly in the case of **SAMUEL MUKUNYA KAMUNGE V JOHN MWANGI KAMURU HIGH COURT CIVIL APPEAL NO. 34 OF 2002 AT NYERI** it was held:-

*“...a police abstract report having been produced showing the respondent as the owner of motor vehicle KAH 294A, 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 motor vehicle KAH 263A was owned by the respondent.”*

The respondents’ authorities of **THURANIRA KARAUARI VS NDECHE Civil Appeal No. 192 of 1996 and PHILIP MUNGAI VS KINDARUMA LTD [2010] eKLR** in regard to proof of ownership of motor vehicle by tendering a copy of records from the Kenya Revenue Authority have been overruled in the past few years. It is trite law that uncontroverted evidence contained in a police abstract is sufficient proof. In the case before me, the traffic case proceedings consist of an admission by the 2<sup>nd</sup> respondent is driver that the vehicle in question belonged to the 2<sup>nd</sup> respondent.

Guided by the foregoing decisions and the evidence on record, I reach a conclusion that the appellant established on the balance of probability that the vehicle Registration No. KBK 167Z Toyota Probox belonged to the 2nd respondent. I find that the magistrate erred in holding that the ownership of the vehicle had not been proved.

I find that negligence and ownership of the motor vehicle was proved against the respondents on the balance of probability. The 2nd respondent is vicariously liable for the acts of the 1st respondent.

In effect, I set aside the judgment of the learned magistrate on liability and accordingly enter judgment in favour of the appellant on full liability against the respondents jointly and severally.

The magistrate had assessed damages in this case which are hereby adopted:-

- a. Pain and suffering - 100,000/=
- b. Loss of expectation of life - 150,000/=
- c. Loss of dependency - 1,833,728/=

(28,652x12x8x2/3)

- d. Special damages - 41,209/=

Total 2,127,937/=

This damages payable to the appellant by the respondents is **KShs.2,127,937/=**.

The appellant is awarded the costs of this appeal.

The appeal is hereby allowed and it is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF OCTOBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Ithiga for Appellant**