



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 309 OF 2010

BETWEEN

JOEL MUGA OPIJA APPELLANT

AND

EAST AFRICAN SEA FOOD LIMITED RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisii (Gacheche, J.)

dated 20th November, 2007

in

CIVIL APPEAL NO. 175 OF 2004)

JUDGEMENT OF THE COURT

This is a second appeal. The appellant Joel Muga Opija was the respondent in the first appellate court – Civil Appeal No. 175 of 2004 at the High Court of Kenya at Kisii and was the plaintiff in the Senior Resident Magistrate's Court at Homa Bay – Civil case No. 15 of 2003. He sued the respondent East African Sea Food Limited vide a plaint dated 18th November, 2002 and filed on 28th February, 2003, in which he claimed that he was suing as an Administrator of the estate of Evans Odhiambo Muga (deceased) who, he said was his son and who died in a road accident that took place along Kendu Bay/Pala road. In this appeal, the appellant raised eight grounds of appeal, but at the hearing of the appeal, Mr. G.S. Okoth, his learned counsel, abandoned the second ground preferring to argue grounds 1,3,4,5,6, 7 and 8 which were that:-

“1. The learned Judge of the Superior Court misdirected herself on several matters of law of procedure practice and evidence.”

2.

3. The learned Judge of the superior court erred in law in refusing to entertain the application dated 28th March, 2006 and filed on 3rd May, 2006 for admitting and examining the application proceedings and orders made in Succession Cause No. 160 of 2001 before the Senior Resident Magistrate at Homa Bay and thereby occasioned a miscarriage of justice.

4. *The learned Judge of the superior court erred in law in holding that the appellant herein had no Locus standi to file the original suit by rejecting exhibit 5 (Limited grant of Letters of administration) when it was expressly endorsed thereon that the said grant was for filing suit.*
5. *The learned Judge of the superior court erred in law in failing to note that prescribed forms for limited grant of letters of Administration ad litem were only introduced by Legal Notice No. 39 of 2002 and further that the court is permitted by rule 70 of the Probate and Administration rules to make appropriate additions and modifications of the prescribed forms.*
6. *The learned Judge of the superior court erred in purporting to place the burden of proof upon the appellant herein to be proof beyond reasonable doubt instead of proof on a balance of probability.*
7. *The learned Judge of the superior court erred in law in holding that the plaintiff and his witness had not proved negligence when the evidence adduced proved all the ingredients of the tort of negligence which were not rebutted by any evidence to the contrary as the defence did not adduce any evidence to support their defence.*
8. *The learned Judge of the superior court erred in law in holding that there was no proof of ownership of the subject vehicle and disregarding the Police Abstract which was produces (sic) without any objection from the defence.”*

The facts giving rise to the trial in the subordinate court and eventually the appeal to this Court are fairly short and straight forward and may be stated in summary thus:-

E O M, then aged 15 years, was the son of the appellant. On 16th June, 2001, at about 9.30 am, he was riding a bicycle along **Kendu Bay/Pala road** when, according to **Washington Ouma (PW2)** who was from the relevant area and was at that time basking in the sun nearby, was hit by motor vehicle belonging to a fish company and he died on the same day from the injuries received as a result of the accident. Ouma said, the deceased was riding his bicycle on the left side of the road from Kendu Bay and the vehicle that hit him was from behind him and was being driven towards the same direction. The appellant, who was not at the scene, was eventually informed of the incident. The police were in one way or the other made aware of the incident. They prepared a Police Abstract report in which they stated that the registration number of the vehicle involved in the accident was KAH 618V and that that vehicle belonged to the respondent. That abstract had the name of only one witness who was not Ouma. The appellant applied for and obtained **Limited Grant of Letters of Administration ad colligenda bona** dated 16th January, 2002. Although the respondent later claimed that document could not on its own give the appellant the necessary legal status to file the suit such as was filed, nonetheless, the appellant, armed with that document proceeded to the Senior Resident Magistrate's court and filed *Civil Suit No. 160 of 2003* in which he sought judgment against the respondent for:-

- “(a) Ksh.8,785 as special damages
- (b) Damages under Fatal Accident Act and Law Reform Act as above.
- (c) Interest on (a) and (b) at court rates.
- (d) Cost of the suit.
- (e) Such further or other alternative relief as this Honourable Court deems fit to grant.”

That judgment was sought on grounds that the respondent was the registered owner of the vehicle that hit the appellant's son and caused his death; that the same respondent's vehicle was being driven by respondent's employee; that the same driver was negligent in the way he drove the vehicle and particulars

were given; that the respondent being the employer of the same driver, was vicariously liable for the negligence of that driver and that the deceased suffered injuries and the appellant also suffered loss as a result of the death of the deceased.

The respondent in his defence to these claims, in a statement of defence dated 28th March, 2003 and filed on 14th April, 2003, admitted only the parts of the claim that described the parties, but otherwise denied almost all other contents of the plaint and particularly denied that the appellant had any status to file and prosecute the suit; that the respondent was the registered owner of the vehicle that hit and killed the deceased; that the driver of the same vehicle was its employee; that the same driver was negligent and that was vicariously liable for the accident resulting into the death of the deceased. It also denied the claims as to the specific losses and general losses and put the appellant to strict proof of all those allegations in the plaint and alleged contributory negligence on behalf of the appellant. The appellant filed a reply to the statement of defence in which he, among others, denied any allegations of contributory negligence made by the respondent.

At the hearing of the suit before the Senior Resident Magistrate, the appellant gave evidence and called one witness, we have mentioned herein above, whereas, the respondent offered no evidence. By consent of the parties, their respective advocates submitted written submissions. The learned Senior Resident Magistrate, in a judgment dated and delivered on 23rd June, 2004, granted the appellant's claim, finding the respondent vicariously liable for the accident to the extent of 80% while the deceased's contributory negligence was put at 20%. After allowing for the contributory negligence at 20% the learned Senior Resident Magistrate awarded a sum total of Kshs.350,120 to the appellant together with costs and interest thereon.

The respondent felt aggrieved and moved to the High Court vide Civil Appeal No. 175 of 2004 in which it cited nine grounds of appeal which were in summary that the learned Magistrate erred and misdirected himself in superficially treating the evidence and submissions on liability before him; that the demand of contributory negligence made by the respondent was not sufficiently considered; that the learned Magistrate did not give proper consideration to the submissions on the quantum of damages; that respondent's submission on principles applicable and authorities annexed to the written submissions were not considered; that the learned Magistrate failed to consider all the evidence presented on behalf of the respondent; that the appellant's injuries were not considered at the time of assessing the damages; that the learned Magistrate proceeded on wrong principles when assessing the damages and that the learned Magistrate erred in awarding a sum in respect of damages which was so inordinately high that it represented an entirely erroneous estimate vis a vis the appellant's injuries.

We have set out the above grounds which were the grounds of appeal before the learned Judge only to appreciate that the two main points taken by the respondent at the hearing of the appeal and upon which the learned Judge's pronouncement were buttressed namely whether or not the appellant had status to bring the suit and whether or not the respondent was the registered owner of the motor vehicle registration No. KAM 618V allegedly involved in the accident, the subject of this appeal were specifically preferred as grounds of appeal in the High Court. In saying this, we must not be misunderstood to be saying that if they were not specifically grounds of appeal, the first appellate court could not consider them. Of course if the matters were argued by both parties as appears was done in this matter then the First Appellant Court was perfectly entitled to consider them. We are also aware that they could validly be argued in the cause of urging grounds such as that there was no proof of negligence on the part of the respondent. All we are saying is that they may have become important to the respondent as a result of an afterthought.

