Case Number:	Civil Appeal 232 of 2016
Date Delivered:	04 May 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Anthony Ndung'u Kimani
Citation:	Kenya Power And Lighting Company Limited v Patrick Njane Mbugua & another [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. Onsarigo (RM)
County:	Nairobi
Docket Number:	-
History Docket Number:	CMCC No. 1219 of 2010
Case Outcome:	Appeal allowed
History County:	Kiambu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

CIVIL APPEAL DIVISION

CIVIL APPEAL NO 232 OF 2016

KENYA POWER AND LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

PATRICK NJANE MBUGUA.....1ST RESPONDENT

WILLIAM MACHARIA.....2ND RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. Onsarigo (RM)

delivered on 27th January 2016 in Thika CMCC No. 1219 of 2010)

JUDGEMENT

INTRODUCTION

1. This is an appeal against the judgment of Hon. Onsarigo R.M dated 27th January 2016. The 1st respondent instituted a claim in the lower court against the appellant seeking general and special damages for injuries sustained in a road traffic accident. The 1st respondent claimed that on 25th November 2007 the appellant's motor vehicle KMT 853 was being driven by the appellant's driver or agent so negligently along Nairobi-Thika road near Theta clubthat it lost control and rolled several times. The 1st respondent was a passenger in the vehicle and he claims that as a result of the accident he sustained serious injuries. The appellant filed itsdefense denying the claim and also averred that it was not the owner of motor vehicle KMT 853 as at 25th November 2007. In due course the defendant issued a third party notice to the 2nd Respondent claiming that the 2nd respondent was the owner of the vehicle at the time of the accident.

2. Before considering the facts and the parties' submissions I must first recognize that the duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

3. Patrick NjaneMbugua (Pw1) recalled that on the material day he was a passenger in motor vehicle KTM 853. He testified that when they got to Kenyatta road the driver was driving at an abnormal speed and lost control. He became unconscious and was taken to the Hospital by good Samaritans. He was later referred to Thika Level 5 Hospital and thereafter to a private hospital. He testified that he suffered a fracture on his right leg and arm and also had a dislocated arm. He reported the incident to Ruiru police station

4. Dr. Cyprus Oketch Okere (Pw2) testified that the 1st respondent sustained bruises on the nose, blunt back injury, dislocation of the right shoulder and comminuted segmental fracture of the right femur.

5. The appellant called Jerald Kihui Karanja**(DW1)** as its witness. **DW1** told court that the vehicle was owned by Kenya Power but was disposed in 1995 to Mrs. Waiganjo at Kshs 75,000/-. He produced the appellant's filed list of documents in support of his

testimony.

6. After conducting an elaborate hearing, the trial magistrate found the appellant 100% liable for the accident, awarded the 1st respondent Kshs 800,000/- as general damages and Kshs 63,860/- as special damages. In arriving at its determination the trial court held as follows;

"The plaintiff in his examination in chief did produce a copy of records indicating that as at 25th November 2007 the motor vehicle KTM 853 was owned by the Defendant. The defendant on the other hand called one witness who testified that as at 25th November 2007 the motor vehicle had been sold to Mrs. Waiganjo. However, no evidence was led to indicate that the third party was the owner of motor vehicle KMT 853 at the time of the accident. The plaintiff did produce a copy of records indicating that the motor vehicle at the time of the accident (sic). I therefore hold that the plaintiff discharged his burden of proof as this was the acceptable way to confirm motor vehicle ownership. I hold that the defendant is vicariously liable and hold 100%liable."

7. Dissatisfied with the holding of the trial court, the appellant has filed this instant appeal on the following grounds:

1. The learned magistrate erred in law and in fact in failing to properly consider and evaluate the evidence before him which showed that;

a) The appellant was not the beneficial owner of motor vehicle registration number KTM 853.

b) That the appellant had sold the said motor vehicle to its employee who later sold it to the third party.

c) The appellant had rebutted the presumption of ownership against it.

d) The appellant was not in possession and/or control of the vehicle at the time of the accident.

2. The learned magistrate failed to consider the evidence of the first respondent which confirmed that the owner of the motor vehicle registration number KTM 853 was the third party.

3. The trial magistrate erred in law in holding that the appellant was vicariously liable for the action of the driver of motor vehicle registration number KTM 853 was the third party.

4. The trial magistrate erred in law and in fact in failing to consider the appellant's documents produced in evidence.

5. The learned magistrate erred in law and in fact in failing to properly consider and evaluate the appellant's submissions dated and filed on 11th September 2015.

6. The learned magistrate erred in fact in failing to find that the appellant had proved its defense on a balance of probabilities.

