



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL 90 OF 2008

EZEKIEL AJWALA

OTIN

JOYCE ATIENO OKUNE (Suing as the legal administrators and personal representatives of the estate of

RICHARD OKUNE OTIN

(Deceased).....APPELLANT

VERSUS

C. M. MOTORS

LTD.....RESPONDENT

JUDGMENT

The Appellant’s appeal comprises the following grounds namely:-

1. **THAT the learned trial magistrate erred in law and in fact in failing to consider overwhelming uncontroverted evidence pointing the respondent as being the owner of motor vehicle KAM 137 T as at the time of the accident.**
2. **THAT the learned trial magistrate erred in law and in fact in failing to consider the fact that by the Respondent being in possession of Motor vehicle registration number KAM 137 T they were in law deemed the owners of the same motor vehicle until the contrary is proved.**
3. **THAT the learned trial magistrate erred in law and in fact by upholding a defence which was never prosecuted.**
4. **THAT the learned trial magistrate erred in law and in fact by considering an authority whose fact and circumstances were different from the ones in the Appellant’s suit.**
5. **THAT the learned trial magistrate failed in law and in fact by failing to carefully analyse the decision in Thuranira Karauri =vs= Agnes Ncheche C. A. 192 of 1996 in the light of statute law.**
6. **THAT the learned trial magistrate erred in law and in fact by failing to hold and find that a certificate of search from Registrar of Motor Vehicle was only conclusive proof of ownership of Motor vehicle where the contrary was not proved.**
7. **THAT the learned trial magistrate erred in law and in fact by failing to consider issues which (though unpleaded) by the conduct of the parties during trial became issues for determination by**

court.

The appellants are the representatives of the estate of the late **Richard Okune Otin** who was killed on 25th June 2004 through a road traffic accident. It was the appellant's case at the lower court that the deceased was a pillion passenger who was being carried by a bicycle along Kisumu Ahero road on the fateful day. It was the appellant case that the motor vehicle registration number KAM 131 T was owned by the respondent and that the same was negligently driven by the respondent's agent and as a consequence it caused the said accident.

PW4 Joseph Adero Oniango who was the eye witness told the court that he saw a pedal cyclist cycling on the left side of the road carrying a pillion passenger when a lorry came at a high speed and hit the cyclist from the rear throwing both of them down. The deceased was thrown onto the road while the cyclist outside the road.

Subsequently a good Samaritan took the deceased to the hospital but later died.

PW1 the brother to the deceased and PW2 the widow produced the relevant letters of administration as well as the hospital treatment receipts inter alia.

PW3 number 48281 P. C. Samson Chakali the police officer produced the police abstract which showed the respondent to be the registered owner of the motor vehicle. He further told the court that the driver of the motor vehicle was charged in a traffic court but he had no idea of the results.

The respondent on the other hand chose not to offer any evidence in its defence. The case was therefore closed and parties made their submissions.

The trial court after going through the evidence found that the appellant's case could not succeed for the reason that the appellant did not establish that the respondent was the registered owner of the motor vehicle. The court opined that the appellant was duty bound to produce the certificate of Registration from the Registrar of motor vehicle now that the respondent had denied the ownership.

The court after dismissing the case went correctly to analyse the award it would have given the appellant had the case succeeded.

I have gone through the submissions of both the appellants and the respondent. What is not disputed is the fact that the trial court established that indeed an accident occurred on 25th June 2004 and the same was fatal. The documents including the death certificate and the police abstracts goes ahead to buttress this.

The big question and which forms the bedrock of this appeal is whether or not the court was right in dismissing the appellants case on the grounds that they did not establish that the respondent was the owner of the motor vehicle registration number KAM 137T through the production of certificate of search from the Registrar of Motor vehicles.

The appellants have argued that the fact that the respondent participated in the trial fully and cross examined the parties including the police officer who produced the police abstract cannot be heard to deny that it was not the owner of the motor vehicle.

It was incumbent upon the respondent once the appellants had closed their case to rebut what they had adduced.

According to the appellant therefore the respondent had acquiesced and it cannot therefore complain. The appellant further argued that the writings on the body of the vehicle as required under Rule 39 of the Traffic Rules showed that it owned the said motor vehicle.

The respondent as expected have supported the findings of the trial court. They content that since the appellant were unable to produce the details from the registrar of Motor vehicles then their case must

fail. As it were it had no obligation to prove anything beyond what it had offered in its defence.

Having therefore narrowed down the preliminary issue to be determined the question that I need to determine is whether the reliance by the respondent on its defence was sufficient to disapprove the appellant's case.

PW3 P. C. Samson Chakali said:- **“ I am here today on behalf of the base commander Kisumu. I have with me a police abstract number A467348 dated 10th September 2004. This abstract was issued in respect of an accident involving vehicle KAM 137 T a lorry and a pedal cyclist and a pillion passenger. The pillion passenger was Richard Okune Otieno.....”**

According to the police record, the owner of the lorry was CMC motors of P. O. Box 30060 Nairobi.....”

PW4 on the other had said in his evidence in Chief:- **“....I saw the lorry that had caused the accident. I confirmed it was the one because I had noted its registration number. Also it was written on the door.”**

There is no doubt therefore that the accident occurred and that the cause of the same was the defendants driver.

As earlier observed the respondent relied mainly on its pleading and in particular its defence in rebutting the appellants case. The court agreed with the respondent.