Be that as it may, the learned Judge of the High Court, (*Gacheche, J.*) after hearing both parties' counsel allowed the appeal, set aside the judgment of the learned Magistrate and dismissed the suit with costs to the respondent. However, each party was ordered to bear the costs of the appeal, which we understand to mean that each party was to bear its own costs of the appeal. The learned Judge was of the view that the appellant herein had not proved negligence against the respondent as evidence of **Washington Ouma (PW2)** "appeared doubtful" on the issue and yet he was the only witness called by the appellant as the appellant did not witness the accident and so could not testify on the issue of negligence. Secondly, the learned Judge made a finding that though the respondent denied ownership of the subject vehicle, the

appellant failed to prove that it was the owner of the vehicle as the appellant produced Police Abstract Report only which to the learned Judge, was not enough proof of ownership. Lastly, she upheld the respondent's submission that the appellant had no locus standi as limited grant above which was exhibited at the trial, was not enough proof that the appellant could bring a suit. Having made the above findings, the learned Judge concluded her judgment thus:-

“The upshot of all this is that I find that Opija did not prove his case against the company on a balance of probability, and this appeal must in the circumstances succeed. The judgment of the subordinate court is hereby set aside, the suit against the company is dismissed with costs. Each party shall bear the costs of the appeal.”

This is the judgment that prompted the appeal, the grounds of which we have set out hereinabove.

Mr. G.S. Okoth, the learned counsel for the appellant in his address to us, abandoned the second ground of appeal, as we have stated. On the remaining grounds, he submitted on the issue of Status that the form that was used by the appellant to apply for Letters of Administration was the one that was being used at the relevant time before the new forms that have introduced the distinction between the form used for applications came into effect. He further submitted that in any case, the Senior Resident Magistrate's court had made a specific order allowing the appellant to use the forms and the Letters of Administration in issue were specifically issued for the purpose of filing and conducting the subject suit.

On the issue of ownership, Mr. Okoth's take was that as the respondent offered no evidence to rebut the contents of the Police Abstract Report, which contents included the entry that the respondent was the registered owner of the vehicle in question, the learned Judge erred in disregarding that evidence. In the same way, as the respondent adduced no evidence to contradict that of Ouma, who saw the accident, the learned Judge erred in finding doubt in that evidence. He referred to several authorities and urged us to allow the appeal.

Mr. Nyamweya, the learned counsel for the respondent opposed the appeal, contending that ownership was indeed not proved as the learned Judge had found because, a Police Abstract Report on its own is not enough proof of ownership which the respondent had, in a statement of defence categorically denied and in respect of which the appellant had been put to strict proof. In his view, as the ownership was not proved so was negligence not proved as the respondent was sued on account of the negligence of its employee, the driver. Further he submitted that as the appellant in his evidence in court admitted that he never witnessed the accident and as Ouma, his witness could not be relied upon, the entire case was not proved. As to the issue of status, Mr. Nyamweya submitted that the Letters of Administration ad colligenda bona did not indicate that the purpose of its issue was to file the suit. He urged us to dismiss the appeal with costs.

In our view, the main issues raised in this appeal are three and these are first, whether the appellant had locus standi to sue as the Administrator of the Estate of the deceased E O M; second, whether police abstract produced at the hearing of the case was enough proof of ownership of the motor vehicle registration number KAM 618V which was involved in the accident that resulted into the death of the deceased, and lastly whether the driver and consequently the owner of that vehicle namely the respondent was negligent. It is clear from the grounds of Appeal before us and from the submissions by the learned counsel that the issue of quantum of damages is no longer an issue before us.

