



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO.30 OF 2014**

**BETWEEN**

**MUHAMBI KOJA .....APPELLANT**

**AND**

**SAID MBWANA ABDI .....RESPONDENT**

*(Being an appeal from the judgment and order of the High Court of Kenya at*

*Malindi (Meoli,J.) dated 21<sup>st</sup> March, 2014*

**In**

*H.C.C.A. No.31 of 2010)*

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**JUDGMENT OF THE COURT**

Although the memorandum of appeal lists five grounds, in our view only one broad question falls for our determination, that of proof of ownership of motor vehicle registration number **KAN 507 Q**. That was the sole ground argued before us.

This in summary is how this question arose in the two courts below, this being a second appeal. By a plaint initially filed in the **Chief Magistrate's Court at Malindi in Civil Suit No.235 of 2007** and subsequently amended and filed on 8<sup>th</sup> August, 2008 the appellant who had been involved and injured in a road traffic accident with the aforesaid motor vehicle on 1<sup>st</sup> December, 2005 instituted an action against the defendants, Said Mbwana Abdi (*the only respondent in this appeal*) and **Caroline Nyambura Mwenje**,(not a party in the appeal) claiming that the former was the insured and/or beneficial owner of the vehicle and the latter its registered owner; that the motor vehicle was so recklessly driven by the defendants' authorized driver, servant and/or agent that it lost control, veered off the road and knocked down the appellant on the side walk of the road, occasioning him serious bodily injuries. For these he claimed from the defendants jointly and severally **Kshs.253,440.40** in special damages, general damages, costs of the suit and interest. **Caroline Nyambura Mwenje** did not enter appearance and judgment was entered against her. We note that the respondent in his statement of defence denied being the owner of the motor vehicle. At the trial, the following evidence respecting ownership was presented. The appellant stated that;

***“The vehicle was KAL 507 Q Toyota (should be KAN). The vehicle is owned by Said Mbwana. He is the one I sued as 1<sup>st</sup> defendant. I knew the vehicle was being used as a taxi. Police investigated and found the vehicle is owned by Said Mbwana.”***

In cross examination, he explained that;

***“The vehicle as per the search is owned by Caroline Nyambura, who I sued as 2<sup>nd</sup> defendant. She is the owner. When the vehicle was working it belonged to Said Mbwana Abdi. He is the one who was driving. It was a taxi”***

As will shortly become apparent the respondent was not driving the vehicle when it was involved in the accident. **P.C Gordon Kwendo**, on behalf of the investigating officer produced the police file containing police abstract report in which it was declared that the respondent was the owner of the vehicle. The witness also confirmed that from their record the registered owner was shown as **Caroline Nyambura Mwenje**. The respondent himself did not testify. Instead, on his behalf **Karisa Gumbe Mugaru** did.

He said;

***“I know Said Gona Abdi as he is the owner of the vehicle. .... On 1<sup>st</sup> January, 2005 I was driving the vehicle from Malindi to Mombasa.... A person from the left side heading to the right without checking ....I was driving on the left lane. He was hit by the vehicle. He was hit and I stopped.”***

He continued as follows in cross-examination;

***“Said Gona is my friend. I had authority to drive the vehicle”***

From that evidence the learned trial Magistrate found, on the question under our review, that;

***“The court entered interlocutory judgment against the 2<sup>nd</sup> defendant who, according to a copy of records from the Registrar of Motor Vehicles is the registered owner of the Motor Vehicle, KAN 507 Q Toyota Saloon. The copy of records was produced as exhibit-1. According to DWI Karisa Gumbe Mugaru, the vehicle KAN 507 Q was owned by Said Gona Abdi at the time of the accident. He said Gona had authorized him to drive the vehicle. PW2 who produced the police abstract and the file told the court that the owner was Said Mbwana Abdi who is the 1<sup>st</sup> defendant. I find that the 1<sup>st</sup> defendant is liable as he was the beneficial owner of the motor vehicle and the motor vehicle was being driven by DWI with his authority.... I have pointed out that DW1 must shoulder some blame as he did nothing to avoid the accident though he had seen the plaintiff within a good distance and could have avoided the accident.”***

With that the learned trial Magistrate entered judgment, apportioning liability at the **ratio of 40%: 60%** between the appellant on the one hand and the respondent and **Caroline Nyambura Mwenje** on the other hand awarding damage, as follows:

-Kshs.1,200,000 – general damages less 40% =Kshs.720,000

-Kshs.140,704 – Special damages less 40% =Kshs. 84,423

**Total Kshs.804, 423**

On appeal to the High Court the respondent raised, among other grounds that;

***“3. The trial Magistrate erred in finding liability against the 1<sup>st</sup> defendant whereas it was proved that he was not the owner of the subject motor vehicle”***

The learned Judge (**Meoli, J.**) in her judgment in overturning the trial court's decision observed that the respondent's liability was based on two pieces of evidence, that of **Karisa Gombe Mugaru**, a witness called by the respondent himself and the police abstract report. She then framed two questions for her determination;

**“(a) Whether SAID MBWANA ABDI should be held liable?**

**(b) Whether damages awarded are excessive.”**

Of relevance to us in this appeal is the learned Judge's answer to the first question. She held;

*“There is no evidence to prove that SAID MBWANA ABDI owned the motor vehicle, whether as a beneficial/insured owner or as one who had hired it for use. The only reason why DWI decided that the motor vehicle belonged to SAID is because the latter had instructed him to drive it. It is not clear whether SAID GONA ABDI and SAID MBWANA ABDI refer to one and the same person... I think for the Court to make a persuasive conclusion that 1<sup>st</sup> defendant was a beneficial owner, it was necessary for evidence to be led to demonstrate that 1<sup>st</sup> defendant had either purchased the motor vehicle from, 2<sup>nd</sup> defendant but had not yet registered it, or had hired it for use in some income generating activity. There is no such evidence... It was unsafe to rely on what was presented to the trial court to hold the 1<sup>st</sup> defendant/appellant liable”*

The learned Judge upon allowing the appeal, set aside the judgment against the respondent. It is that decision that has been challenged in this appeal and as observed at the beginning of this judgment the only question for our determination is whether or not the learned Judge erred in holding that there was no evidence of the respondent's ownership of the motor vehicle.

The respondent was described in the amended plaint as “the insured and/or beneficial owner”, a claim he denied. The only evidence linking him with the ownership of the motor vehicle is, first and foremost that of his own witness, **Karisa Gombe Mugaru** whose evidence we have earlier on reproduced but does bear repeating here; that the respondent was the owner of the vehicle with whose authority he was driving it. The second piece of evidence was contained in the police abstract report which described the respondent as the owner. At the same time the appellant himself led evidence and produced a copy of the records, prepared by the Registrar of Motor Vehicles dated 17<sup>th</sup> May, 2008 confirming that indeed the registered owner of the vehicle was “**Mwenje Caroline Nyambura.**” So that, before the two courts below and ultimately before us we have two distinct “owners” – one by virtue of a police abstract report and another on the strength of a confirmation of the records in the custody of the Registrar of Motor Vehicles.

In terms of **Section 8** of the **Traffic Act**,

***“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”*** (Our emphasis)

This **section** has been the subject of interpretation by the courts in numerous cases, but the one cited with outstanding frequency is this Court's decision rendered at Nyeri in 1997 in **Thuranira Karauri v Agnes Ncheche**, **Civil Appeal No.192 of 1996(UR)** in which the Court stated as follows;

*“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 the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr.Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it”*

After the decision in **Thuranira** (Supra) the question of proof of ownership in terms of section 8 aforesaid appears to have been firmly settled and this Court sitting in Kisumu in a recent decision, delivered on 24<sup>th</sup> October, 2013 in the case of **Joel Muga Opija v East African Sea Food Limited**, Civil Appeal No.309 of 2010 considered the question comprehensively and treated the comments in **Thuranira** regarding proof of ownership of a motor vehicle by way of a police abstract as ‘*obiter*’. In **Opija** case (supra) the Court declared the applicable law in the following terms;

*“It is clear to us that there has been a move from the rigid position that was pronounced, albeit as *obiter* in the **Thuranira** case ... 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.”*

We agree. To begin with, in the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle. But situations, in the normal course of business and human interactions, may arise where the person named in those records may have passed the property in the vehicle to some other person in whom the ownership presently vests. For instance, **Section 9** of the Traffic Act recognizes this situation and requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding fourteen (14) days after the date of such transfer, unless the new owner is registered as the owner thereof. The registered owner must, within seven days from the date of the transfer inform the Registrar in a prescribed form. (He is also required to furnish) the name and address of the new owner and deliver the original registration book to the new owner.

It is the new owner who takes over from this point on and after inserting particulars of the change of ownership, forwards the registration book with the prescribed fees to the Registrar, whereupon the vehicle will be registered in the name of the new owner. Where, however, there is proof and the Registrar is satisfied that the above steps cannot be taken on account of the registered owner having died or left Kenya or cannot be traced or has simply refused to comply with these requirements, the vehicle may nonetheless be registered in the name of the new owner upon payment of the prescribed fees.

Two scenarios are presented under this provision. There are two steps to be satisfied within fourteen days before the vehicle can be registered in the name of the new owner. As this process is in motion the new owner, though not registered, can use the vehicle on the road for a period of fourteen (14) days. If the vehicle was to be involved in an accident in this intervening period the registration book will be in the name of the seller yet the motor vehicle will have been transferred and ownership vested in the new owner only pending registration. That new owner will be liable if evidence of transfer is led. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms. The police abstract report which is usually completed after investigations are conducted by the police and which is admissible in evidence by virtue of **Section 38** of the Evidence Act, is one such proof.

In **Lake Flowers v Cila Francklyn Onyango Ngonga & Another**, Nakuru Civil Appeal No.2010 of 2006(UR) the Court found that the appellant had failed to rebut the evidence on the police abstract showing it to be the owner of the motor vehicle involved in the accident. The other form of evidence that had been used to prove title to a motor vehicle were tender documents that proved that the appellant in whose name the vehicle was registered had ceased to be its owner upon selling it through a tender process to a third party whose details he supplied to the court. See **Securicor Kenya Limited v Kiyumba Holdings Limited** Nbi Civil Appeal No.73 of 2002 (UR). The third instance is where there is proof that the registered owner has lost such ownership through an auction sale to the highest bidder. See **Earnest Orwa Mwai, v Abdul Hashid & another**, KSM Civil Appeal No.39 of 1995 (UR). In **Nelson Yabesh Bichanga v Mary Omari** KSM Civil Appeal No.43 of 2006 (UR) it is the sale agreement that was used in rebuttal.. There are certainly more than these examples but we are satisfied that these four will suffice for the purpose of this appeal.

The proviso to **Section 9 (2)** is the second scenario. Unlike the first scenario which is restricted to fourteen days within which the motor vehicle must be registered, the second scenario is where the previous owner has transferred the vehicle to a new owner but has either refused to comply with the requirements necessary to register it, or has died or left Kenya or cannot be traced. Only after the Registrar is satisfied as to any one or more of these conditions and upon payment of fees will the new owner be registered. In the meantime before the Registrar is satisfied, although not named in the log book, the new owner, will for all intents and purposes be deemed to be the owner, and in case of an accident, will be held liable.

These decisions confirm that, by dint of **Section 8** of the Traffic Act the registration book or the Registrar's extract of the record are only *prima facie* evidence of title to a vehicle and the person in whose name it is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities it is shown that as a matter of fact the vehicle had been transferred but not yet registered to a *de facto* owner, a beneficial owner or a possessory owner. Such an owner, though not registered, for practical purposes may be more relevant than that in whose name the vehicle is registered as was found in the Securicor Kenya case (Supra).

Having disposed of the difficult part of this appeal, namely, the state of the law, we turn to consider how the above principles apply to the facts of this case. Before the trial court, were two documents, both purporting to be presented as evidence of ownership of **KAN 507 Q**; The two documents are an extract of the record issued by the Registrar naming **Mwenje Caroline Nyambura** as the registered owner and a police abstract report indicating the owner as the respondent. Both documents were presented by the appellant, who appeared to have been saying that: ***"This vehicle was initially registered in the name of Mwenje Caroline Nyambura, but it has since been transferred to the respondent who has not registered it."***

The only thing the appellant failed to do was to draw such a nexus between **Mwenje Caroline Nyambura** and the appellant in any of the forms discussed earlier. How did the ownership move from **Mwenje Caroline Nyambura** to the respondent? Was it a sale, an auction sale or a tender? The police abstract report was produced and admitted without establishing this nexus in the face of the official record of the Registrar.

The appellant having pleaded in the amended plaint that the respondent was an *"insured and/or beneficial owner"* of the vehicle was bound by the rules of evidence, to prove the deposition to show, for instance, that the respondent was the insured of in **Policy No.041/083/025242/01/05 TPO** for the period 20<sup>th</sup> May, 2004 to 19<sup>th</sup> May, 2005 as shown in the police abstract report. Both courts below did not address how beneficial ownership is obtained.

**Black's Law Dictionary**, 9<sup>th</sup> Edition defines a *'beneficial owner'* as one who enjoys, uses and manages property as of right and can convey it to others; an equitable ownership. None of this applied to the respondent without evidence. We reiterate the holding in Nelson Yabesh Bichanga (Supra), where the Court emphasized that;

***"The evidence availed by the production of other records from the Motor Vehicle department shows that the appellant was the registered owner of the subject vehicle as at the date of the accident. Thus the onus of proving the contrary was on him. He needed to prove that the ownership had actually passed on to the second respondent through a valid contract entered into between him and the second respondent under the provisions of Section 20 of the Sale of Goods Act..."***

***...This is the reason why the learned Judge rightly decried the absence of any sale agreement which would have established that indeed such a sale did exist notwithstanding that the registered owner still remained the appellant."***

In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the

registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.

In the matter before us, the learned Judge properly directed her mind on this question and correctly found that **Mwenje Caroline Nyambura**, against whom a default judgment had been entered, remained the registered owner of **KAN 507 Q**.

Accordingly this appeal lacks merit and is dismissed with costs.

**Dated and delivered at Malindi this 29<sup>th</sup> day of May, 2015**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**