



Editorial Summary

1. *Civil Appeal*

2. *Subject of Sun ordinate case:*

TORT

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2.1 *Running Down cause*

2.2 *Motor vehicle registration KAC 775U (amended)*

Matatu Nissan Public service vehicle

Self accident

2.3 *Appellant passenger*

2.4 *Sustains injury*

i) *Fracture lower 1/3 of fibia & fibula*

ii) *Deep right arm wound*

iii) *Chest tenderness*

2.5 *Trial magistrate on completion of suit leaves*

services of the judiciary.

2.6 *Judgment written by a second magistrate.*

2.7 *Held in judgment*

Liability:

i) *No proof of ownership of vehicle tender.*

ii) *Records of certificate of motor vehicle*

registration.

iii) *Suit dismissed*

Quantum possible:

General damages

Pain and suffering

Ksh. 220,000/-

Special damages

Ksh. 8,550/-

3. *Appeal*

That Hon. Trial magistrate erred in law and fact:

3.1 *... failing to find defendant liable on
basis of ownership.*

3.2 *... misdirected in finding plaintiff had not
proved the defendant was registered owner.*

3.3 *... failed to consider pleadings to frame and
decide issue of ownership.*

3.4 *... failed to find averment that defendant was
one in charge or control of subject motor vehicle.*

3.5 *... failed to consider the evidence which showed
defendant liable as owner and driver of subject
motor vehicle.*

3.6 *... evidence showed defendant owner and or*

owner in control of subject motor vehicle.

3.7 ... failed to consider further medical expenses and special damages pleaded not proved.

3.8 ... assessment of damages too low.

3.9 Prayed that the defendant be found liable on grounds ownership may be proved other than the production of registration of motor vehicles.

3.10 To enhance award from 220,000/- to Ksh. 800,000/-.
general damages, pain and suffering.
To enhance special damages from Ksh. 8,500/- to Ksh. 70,000/-

4. In reply:

4.1 Defendant had denied ownership of motor vehicle registration KAC 755U.

4.2 Police abstract alone not sufficient to prove ownership.

4.3 Failure to produce certified copy of registration of a motor vehicle fatal.

4.4 No certificate of search by registrar of motor vehicles produced.

4.5 Respondent was never sued as a driver.

Quantum

4.6 *Special damages*

Only 2550/- pleaded.

*Figures of Ksh. 6,000/- and Ksh. 9,070/-
submitted for award to be dismissed as
liability not proved.*

Further Medical Expenses

4.7 *This was not pleaded nor proved.*

General Damages

4.8 *Award of Ksh. 220,000/-.*

*This cannot be disturbed unless Hon. Magistrate
took irrelevant factors.*

5. *Held:*

5.1 *Appeal dismissed.*

5.2 *Decision of trial magistrate upheld.*

5.3 *Failure to prove ownership of motor
vehicle and driver fatal.*

6. *Case Law:*

7. *Advocates :*

i) *Bunyore G holding brief for Okwiri J M instructed by
M/s Muri Mwaniki & Co Advocates for appellant/ original
plaintiff*

ii) *S J B Gathirwa instructed by Gathirwa & Co Advocates
& Co Advocates for the respondent*

**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Appeal 782 of 2004**

**PETER MUNIU MAINA APPELLANT/ORIGINAL
PLAINTIFF**

VERSUS

NJIHIA MUIRURI RESPONDENT/ ORIGINAL DEFENDANT

(Being an appeal arising from the Judgment and decree of Hon. L. Gicheha – Senior Resident Magistrate delivered on 13th August 2004 in Case No. 279 of 2002 dated at Thika Law Courts)

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J U D G M E N T

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I. BACKGROUND

1. This is an unfortunate case. It arises from a Running Down cause, involving a self road traffic accident.
2. Peter Muniu Maina a male adult then aged 25 years old was a passenger in motor vehicle KAE

775U – later amended in the plaint to read motor vehicle KAC 775U, was on the 20th March 1999 travelling along the Thika Ndakani road. The vehicle, a Nissan matatu (public service vehicle) lost control at Kiama River and hit a wall on a self accident. The appellant sustained injuries of:

- i) Fracture of the lower 1/3 of the fibia & fibula
- ii) Deep right arm wound.
- iii) Chest tenderness

3. He sued one Njihia Muiruri as the owner and or the one in charge and control of the motor vehicle registration KAC 775U.

4. A defence was filed and the said respondent/original defendant denied being the owner of the vehicle in question.

5. The trial was heard at the magistrate's court in Thika. The Hon. Magistrate then, upon hearing all the evidence, left the service of the judiciary without writing a judgment. A second Hon. Magistrate wrote a judgment upon the evidence recorded. The finding of the said magistrate was that there was no evidence of proof of ownership. The said suit was dismissed.

6. A possible award in quantum was given as Ksh. 220,000/- for general damages for pain and suffering and for special damages Ksh. 8,500/-

7. Being dissatisfied with this finding, the original plaintiff appealed to this High Court.

II APPEAL

8. The appellant original plaintiff stated that the Hon. Magistrate erred in law and fact:

8.1 ... *failing to find defendant liable on basis of ownership.*

8.2 ... *misdirected in finding plaintiff had not proved the defendant was registered owner.*

8.3 ... *failed to consider pleadings to frame and decide issue of ownership.*

8.4 ... *failed to find averment that defendant was one in charge or control of subject motor vehicle.*

8.5 ... *failed to consider the evidence which showed defendant liable as owner and driver of subject motor vehicle.*

8.6 ... *evidence showed defendant owner and or owner in control of subject motor vehicle.*

8.7 ... *failed to consider further medical expenses and special damages pleaded not proved.*

8.8 ... *assessment of damages too low.*

8.9 *Prayed that the defendant be found liable on grounds ownership may be proved other than the production of registration of motor vehicles.*

8.10 *To enhance award from 220,000/- to Ksh. 800,000/-.General damages, pain and suffering.*

To enhance special damages from Ksh. 8,500/- to Ksh. 70,000/-

Submissions - Ownership

9. The appellant prayed that the original defendant/respondent be found liable at 100% for the said

accident. This was because proof of ownership was described in the plaint as “owner and or the one in charge and control.” That a different person other than the registered owner may be the defacto owner of a motor vehicle. This there may be actual ownership

beneficial ownership

possessing ownership.

Whatever the category, the said ownership should be held liable at 100%

10. In reply on this point, the respondent stated that without proof of ownership of the motor vehicle, then the suit is fatal.

11. All along the defendant denied being the owner of the said motor vehicle. The appellant was to prove ownership by producing a search certificate for the registration of motor vehicles.

12. Whereas this had not been done the Hon. Magistrate was correct to dismiss the suit. Liability could not be proved.

QUANTUM

13. The appellant prayed that the award (possible) of Ksh. 220,000/- be enhanced to Ksh. 800,000/-. The award by the Hon. Magistrate was extremely low.

14. The respondent prayed that upon appeal, the court is not to interfere with an award unless it was inordinately based on wrong principles of law.

15. On special damages, what was pleaded, the court noted was Ksh. 2,550/- ... nonetheless, the appellant wanted an award of Ksh. 9,000/- to be given. That a further award for future medical expenses of Ksh. 70,000/- to be given.

16. The said respondent stated that the said special damages claim must be pleaded specifically and proved. The claim had not so been done.

17. It was the prayer of the respondent that the said claim be dismissed.

III OPINION

18. The issue of ownership herein is what is the main contention in this case. Whereas the police abstract is proof of a report being made, the owner of the motor vehicle was not disclosed but was pending under investigations. When the said owner was actually traced and registration number of the motor vehicle ascertained as registration

No. KAC 775U, it was the mandate of the plaintiff to produce the certificate of motor vehicle registration for the Registrar of motor vehicles. Upon this being done, the respondent named therein would then prove otherwise.

19. In this case, this was never so done. I would therefore hold that the Hon. Trial Magistrate came to the correct conclusion to dismiss this case.

20. The law required the Hon. Magistrate give a possible award. This was done and therefore transpired that the award, according to the appellant was low. I would not agree with this. I believe the magistrate did give a fair award and slightly on the higher side.

21. As this is the appellate court, the award ought not to be interfered with unless arrived at the wrong principles of law.

22. I would accordingly dismiss this appeal. There will be costs to the respondent original defendant.

DATED THIS 23RD DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

- i) *Bunyore G holding brief for Okwiri J M instructed by
M/s Muri Mwaniki & Co Advocates for appellant/ original plaintiff*

- ii) *S J B Gathirwa instructed by Gathirwa & Co Advocates
& Co Advocates for the respondent*