Pleading is defined by Black Law Dictionary 8th Edition as:-

“A formal document in which a party to a legal proceeding (especially a civil law suit) sets forth or responds to allegations, claims, denials or defences.”

From the above definition therefore a pleading is not evidence.

Evidence under Evidence Act Chapter 80 Laws of Kenya Section 3 thereof has been defined as:-

“Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons admissions, and observation by the court in its Judicial Capacity”.

My observation and understanding therefore is that pleadings are not generally evidence. A mere denial or approval in a pleading does not constitute evidence. More needs to be done especially where there is rebuttal or otherwise.

This observation is in line with Section 107 of the Evidence Act Chapter 80 Laws of Kenya which states that:-

107 (i) Whoever desires to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

The appellants established through the police abstract and PW4 that prima facie the owner of the motor vehicle that caused the accident was the respondent. The respondent in my opinion at that point ought to have rebutted this. As it were the burden shifted to it to establish that indeed he was not the owner of the motor vehicle in question.

My finding is well buttressed by Section 116 of the Evidence Act which states:- **“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who confirms that he is not the owner”.**

It is not enough to leave it to the court as the respondent seemed to have done. It is not enough for the court to have relied only on the defence which as earlier observed is simply an averment or a pleading.

The late Justice Madan (as he then was) in CMC Aviation Ltd =vs= Cruisair Ltd (No.1) (1978) KLR 103 at page 104 observed that:-

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.

As stated in the definition of “evidence” in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved.

Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy for example the following definition of “evidence” in Cassell’s English Dictionary page 394:

“Anything that makes clear or obvious; grounds for knowledge, induction or testimony; that which makes truth, or renders evident to the mind that it is truth”.

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents”.

In the light of the above authority the respondent essentially ought to have established by way of evidence that the motor vehicle in question indeed did not belong to it. Section 8 of the Traffic Act Chapter 403 states: **“The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle”.**

The above quoted portion of the law clearly shows that the registered owner of a motor vehicle can only be established via a search at the registrar of motor vehicle. This can however be challenged. This is not indeed the actual owner of the vehicle but the registered owner.

In ordinary day to day operation of life people have been known to sell vehicles and for whatever reasons they do not necessarily transfer to themselves. The courts are alive to this fact.

It was not safe for the trial court to have dismissed the suit on the ground of non production by the appellants of the search from registrar of motor vehicle. Civil cases are decided on balance of probabilities and not beyond any reasonable doubt like in criminal cases. Evidence was adduced by PW3 and PW4 that the vehicle that caused the accident belonged to the respondent. The respondent had the chance and opportunity, which it, did, to cross examine the witnesses.

In fact Rule 39 of the Traffic Rules is worth a mention herein. The said Rule states:- **“(39) The owner of every commercial vehicle or trailer shall cause to be painted or otherwise clearly marked in the English language in a conspicuous position on the right or offside of every such vehicle in letters not less than one inch in height which shall at all times be kept clearly legible-**

- (a) The name and address of the owner of the vehicle.**
- (b) The registered tare weight of the vehicle and**
- (c) The maximum weight the vehicle is authorized to carry”**

The above evidence was adduced by PW4.

In the premises it is my observation that by the evidence under oath on record the appellant on a balance of probability were able to establish the connection in terms of ownership between the respondent and the motor vehicle registration number KAM 137 T.

Finally on this score I must reiterate the provisions of Article 159 of our constitution. When that article was inserted in our constitution the same was to safeguard against any short cuts that are unjust and procedurally burdensome. It indeed open the door for people to the extent that they have a legitimate claim to receive justice at its altar.

In the case at hand there is no doubt that the appellants lost a brother and a husband. There are two (2) children who are young and tender in age. From the evidence on record their father was the bread winner. Should, they leave the altar of justice empty handed because of a legal technicality? Thus is what Section 159 of our constitution choose to address.

For the above reasons I allow the appeal and find that the same is meritorious. The next issue to determine is whether the appellants are entitled to damages.

Before addressing this there is the question of negligence. It has been observed that the said lorry hit the deceased from behind and as a consequence he fell on the road. Unfortunately the only evidence on this was adduced by the appellant.

My hands are tied! Had the respondent called its witness perhaps it would have shed some light. The respondent has shifted blame on one **Saleh Juma Kadir** the cyclist who carried the deceased. Unfortunately again no 3rd party proceedings were taken by the said respondent. In the light of this I do hold the respondent 100% liable in causing the said accident.

Having carefully read the award on damages by the trial court as well as the authorities relied on by the parties at the trial I do not fault the said findings. I shall therefore proceed to affirm them herein as follows:-

(1) Loss of expectation of life	Kshs. 120,000/=
(2) Pain and suffering before death	Kshs. 30,000/=
(3) Loss of dependency	Kshs. 905,600/=
(4) Loss of consortium	Kshs. 40,000/=
	Total <u>Kshs. 1,095,600/=</u>
(5) Special damages	Kshs. 58,896/=
	Grand Total <u>Kshs. 1,154.496</u>

In the premises I do allow this appeal by setting aside the trial court judgment and that general damages of Kshs. 1,095,600 as well as the special damages of Kshs. 58,896 with interest from the date of the judgment on 3rd September 2008. The appellant shall have the costs of this appeal as well as in the lower court.

Dated, signed and delivered at Kisumu this 13th of July 2012

H. K. CHEMITEI

JUDGE

In the presence of:

Lore for Njoga Advocate for Plaintiff /Appellant

Amondi Advocate for Defendant /Respondent

HKC/aao