7. Without prejudice to the foregoing, the award of damages in the any event was manifestly excessive.

SUBMISSIONS

8. The appeal was dispensed by way of written submissions.Counsel for the appellant, argued in his written submissions that the 1st respondent had failed to discharge his burden of proof regarding the ownership of the vehicle. He submitted that the documentary evidence tendered by the appellant had established that it was not the owner of the ill-fated vehicle as it had been sold 15 years prior to the accident. The cases of ***Nancy Ayemba Ngaira vs Abdi [2010] eKLR, Ignatius Makau Mutisya v Rueben Musyoki Muli [2015] eKLR*** and ***Kyoga Hauliers Limited v Malindi Parcels Service & Another [2018] eKLR*** were cited in support of the appellant's case.

9. Counsel argued that if the trial magistrate had carefully evaluated the evidence he would have reached the conclusion that the appellant was not the beneficial owner of the vehicle and that it was the third party who was liable for the accident. He pointed out that the third party had not alluded to the relationship of the appellant and the driver and had not denied ownership of the vehicle. He had also conveniently failed to testify.

10. Counsel also argued that the 1st respondent had failed to establish the existence of a contractual or agency relationship between the appellant and the driver of the motor vehicle at the time of the accident; therefore, the trial court had erred in finding that the appellant was vicariously liable for the actions of the driver. Counsel observed that the identity of the driver was unknown to both the appellant and the 1st respondent. He surmised that the third party would have identified the driver if he had testified.

11. The appellant also challenged the trial court's award of damages. Counsel argued that the sum of Kshs. 800,000/= awarded as general damages was excessive as the only serious injury the 1st respondent had suffered was a fracture of the femur. He submitted that a sum of Kshs. 500,000/= would have been sufficient compensation for the injuries suffered.

12. Counsel for the 1st respondent countered that the appellant had squandered its opportunity to scrutinize and interrogate the third party and adduce viable evidence to prove that although it was the registered owner, it was the third party who was in possession at the material time. Counsel argued that if the appellant had proved that the third party was in possession, liability would still not move from the registered owner, but it became a shared one with that of the beneficial owner. He contended that the appellant's stature was not the kind that would sell a vehicle to a third party without an agreement. That the appellant also had a sophisticated way of disposing off its property and that if there was a mistake on the side of the appellant, it could not be allowed to take advantage of its own mistake.

13. On the award of damages, counsel argued that the award of special damages had not been challenged and that the award of general damages was in fact lower than the awards made in the authorities adduced since the 1st respondent had suffered a compounded fracture which was a very severe.

14. Counsel also questioned the jurisdiction of this court to hear the matter given that there had been established High Courts in Thika, Kiambu and Murang'a. He also declined to respond to the issues of negligence and vicarious liability on the ground that the issues had not been raised in the memorandum of appeal.

ANALYSIS AND DETERMINATION

15. Before I determine the substantive issues herein, I will first deal with the 1st respondent's contention that this court lacked territorial jurisdiction to hear and determine the appeal. The 1st respondent's counsel urged this court to find that it did not have jurisdiction to hear the matter since there had been established a High Court at Thika, Kiambu and Murang'a. **Order 47 Rule 10** of the **Civil ProcedureRules** provides that an appeal from a decree or order of a subordinate court to the High Court may be filed in the District Registry within the area of which such subordinate court is situated. But then what is the jurisdiction of the High Court"

16. The jurisdiction of the High Court is clearly spelt out under Article 165(3) of the Constitution. Through administrative practice, the Chie Justice from time to time by notice in the official Kenya Gazette may amend the schedule listing district registries of the High Court indicating where particular matters may be filed. This may appear to limit the territorial jurisdiction of the High Court. But the converse is true.

17. The jurisdiction of a court is a donation of the law and cannot be conferred by the parties or through an administrative notice. The High Court in particular derives its jurisdiction, first and foremost, from the constitution and then from any other written law. That jurisdiction may only be limited or ousted altogether by the law.

18. Unlike the subordinate courts whose territorial jurisdiction is defined by sections 12, 13, 14 and 15 of the Civil Procedures Act, there are no similar substantive provisions in respect of the High Court(See **Riddles burger and Another vs Robinson and Others, 1958 EA 375** which was cited with approval in **Francis Ndichu Gathongo vs Evans Kitazi Ondansa and Another, Civil Appeal No. 287 of 2002)**

19. The Court of Appeal **in Sally Njambi Mahihu and Another Vs Mwanguza Kai Deche and Another, [2017] eKLR,** had this

to say on the matter;

"…… that the High Court of Kenya remains one and the same court only that it seats at different locations in the country such as Malindi and Nairobi. The location where it seats cannot therefore affect its jurisdiction. The practice and requirement that suits be found in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary; it is intended to reduce costs of transporting witnesses from one corner of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and constitutional value in Article 159 which emphasizes the need to reduce costs and delay in the hearing and determination of suits."

20. The need to have orderly proceedings in the High Court both in the exercise of its original or appellate jurisdiction cannot be overemphasized. There is a discernable requirement to prevent abuse of the court process by forum shoppers who would hop from a district registry to the next for reasons other than seeking fair audience before the courts. Parties must be cushioned against unnecessary costs and inconvenience.

21. An issue on jurisdiction ought to be raised at the earliest stage of the proceedings as it is central to the propriety of the entire proceedings. In our instance suit, had this issue been raised at a preliminary point, the court would have had the opportunity to transfer this appeal to the desired registry.

22. As observed above the jurisdiction of the High Court is not limited. The Appeal has now been heard to conclusion. This court had jurisdiction. There is absolutely no demonstration of any prejudice on the part of the 1st Respondent. The objection based on the jurisdiction is dismissed.

23. Having considered this appeal and the rival submissions by the parties, I found that the main issue raised in the appeal pertains to ownership of motor vehicle registration number KTM 853.In the case of **Kabir Mohamed Farouk v Postal Corporation of Kenya [2018] eKLR** the court cited the case of ***Jotham Mugalo Vs. Telkom (K) Ltd Kisumu HCCC No. 166 Of 2001*** **where** Warsame J held as follows;

"Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defense cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence."

24. At the hearing of the matter before the trial court, the 1st respondent produced a copy of records indicating that the appellant was the owner of the vehicle. Since the appellant was disputing ownership of the vehicle, the burden of proof shifted to the appellant in accordance with **Section 109** of the **Evidence Act** which provides that, *"the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence...."*

25. To discharge that burden, the appellant called **DW1** who testified that the vehicle had been sold off by the appellant by the time the accident occurred. The witness produced a copy of an internal memorandum of the appellant dated 11th January 1995 authorizing the release of the subject vehicle to one Mrs. Waiganjo who had purchased the vehicle for Kshs. 75,000/=. **DW1** also produced a copy of a receipt issued to the said Mrs. Waiganjo for Kshs. 75,000/= as well as a copy of transfer of ownership of the motor vehicle to her.

26. As held in the cases of ***Kabir Mohamed Farouk (supra), Nancy Ayemba Ngaira vs Abdi Ali (supra), Ignatius Makau Mutisya v Rueben Musyoki Muli (supra)*** and ***Kyoga Hauliers Limited v Malindi Parcels Service & Another (supra)*** the copy of records obtained from the registrar of motor vehicle is not conclusive proof that the sole owner of a vehicle is the person whose name is indicated thereon. Often times, the certificate of records may show that one is the registered owner of a vehicle while its actual possession has passed to a third party. The unchallenged evidence of **DW1** showed that this was the case in the instant suit.

27. Although the copy of records produced by the 1st respondent showed that the appellant was the registered owner, it is my finding that the evidence of **DW1** adequately disproved the 1st respondent's assertion that the appellant was the owner of the vehicle at the material time since his testimony that the appellant had sold the vehicle was not challenged.

28. This is so because on cross examination the 1st Respondent admitted that the police abstract in respect of the accident indicated that the owner of the subject motor vehicle was **William Macharia Chege, the 2nd Respondent**. At page 7 of the proceedings, he stated during close examination;

"*….. after 3 days I did another search and I noted that the vehicle belonged to William Macharia Chege"*

29. The 1st Respondent's counsel was, in cross examination of **DW1**, content with a confirmation that **DW1** had no search certificate to indicate that the motor vehicle belonged to Mrs. Waiganjo. Yet **DW1** had produced compelling evidence to demonstrate that the motor vehicle had left the hands of the appellant and ownership assumed by one Mrs. Waiganjo in 1995. The appellant had by this demonstration discharged its burden of proof and the plaintiff had the onus to prove the ownership of the motor vehicle as at the time of the accident, a task that was glossed over casually obviously with disastrous effect to the 1st Respondent's case against the appellant.

30. Had the trial magistrate addressed his mind to this evidence, he would have more probably than not, arrived at a different finding on liability.

31. In as much as the appellant failed to lead evidence to show that the vehicle had subsequently been sold to the third party, the evidence on record proved that the third party was the owner of the vehicle at the material time. This position is informed by the fact that the police abstract produced by the 1st respondent identified the third party as the owner of the vehicle.

32. An important aspect of the evidence that in my view was overlooked by the trial court was the position taken by the 2nd Respondent in the trial. When it was the turn of the 2nd Respondent to testify, counsel for the 2nd Respondent stated;

"I will not call any witness. I wish to close the 3rd party's case."

33. Thus despite the police abstract clearly indicating that the vehicle belonged to the 2nd Respondent, the 2ND Respondent found no need to explain away why the police abstract, a public official document, would have his name as the owner of the subject motor vehicle if that was not the factual position. The 2nd Respondent's filed defence therefore, remained what it is, mere allegations. By letting this opportunity slip through his fingers, the 2nd Respondent unwittingly gave credence to the evidence of the appellant to the effect that as at the time of the accident, the appellant was not the owner of the subject motor vehicle.

34. I find useful guidance in the case of ***Joel Muga Opinja v East Africa Sea Food Ltd Civil Appeal No. 309 of 2010 [2013] eKLR*** where the Court of Appeal held;

"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, <u>but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.</u>" [Emphasis added]

35. In the case of ***Agro-Chemical Food Company Limited v Joel Angana& 2 others Civil Appeal No. 154, 155 & 156 of 2012 [2016] eKLR***which falls on all fours with the present case, Majanja J. held as follows;

*"14. As the plaintiffs established prima facie evidence that the defendant was the registered owner of the motor vehicle and it was then the duty of the defendant to rebut this presumption on the balance of probabilities. **DW1** produced copies of newspaper advertisements showing that the motor vehicle was advertised for sale through tender on 26th April 1996. The copies of the advertisements produced were certified copies produced without objection and there is no reason to believe that they were not what they purported to be as they appeared regular on the face. Although the defendant failed to produce a sale agreement of transfer of the motor vehicle in favor of Tridev, there is additional evidence to show that the vehicle had indeed transferred on the date of the accident. PW 4 confirmed that the insurance sticker showed that the vehicle was owned by Tridev and the police abstract confirmed*

as much. I am aware and take judicial notice of the fact that it is mandatory for every motor vehicle owner to take out third party insurance under the Insurance (Motor Vehicle) Third Party Risks Act (Chapter 405 of the Laws of Kenya). Why would Tridev take out insurance if it was not the owner of the motor vehicle" This evidence just goes to show that it is more probable than not that defendant had sold the vehicle to Tridev and it was therefore not the owner on the date of the accident. Had the learned magistrate considered this evidence, he would probably have come to a different conclusion. I therefore find and hold that the defendant had discharged its burden of proving that it was not the owner of the motor vehicle hence the it could not be held liable for what befell the plaintiffs."

36. The third party, who is the 2nd respondent in this appeal, was similarlyidentified as the owner of the vehicle and was also shown to have taken out an insurance cover for the vehicle. The records show that the third party entered appearance and filed a defense as well as a witness statement before the trial court. The court gave directions that all issues arising from the Third Party Notice be dealt with at the hearing of the plaintiff's claim. The Third Party was ably represented during the course of the trial but chose not to testify or call evidence to rebut the claim that he was the owner of the vehicle.I therefore accept the appellant's invitation to draw an adverse inference from his failure to do so.

37. It is also noteworthy that the 1st respondent admitted during cross examination that he had done another search which showed that the vehicle belonged to the third party. It is obvious that based on the evidence on record, the trial magistrate fell into error when making a determination on liability between the three parties.Had the trial magistrate properly considered all facts he would have reached the conclusion, as I have, that the evidence proved that the third party was the owner of the vehicle at the time of the accident.Consequently, he was vicariously liable for the actions of the driver of the vehicle who caused the accident.

38. As for the award of damages, I am guided by the principle that an appellate court will only interfere with the findings of a trial court on an award of damages if it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see ***Butt v Khan [1981] KLR 349***).

39. There was no dispute that the plaintiff had suffered a dislocation of the right shoulder, a comminuted segmental fracture of the right femur and bruises to the nose and a blunt injury on his lower back. In coming to the conclusion that an award of Kshs. 800,000/= would be adequate compensation for the 1st respondent, the trial magistrate properly assessed the authorities adduced by the parties. He also took into account the severity of the 1st respondent's injuries and the degree of permanent incapacity which had been assessed at 20%. I find no reason to interfere with the trial court's award of general damages and uphold the award of Kshs. 800,000/= made for general damages.

40. For special damages, I will reduce the award to Kshs. 46,710/= which was the sum pleaded and proved.

41. In the end, I find that this appeal is merited and allow it as follows;

a. The trial court's finding on liability is set aside and substituted with liability at 100% against the 2nd respondent;

b. The trial court's award of general damages is upheld;

c. The trial court's award of special damages is set aside and substituted with an award of Kshs. 46,710/=

d. The appellant shall have the costs of the appeal and at the trial court to be borne by the respondents.

Dated, Signed and delivered at Kisii this 4th day of May, 2020.

A. K. NDUNG'U

JUDGE