

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: MUSINGA, (P), TUIYOTT & NYAMWEYA, JJ.A.)

CIVIL APPEAL NO. 544 OF 2019

BETWEEN

JONATHAN KAMAU KIONGO.....APPELLANT

AND

**JOHN KINYANJUI WAWERU.....1ST RESPONDENT
HENRY WAWERU MBURU.....2ND RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at
Kiambu (J. N. Mulwa, J.) dated 10th April 2019*

in

H.C.C.A. No. 193 of 2016)

JUDGMENT OF THE COURT

- [1] On the night of 28th September 2013, at about 10.15pm, an accident occurred along Kiambu-Nairobi road involving motor vehicle registration KBU 665D and motor vehicle registration KAN 930L. This appeal is substantially about who was liable for the accident.
- [2] **Jonathan Kamau Kiongo**, the appellant herein, initially filed a suit in the Chief Magistrates Court at Kiambu in **Civil Case No. 343 of 2015**, in which the trial Court held that **John Kinyanjui Waweru**, the 1st respondent herein, was wholly to blame for the accident and entered judgment against him and **Henry Waweru Mburu**, the 2nd respondent, as the owner of the motor vehicle registration KBU

930L. The trial Court me made an award in favour of the current appellant for special damages of Kshs.56,206, future medical costs of Kshs.300,000, general damages for pain and suffering and loss of amenities of Kshs.1,800,000 and material damages of Kshs.240,000. In addition, interest on those sums and costs of the suit.

- [3] The decision was challenged by the respondents in **Kiambu Civil Appeal No. 193 of 2016**, and the High Court at Kiambu upheld the award of damages but found the current appellant to be 30% liable. The appellant has escalated the dispute to this Court in which he seeks the reversal of the decision of the High Court on liability.
- [4] The respondents on the other hand filed a notice of cross-appeal dated 9th January 2020 challenging the finding that the appellant was the owner of the motor vehicle KAN 930L and therefore the award of Kshs.240,000, being the value of the vehicle, was deserved.
- [5] At the hearing of the appeal learned counsel **Mr. Marube** appeared for the appellant, while learned counsel **Mr. Mege** represented the respondents. Counsel augmented their written submissions with oral highlights.
- [6] The appellant in his submissions argued that the High Court, acting as the first appellate court, erred in law by setting aside the trial court's finding of 100% liability and apportioning 30%

contributory liability against him. He argued that as a second appellate court,

this Court's jurisdiction was strictly confined to matters of law and that it must resist the temptation to delve into matters of fact unless it was shown that the lower courts' findings were perverse or founded on incorrect bases. He cited several authorities to support this restriction, including Kenya

Breweries Ltd v Godfrey Odoyo

[2010] KECA 498 (KLR), John Onyango & another v Samson

Luwayi [1986] KECA 82 (KLR), and Richard Kaitany Chemagong

v Republic [1984] KECA 64 (KLR). He contended, further, that

where a right of appeal is confined to questions of law, an appellate court should accept the findings of fact of the lower court and should not interfere with them unless no reasonable tribunal could have reached such a conclusion, seeking support in the decision in

Stephen Muriungi and another vs. Republic (1982-88) 1 KAR

360. It was asserted that High Court judge failed in her statutory duty to conduct a fresh re-evaluation of the evidence as a retrial, a serious omission, citing the decision of Selle and

Another vs.

Associated Motor Boat Company Ltd and Others [1968] EA 123.

- [7] In addition, on liability, the impugned judgment was said to be founded on a wrong premise and was therefore perverse. The

High Court judge had fundamentally misapprehended the facts by wrongly stating that the appellant had been convicted in a traffic case upon his own plea of guilt. The appellant asserted that the record clearly showed he was neither charged nor convicted.

Instead, it was the 1st respondent herein who had pleaded guilty and was convicted for the offence of careless driving. He argued that this misapprehension clouded the judge's reasoning, leading her to an erroneous conclusion on the apportionment of liability, resulting in a miscarriage of justice.

[8] Still on this aspect, it was submitted that had the High Court properly re-evaluated the record, it would have found no evidence of contributory negligence and would not have interfered with the trial court's finding. The respondents are assailed for failing to discharge the burden of proof under sections 107-112 of the Evidence Act as they opted not to testify or tender any evidence, leaving their statement of defence as unsupported assertions. The appellant sought reliance on the standards described in **Halsbury's Laws of England** for the proposition that the legal burden of establishing facts remains constant and rests upon the party desiring the court to find on its behalf. Citing **Edward Mariga through Stanley Mobisa**

Mariga v Nathaniel David Schulter & another [1997] KECA 336

(KLR) and CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)

(Civil Application 12 of 1978) [1978] KECA 9 (KLR), he emphasized that pleadings are not evidence and that the respondents were required to prove their allegations of contributory negligence rather than relying on the appellant's

version of events.

The trial court was therefore correct in treating his evidence as uncontroverted and finding the respondents 100% liable.

[9] Regarding liability, the respondents supported the High Court's finding that the appellant took no evasive action such as swerving or slowing down to avoid the collision, which they argued justified the apportionment of 30% contributory liability. Significantly, the respondents raised the doctrine of approbation and reprobation, arguing that the appeal was totally compromised because the appellant had already accepted the full payment of the decretal sum, amounting to Kshs. 2,421,625/-, which was paid by consent of the parties to a joint bank account in the two names of the parties' legal representative firms, following the High Court judgment. Relying on

Dr. Sunny Samuel v Simon M. Mbwika & another [1998] KECA

224 (KLR), they asserted that a party cannot attack a judgment while simultaneously enjoying its benefits and fruits, and therefore the appellant was estopped from pursuing the appeal.

[10] Prosecuting the cross-appeal, the respondents argued that the appellant did not plead that he was the owner of motor vehicle registration number KAN 930L, only describing himself as "*lawfully driving*" it. They assert that it is settled law that parties in civil disputes are bound by their respective pleadings and a court cannot find against a party on an unpleaded matter,

faulting the High

Court's holding that the appellant was the owner of the vehicle as not flowing from the plaint.

[11] On a second and related issue, the respondents submitted that the appellant had failed to provide sufficient evidence to establish legal ownership of the motor vehicle registration number KAN 930L, as the logbook did not bear his name and that the sale agreement and transfer documents were inadequate to establish a nexus of ownership in his favour, citing **Galaxy**

Paints Company Ltd v

Falcon Guards Ltd (Civil Appeal 219 of 1998) [2000] KECA 215

(KLR) and **Thuranira Karauri vs Agnes Ncheche [1997] KECA 385**

(KLR) regarding the necessity of official records to prove ownership in disputed cases.

[12] They further argued that the claim was barred by the doctrine of *ex turpi causa non oritur actio* because the appellant was in breach of section 9 of the Traffic Act for failing to register the vehicle within fourteen days of purchase. Relying on **Samuel**

Mukunya Kamunge

v John Mwangi Kamuru [2005] KEHC 1077 (KLR), they maintained that the court should not allow a party to benefit from their own illegal conduct.

[13] As a Court sitting on a second appeal, our mandate here is confined to the ambits of section 72(1) of the Civil Procedure Act

which requires the Court to deal with issues raised on appeal on points of law only, unless it is shown that the courts below considered

matters, they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse. (See **Stanley N Muriithi & another v Bernard Munene Ithiga [2016] KECA 821 (KLR)**).

[14] It is true that the respondents did not adduce any evidence at all, with only the appellant testifying on how the accident happened. His testimony was that when he reached a place called Barua stage, he saw an oncoming vehicle flashing lights at him and shortly thereafter hit his vehicle. The impact was on the right head lamp. In support of his evidence on liability, the appellant produced proceedings in the Chief Magistrate's Court at **Kiambu, Traffic Case No. 957 of 2013, Republic vs John Kinyanjui Waweru** in which the 1st respondent pleaded guilty to the offence of careless driving contrary to section 49(1) of the Traffic Act in respect of the accident.

[15] The facts read out in the traffic proceedings, and admitted by the appellant to be true, were that the accused was driving motor vehicle registration KBU 665D from Nairobi to Kiambu and on reaching the scene, hit a third-party motor vehicle registration KBU 098 from behind, went off the road and hit motor vehicle registration KAN 930L driven by the appellant. In mitigation, the 1st respondent stated:

“A vehicle flashed lights and could not see anything.”

[16] In their joint defence, the respondents asserted that the accident was solely caused or substantially contributed to by the negligence of the appellant, setting out particulars of the alleged negligence.

[17] On this evidence, the trial court and the first appellate court returned different views, albeit not a chasm, on liability. Finding that the 1st respondent was wholly to blame, the learned trial magistrate (**B. Khaemba, SRM**) held:

***“It is my finding that, that is the position in this case, the defendants in their defence pleaded negligence, or contributory negligence on the side of the plaintiff (sic). However, they never discharged that burden of proof by adducing evidence to prove the same. I therefore find that the only version that the court has been given, which is not controverted is that of the plaintiff. I will further find the conviction by the 1st defendant in the Traffic Offence final within the meaning of Section 47A of the Evidence Act since the 1st defendant failed to prove any contributory negligence on the side of the plaintiff.*”**

I find the defendants 100% liable for the accident.”