We will consider the issue of status first. The main reason why the learned Judge sustained the respondent's arguments on this issue is that the form used and its contents limited the appellant to “collect, get and receive” the Estate and doing such things as may be necessary for the preservation of the same until further presentation be granted. She rightly in our view considered that as a very limited grant which did not authorise the respondent to institute or defend any claims on behalf of the estate of the deceased. Mr Okoth responds to that by submitting that at the relevant time when the accident happened that **Form P & A 47** was the form used for purposes of instituting and defending claims such as was made in this case. He says that the separate forms now in use came into use much later. The accident took place on 16th June, 2001. That is not in dispute. The deceased died on that same day

according to the evidence which includes Certificate of Death produced as exhibit. **Section 67 (1)** of the **Law of Succession** was clear that no representation, other than a limited grant for collection and presentation of assets, could be made until there had been published Notice of the application for the grant. **Form 47** used here was undoubtedly that for limited grant and ideally was not a suitable form for grant that would authorise a person to sue or to defend a suit on behalf of the estate of a deceased person. However, **Rule 70** of the **Probate and Administration Rules** states:-

“The forms set out in the First Schedule with such adaptations, additions and amendments as may be necessary, shall, when appropriate be used in all proceedings under these rules.

Provided that the Chief Justice may by notice in the Gazette vary the forms and prescribe such other or additional forms as he

thinks fit.”

A look at the first schedule indicates that **Form 47** is one of such forms which could be used with variations as appropriate.

Thus before the Chief Justice gazetted a varied form, applicants could use Form 47 as appropriate for all proceedings under the rules. This continued till **Legal Notice No. 39** was introduced under the **Probate and Administration (Amendment of the fifth schedule Rules) 2003**, and a proper form was introduced. This was long after the death of the deceased and indeed after the appellant had applied for Letters of Administration under the old provisions.

We think that had the attention of the learned Judge of the High Court been drawn to the above, and to the fact that the learned Magistrate had in a ruling allowed the use of the form for filing the case, she would not have come to the same conclusion she came to in her judgment. We are persuaded that that ground was well taken.

The next issue is that of whether the respondent was the registered owner of the vehicle the subject of the suit. The appellant, in his evidence clearly did not witness the accident and did not see the vehicle that killed his son. He however stated in his evidence in chief as follows concerning the issue:-

“I later recorded my statement with Police. I was issued with a police abstract which I wish to produce as Exh.- Marked Exh. No. P3,”

and in further cross examination this witness stated:-

“I sued the defendant because it was their vehicle that was involved in the accident, I cannot recall the driver's name, I saw the vehicle at Kendu Police Station registration number was KAM 618V. The police informed me the vehicle belonged to East Sea Food Co.,”

and in cross-examination he stated:-

“I saw the vehicle at the Police Station. I was told it was the one involved in the accident,”

Washington Ouma merely said the vehicle belonged to a fish company and went on to say that the police arrived at the scene later, but was not specific as to at what time the police arrived at the scene and he was not recorded as a witness as the police did not record the names of those at the scene.

That was all the appellant and his witness said as concerns the ownership of the vehicle involved in the accident. It will readily be seen that the main evidence on ownership was that contained in the police abstract. In the abstract, the name of the respondent is given as the registered owner of the vehicle. Its insurer is also given and the policy number is also given but for some reasons not revealed, the name of

the driver is not given. Against all that appellant's evidence, the respondent opted to and did offer no evidence in its defence.

It was in consideration of the above evidence that the learned Senior Resident Magistrate found as follows:-

“The defendant opted not to adduce any evidence in defence.

From the evidence on record PW2, an eye witness stated that the vehicle in issue, which he noted belonged to a Fish Company, knocked down the deceased, who was cycling, from the rear. The same died on the spot. The police abstract (Exh. No.3) shows the vehicle involved in the accident registration number KAM 618V Mitsubishi Canter belonged to East African Sea Food Company Since no evidence was called by the defendant to establish negligence on the part of the deceased, I find the defendant is liable in negligence and will attribute this at 80%.”

On appeal, as we have stated, this finding was overturned. The learned Judge overturned this finding as she held that production of Police abstract alone was not enough proof of ownership of the vehicle.

We have anxiously considered this aspect of the appeal as it is a legal matter as to what constitutes evidence that would establish ownership of a motor vehicle involved in an accident particularly in a situation such as obtained in this appeal before us. In the case of ***Thuranira Karauri vs Agnes Ngeche – [Civil Appeal No. 192 of 1996]*** (UR) which was annexed to the submissions of the respondent in the Senior Resident magistrate's court, this Court differently constituted 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 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.”

We observe that in that case the defendant did not give evidence in his defence, and we further note that the learned Judges of Appeal in that case had settled for allowing the appeal on other grounds they considered more serious so that the finding above remained orbiter. Hear them at the end of their judgment:-

“In the final analysis, the appeal succeeds and is allowed. We set aside the judgment and decree of the Superior Court and in view of our finding that the claim was time barred, which rendered the suit incompetent, we substitute an order striking out the plaintiff's suit with costs to the defendant. The defendant will also have the costs of this appeal.”

We find of persuasive value the view held by *Ali Aroni J.* when she considered a similar issue of ownership in the case of ***Collins Ochung Ondiek vs Walter Ochieng Ogunde – [HC Civil Appeal No. 67 of 2008,]*** (UR). She distinguished Thuranira's case from the case that was before her as follows:-

“In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did not take the issue of ownership seriously.

.....

The case of Thuranira Karauri vs Agnes Ngeche can be distinguished from the current case in many ways, it had several loop holes, it was time-barred and no proof of extension of time was produced in evidence, other material documents were produced in breach of provisions of Section 35 of the Evidence Act which is not the case here.”

We agree, many reasons led to the decision in Thurania's case the main one being that the suit was time-barred.

In the more recent case of *Ibrahim Wandera vs P.N. Mashru Limited*, [Civil Appeal No. 333 of 2003] (*unreported*) this Court, again differently constituted considered a similar scenario. In that case only the appellant testified and on appeal the issue of whether ownership was proved was raised. Coincidentally, the advocate for the appellant was the same as is in this case and some of the grounds advanced in the Memorandum of Appeal were very close to the grounds raised in this appeal. This Court stated as follows:-

“The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J. proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned Judge, with respect to him, did not at all make any reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashiru of P.O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross examined on it. It means the respondent was satisfied with that evidence.”

In fact, in that case Mr. Menezes who represented the appellant applied to challenge the admissibility of the police abstract but without success. That he did so, demonstrated the importance of the contents of the abstract as to ownership.

Lastly, in the case of *Lake Flowers vs Cila Franklyn Onyango Ngonga* (suing as the personal legal representative of the estate of Florence Agwingi Ogam (deceased) and *Josephine Mumbi Ngugi* (2008) eKLR which was also on the same issue, it was held:-

“Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or (sic) attempt to partly or wholly blame the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the Police Abstract produced by the 1st respondent which shows it to be the owner of that motor vehicle.”

It is noteworthy, that *Bosire JA.* sat in Thurania'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 Thurania 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 Thurania 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 that 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 on 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.

That in effect leaves only the issue of whether negligence was proved within the standard required in civil suit. Ouma stated clearly that the deceased was hit from behind and fell on the left hand side of the road as one faces Pala side. We do not think that the mere fact that this witness was not listed as a witness in the abstract lessened the weight of his evidence. He was a member of the public and he said the police did not record statements of those who were at the scene. In any case he was not challenged by any evidence from the respondent to the contrary. We think that without any evidence challenging his evidence the fact would remain that the deceased was hit from behind and he fell on the left hand side. The driver must have been seeing him in front of him and there was no evidence that the deceased changed his manner of cycling or that he went zig zaging on the road. We see no reason to disturb the learned Magistrate's finding on negligence.

The sum total of all the above is that in our view this appeal succeeds. It is allowed on liability and as the issue of quantum was not before us, we set aside the decision of the learned Judge and substitute it with the decision of the learned Senior Resident Magistrate. The total award of Ksh.350,120 made by the learned Senior Resident Magistrate shall stand. Costs of the appeal and of the High Court to the appellant. Judgment accordingly.

Dated and delivered at Kisumu this 24th day of October, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR