



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 76 OF 2008

KENNETH WAWERU MACHARIA APPELLANT

VERSUS

ANTONY IRUNGU MUNGAIRESPONDENT

*(Appeal arising from the judgment and order of Hon. J. Gathuku
Resident Magistrate in Murang'a SPMCC 241 "B" of 2005
on 29th August 2008)*

JUDGMENT

This is a judgment arising out of the appeal against the judgment of Honourable Gathuku, learned Resident Magistrate vide Murang'a S.P.M.C.C. no. 241" B" of 2005 delivered on 29th August 2008. This Court directed the appeal to be disposed of by written submissions. The appellant was the only party who filed his submissions.

The history behind the appeal is short and straightforward. Kenneth Waweru Macharia, the Appellant herein, sued Antony Irungu Mungai and Charles Macharia Gichia, being the 1st and the 2nd Respondents herein, before the Murang'a Senior Principal Magistrate's court claiming special and general damages for the injuries he sustained in a road traffic accident on 2nd January 2005 along Maragua-Kiria-Githioro road involving motor vehicle K LW 979. In the plaint dated 23rd May 2005, the Appellant named the 2nd Respondent as the registered owner of the motor vehicle registration No. K LW 979 while the 1st Respondent was the driver of the aforesaid motor vehicle. The Appellant alleged that the 1st Respondent drove the aforesaid motor vehicle carelessly until it veered off the road and overturned thus injuring the Appellant who was lawfully on board the said vehicle. The Respondents filed a defence to deny the plaintiff's allegations. They offered no evidence when the suit came up for hearing. In the end the trial Resident Magistrate entered judgment in favour of the Appellant as against the 1st Respondent. The 1st Respondent was found to be wholly to blame for the accident. The Appellant was awarded:

- (a) Kshs. 200,000 – general damages**
- (b) Kshs. 3,100 – special damages**
- (c) Costs of the suit plus interest.**

The learned Resident Magistrate found the 2nd Respondent not liable for the accident on the basis that the Appellant had failed to produce records or a certificate of search from the registrar of motor vehicle to prove that the 2nd Respondent was the owner of motor vehicle registration no. KEW. 979. The Appellant

felt aggrieved by the decision hence he preferred this appeal.

On appeal, the Appellant put forward the following grounds in his memorandum of appeal.

- 1. The learned Resident Magistrate erred in law in finding that the appellant did not establish that motor vehicle registration KLV 979 Toyota Station Wagon was owned by the respondent herein despite the overwhelming evidence adduced without contradiction.**
- 2. The learned Resident Magistrate erred in fact in dwelling on the discrepancy in the names of the respondent in the plaint and in the police abstract and completely disregarding the statement of defence at paragraph 1 which stated that the descriptive parts of the plaint are admitted. On this ground the court wrongly distinguished the authority of Samuel Mukunya Kamunge versus John Mwangi Kamuru – Nyeri HCCA 34 of 2002 reported in (2005) e KLR.**
- 3. The learned Resident Magistrate erred in law in further distinguishing the authority of Samuel Mukunya Kamunge (supra) on the ground that there was no reply to the defence and hence no joinder of issues, which was contrary to the express provisions of Order 6 rule 10 of Civil Procedure Rules.**
- 4. The learned Resident Magistrate erred in law in finding that it was necessary for the appellant to provide a copy of records of ownership of the suit motor vehicle from the Registrar of motor vehicles to clarify the names despite the averments in paragraphs 1,3 and 5 of the Respondent's statement of the defence and despite the issue of names not featuring in the cross-examination of the appellant by the respondent's counsel.**
- 5. The learned Resident Magistrate erred in law in imposing a burden of explaining the difference in the names while the same was not an issue.**
- 6. The learned Resident Magistrate erred in fact and in law in joining the fray on behalf of the respondent who was, in an adversarial system, required to personally raise all the issues in his favour instead of waiting for the court to do so.**
- 7. The learned Resident Magistrate's judgment was contrary to the weight of the evidence more so considering that the respondent opted to neither testify nor offer written submissions.**

Though the Appellant has raised seven grounds in his Memorandum, those grounds may be summarized to four. The first, second, third and fourth grounds is in respect of the ownership of motor vehicle registration no. KLV 979. It is the submission of the Appellant the trial resident magistrate erred when he concluded that the 2nd Respondent was not the owner of the aforesaid motor vehicle yet there was overwhelming evidence to prove otherwise. With respect I do not agree with appellant that there was sufficient evidence to show that the end Respondent was the owner of the vehicle. The appellant described the 2nd Respondent as Charles Macharia Gichia. The 2nd Respondent answered the allegation by filing a defence but he did not protest that his name was misdescribed in the plaint. In fact the 2nd Respondent described himself as Charles Muchira Gichia. The 2nd Respondent averred in his defence that he reported to the relevant authorities that the 1st Respondent had taken the subject motor vehicle without the owners authority. In fact the 2nd Respondent in fact hinted to the Appellant that he was not the registered proprietor of the motor vehicle. It was incumbent upon the Appellant therefore to tender evidence to prove that the 2nd Respondent was the owner. The trial Resident Magistrate cannot be faulted on this aspect.

In grounds 5 and 6 the Appellant complained that the trial Resident Magistrate had imposed a heavy burden on the Appellant to explain the differences in the names of the 2nd Respondent yet the same was not in issue. The Appellant claimed that the Resident Magistrate joined the fray. I have re-evaluated the evidence and I am unable to fault the trial magistrate. The record shows that the Appellant produced a police abstract form had a name which was different from that given in the plaint and that given by two other witnesses.

The Appellants averred in his seven ground of appeal that there was sufficient evidence to establish the case against the 2nd Respondent. With respect, I do not agree with the aforesaid submission. The Appellant did not discharge that burden of proof against the 2nd Respondent.

In the end I see no merit in the Appeal. It is dismissed with no order as to costs.

Dated and delivered this 29th day of July 2011.

J.K. SERGON
JUDGE

In open court in the presence of Miss Keli H/B for Mbutia for Appellant N/A for Respondent.

J.K. SERGON
JUDGE