[18] On the other hand, the High Court (**J. N. Mulwa, J.**) returned a view that:

***“I fully agree with the appellant’s submission that a conviction under the Traffic Act does not wholly absorb a party from civil negligence - Kajiado HCCA No. 42 of 2015 Mbugua David & Another -vs- Joyce Gathoni Waithera & Another (2016) eKLR.*”**

The Respondent’s evidence is clear that he did not take any evasive action to avoid the accident after seeing the appellant’s vehicle coming towards his, he simply waited to be hit. He did not swerve, slow down or do anything consistent

with an act to avoid or minimize the impact.”

[19] The respondents had pleaded that the appellant solely caused or substantially contributed to the accident through negligence on his part. Having done so, the onus was on the respondents to prove the particulars of negligence they had attributed to the appellant (See

Nandwa v Kenya Nazi Ltd [1988] KECA 42 (KLR)). They did not

lead any evidence in this respect. Neither did they attempt to extract any evidence of contributory negligence from the appellant through cross-examination of the appellant's witness, nor was there concession of such negligence by the appellant's witness. The appellant having laid out sufficient evidence to implicate the 1st respondent, no onus shifted to the appellant to disprove the allegation of contributory negligence pleaded by the respondents.

[20] While it is old learning that conviction of a tortfeasor for a traffic offence of careless driving does not absorb other parties from having contributed to an accident (**Robinson v Oluoch [1971] EA 376**), on

the evidence before the trial court and upon its re-evaluation, there was no basis for the High Court to conclude that the respondent "*did not take any evasive action to avoid the accident after seeing the appellant's vehicle coming towards his, he simply waited to be hit*". We find and hold that the trial court was correct in holding the 1st respondent 100% liable and in turn

the 2nd respondent vicariously to blame to an equal extent.

[21] Turning to the cross-appeal, it is true that the appellant did not directly plead that he was the owner of the motor vehicle registration KAN 930L, simply averring that he was “lawfully driving” it. On their own however the respondents pleaded:

“The 1st and 2nd defendants do not admit that the plaintiff was the beneficial owner of the motor vehicle registration number KAN 930L at the material time and put the plaintiff to strict proof thereof.”

[22] The respondents invited the appellant, perhaps an unintended consequence of that pleading, to prove that he was the owner of the vehicle, an issue which was determined by both courts below. This is a complete answer to the respondents’ faulty submission that the two courts below made a finding in regard to ownership of motor vehicle registration KAN 930L on an unpleaded issue.

[23] So, to the next issue, did the plaintiff prove ownership of the vehicle?

The evidence accepted by the courts below was that one Ishminder Singh sold the motor vehicle to the appellant through a sale agreement dated 2nd February 2010. In addition, Singh gave the appellant the logbook of the vehicle in the name of one Dorothy Mwajuma Salim, a transfer form, and pin certificate for both himself and Dorothy. Just as the two courts below, we hold that these documents sufficiently provide a nexus between the registered owner of the motor vehicle Dorothy, Raju Shah (whom she sold the vehicle), Singh who bought the vehicle from Shah,

and the appellant

who bought the car from Singh. The appellant successfully established that he was the beneficial owner of the motor vehicle notwithstanding that it had not been duly transferred to him as required by section 9(1) of The Traffic Act. Time without number our courts have held that the record of ownership held by the Registrar of Motor Vehicles, though *prima facie* proof of ownership, is not the only proof (see **Joel Muga Opija v East African Sea Food Limited**

[2013] KECA 181 (KLR)).

[24] Regarding the proposition that the holding of the two courts below regarding ownership offends the doctrine of *ex turpi causa non oritur actio*, there is no evidence that this matter was taken up at the trial court and we agree with counsel for the appellant that it was not even available for consideration at the first appellate court. Neither can it be said that, on the material on record, it arose for determination within the rule restated by Law, J.A in **Odd Jobs**

vs. Mubia [1970] E.A. 476 as follows:

“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.”

[25] As we close, we find that nothing turns on the proposition by the respondents that because the appellant had accepted full payment

of the decretal sum then this second appeal is a posture in approbation and reprobation. This cannot aid the respondents because they have not placed proof that the payment was made as a bargain of the appellant abandoning this appeal.

[26] The upshot is that the appeal succeeds and the cross-appeal fails.

The judgment of the High Court in **Kiambu Civil Appeal No. 193 of 2016** dated 27th March 2019 is hereby set aside to the extent that the decision of liability by the trial court is reinstated; that is, that the respondents are 100% liable. The appellant shall have both costs of the appeal and the cross-appeal.

Dated and delivered at Nairobi this 30th day of April 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR.