IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 40 OF 2015

BETWEEN

HERMANT KUMAL RAVAL ……. APPELLANT

AND

JUBILEE JUMBO HARDWARE LIMITED ……..…….. RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (Muchelule, J.) dated 25th September, 2014

in

KSM HCCA NO. 18 OF 2008)

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JUDGMENT OF THE COURT

1. The appellant was the plaintiff in **CMCC No. 125** of **2006** where he had sued the respondent following an accident that occurred on 23rd April, 2005. In the plaint, the appellant averred that he was travelling as a pillion passenger along Otieno-Oyoo road in Kisumu when he was hit by motor vehicle registration number **KAR 665 H** *("the motor vehicle")* which he alleged was owned by the respondent.

2. The appellant contended that the accident was caused by the negligence of the respondent's driverand he set the particulars of negligence. As a result of the said accident, the appellant suffered serious body injuries.

3. The appellant prayed for general and special damages.

4. The respondent filed a statement of defence and denied, ***inter alia,*** the occurrence of the alleged accident, ownership of the motor vehicle and that the appellant had sustained any injuries as alleged. In the alternative, the respondent pleaded that if the said accident did occur; the same was occasioned by the appellant's negligence and set out particulars thereof.

5. During the hearing of the suit, the appellant testified as to how the accident occurred. Several documents, including the police abstract report were produced by consent. The police

abstract report showed that the motor vehicle was owned by the respondent, that at the material time it was being driven by one **Joseph Ohuru,** who was charged with the offence of careless driving, convicted and sentenced to a fine of Kshs2,000/= in default 14 days imprisonment.

6. Apart from the police abstract in court, the appellant did not produce any other documentary evidence regarding ownership of the motor vehicle. However, in his cross examination by the respondent's advocate, regarding ownership of the motor vehicle he stated that he had seen the respondent's name on the motor vehicle, which was a mitsubishi lorry by make. His workmates also told him that the lorry belonged to the respondent.

7. The respondent did not call any witness. Both parties filed written submissions. The appellant submitted that the respondent was fully liable for the occurrence of the accident and sought to be awarded general damages in the sum of Kshs.600,000/=.

8. On the other hand, the respondent submitted that the appellant had failed to discharge his burden of proof in that he had not shown that the respondent was the owner of the motor vehicle in question. The respondent relied on this Court 's decision in **Thuranira Karauri v Agnes Ncheche [1997] eKLR.** In that appeal the Court stated:

> ***"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before a judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry."***

9. The trial court apportioned liability at 70:30 in favour of the appellant and proceeded to award him general damages of **Kshs.220,608.50** plus costs and interest.

10. The respondent was dissatisfied with the said judgment and preferred an appeal to the High Court. The grounds of appeal were as follows:

> **"1. The award of general damages by the learned magistrate was excessive.**
>
> **2. The learned magistrate erred in law and in fact by ignoring the authorities submitted by the appellant in its submissions when arriving at the figure for damages in the judgment.**
>
> **3. The learned magistrate erred in law and in fact in finding that the appellant was 70% liable for the injuries of the respondent while it is apparent that the respondent failed to prove any or any sufficient negligence on the part of the appellant.**
>
> **4. The learned magistrate disregarded totally the evidence from the respondent as it emanated from the cross examination when apportioning liability against the appellant at 70%."**

11. As will be seen from the above quoted grounds of appeal, the issue of ownership of motor vehicle registration No. KAR 665H was not raised in the memorandum of appeal.

12. When the appeal came up for hearing before the High Court, counsel for the parties agreed that the appeal be canvassed by way of written submissions, which they proceeded to file.

13. In the judgment, the learned judge stated:

> **"3. The fact of accident and the *extent of injuries were not disputed, the issues in dispute were whether there was proof that the vehicle that knocked the respondent was registered in the name of the appellant; whether the vehicle was***

being driven by the driver and/or employee of the appellant; whether the driver was responsible in negligence for the Accident; and whether the amount of damages awarded was reasonable in the circumstances."

14. The learned judge held that the appellant had not proved ownership of the motor vehicle and proceeded to allow the appeal with the consequence that the trial court's judgment was set aside in its entirety.

15. In reaching that finding, the learned judge delivered himself as follows:

"Under section 8 of the Traffic Act (Cap 403), there was need for the respondent to show that the records at the motor vehicle registry showed that the offending vehicle was registered in the name of the appellant. Indeed, the Court of Appeal's decision in Thuranira Karauri v Agnes Ncheche, Civil Appeal No. 192 of 1996 was cited by the appellant's advocate to the trial court but was not referred to in the judgment. The court was bound by it. The fact that the appellant's name was written on the side of the vehicle was not proof of ownership."

16. **Hermant Kamal Raval,** the appellant herein was dissatisfied with that judgment and preferred an appeal to this Court. In his memorandum of appeal which consists of two grounds, he stated that the learned judge erred in law and fact in holding that there was no proof of ownership of the motor vehicle in question, and in maintaining that the decision of this Court in **Thuranira Karauri V Agnes Ncheche** was still good case law, in complete disregard of more recent decisions of the Court on the subject of proof of ownership of a motor vehicle.

17. **Mr. Kimanga,** learned counsel for the appellant, submitted that the appellant had pleaded that the motor vehicle was owned by the respondent. Further, the appellant had also given oral evidence to that effect and even produced a police abstract in court in support thereof.

18. Counsel cited two recent decisions of this Court which, he submitted, had varied the Court's earlier position in the **Thuranira Karauri** case. In **Joel Muga Opija v East African Sea Food Limited [2013] eKLR,** the Court noted that the defendant did not give evidence in his defence to challenge the plaintiff's evidence about ownership of the motor vehicle in question, despite the plaintiff having alleged that it belonged to the defendant and having produced a police abstract report to that effect.

19. The Court there held:

"It is noteworthy, it, that Bosire sat in Thuranira's case (supra), Wandera's case (supra) and in the Lake Flower's case. It would appear that like us, he treated the comments in Thuranira's case as orbiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. In any case 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 the evidence. We think, with respect, that the learned judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law in 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."

20. **Mr. Shilenje,** the learned counsel for the respondent, submitted that the position taken by this Court in **Thuranira's** case *(supra)* is still the correct one. According to him a party who desires to prove ownership of a motor vehicle must produce records of ownership from the office of the Registrar of Motor Vehicles. He urged the Court to uphold this Court's decision in Thuranira's case.

21. Counsel further submitted that the respondent challenged the contents of the police abstract report regarding ownership of the motor vehicle in question through the statement of defence and also through cross-examination of the appellant.

22. The fact that the police abstract report was produced by consent did not necessarily imply that its contents were admitted, Mr Shilenje added. He urged this Court to dismiss the appeal.

23. We have considered the entire record of appeal, counsel's submissions as well as various authorities cited. There is only one substantive issue that arises in this appeal, that is, whether the appellant proved that motor vehicle registration number KAR 665H was owned by the respondent.

24. The vehicle that hit the appellant was a commercial one. There was no dispute that the appellant did not produce records of ownership of the said vehicle from the Registrar of motor vehicles. The appellant however produced a police abstract report that indicated that the respondent was the owner of the motor vehicle. He further stated that the vehicle had the respondent's name on its side. That evidence was not controverted by the respondent. Was that evidence sufficient proof of the issue in contention?

25. As per the **Evidence Act** cap 80 Laws of Kenya, *"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 generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity.

26. The appellant testified under oath and was cross- examined by the respondent's advocate. He stated the basis of his belief that the respondent was the owner of the motor vehicle. **Rule 39** of the **Traffic Rules** requires the owner of every commercial vehicle to write on a conspicuous position on the right hand or off side of such vehicle, ***inter alia***, the name and address of the owner of the vehicle.

27. In this case, it is the name of the respondent that was written on the vehicle.That was in compliance with **rule 39** of the **Traffic Rules.** In the absence of evidence to the contrary, it must then be accepted that the respondent was the owner thereof.

28. **Section 116** of the **Evidence Act** states that:

> ***"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 affirms that he is not the owner."***

The respondent, through its authorized driver, was in possession of the motor vehicle. Having stated in the statement of defence that it was not the owner of the motor vehicle, the respondent was under a legal duty to adduce evidence to rebut the appellant's evidence, which it did not. Pleadings in a suit are not evidence, unless admitted or proved, see **CMC AVIATION LTD V CRUISAIR LTD (No 1) [1978] KLR 103.** The respondent's contention that its statement of defence was sufficient challenge to the appellant's evidence that it was the owner of the motor vehicle is without any legal basis.

29. We cannot accept Mr Shilenje's submission that without production of records of ownership from the Registrar of motor vehicles the appellant had failed to prove that the respondent was the owner

of the motor vehicle that had hit him. We have already stated that the appellant had adduced oral and documentary evidence that the respondent was the owner of the motor vehicle, and in the circumstances the respondent needed to tender evidence to rebut the appellant's evidence.

30. Under **section 73** of the **Police Act,** where an accident occurs and injury or damage is caused to any person, vehicle, dog or cattle, the driver of the motor vehicle is required to stop and if so required by the police, give his name and address as well as the name and address of the owner of the vehicle. Thereafter the police carry out appropriate investigations and may take appropriate action. Upon request and payment of the requisite fees the police may issue a police abstract report in respect of the accident.

31. In this case, the police abstract report indicated that the accident was investigated by one Corporal John Wanga, the name of the driver of the motor vehicle was **Joseph Rajuani Ohuru** and he was charged for careless driving in **Traffic Case No. 1054 of 2005,** convicted and fined Kshs 2000/= in default 14 days' imprisonment. The police further stated that the respondent was the owner of the said vehicle. All that evidence was not rebutted by the respondent. The Court must therefore accept that Corporal John Wanga investigated all the relevant aspects of the traffic case, including ownership of the motor vehicle, before he charged the driver for the traffic offence.

32. In **WELLINGTON NG'ANG'A MUTHIORA V AKAMBA PUBLIC ROAD SERVICES & ANOTHER, [2010[eKLR**, this Court held:

> ***"… where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination 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 standards of probability and not beyond reasonable doubt as in criminal cases. However, where it is challenged by evidence or in cross-examination the plaintiff would need to produce certificate from the registrar of motor vehicles which would only be conclusive evidence in the absence of proof to the contrary."***

We respectfully adopt the above holding in this appeal.

33. We are satisfied that, on a balance of probabilities, the appellant proved that the respondent was the owner of motor vehicle registration number KAR 665H and because the respondent did not adduce any evidence to disprove that, it was not necessary for the appellant to produce a certificate of search from the Registrar of motor vehicles.

34. We must therefore allow this appeal and set aside the judgment dated 26th August 2014 and delivered on 25th September, 2014. In effect, we reinstate the original judgment in **CMCC No. 125** of **2006**. Consequently, the appellant shall be paid a sum of **Kshs 220,608.50** plus costs and interest at court rates from 6th February, 2008 when the award was made until payment in full. The costs of this appeal as well as the High Court appeal and in the Chief Magistrates' Court are awarded to the appellant.

DATED and delivered at Kisumu this 2nd day of June, 2016.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR