REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 80 of 2008

JOEL KIMITHU MWANGI……...……..……APPELLANT
VERSUS
SHADRACK KUIRA…….……..…….……RESPONDENT
(Being an appeal from the judgment and order of S. Ndambuki, Ag. Principal Magistrate in Murang'a Civil Case No. 103 of 2006 dated 28th September 2007)

JUDGMENT

In a suit commenced before the Principal Magistrate's Court in Murang'a on 10th April, 2006, **JOEL KIMITHU MWANGI**, the appellant herein, was the Plaintiff whereas **SHADRACK KUIRA**, the respondent was the defendant. In that suit the Appellant had sued the Respondent claiming special damages of Kshs.1,990/=, General damages for pain, suffering and loss of amenities, costs of the suit and interest.

The suit was informed by the fact that on or about 3rd July, 2003, the Appellant was a lawful passenger traveling in motor vehicle registration number KAP 456H allegedly owned by the Respondent along Kiriaini-Murang'a road. When the vehicle reached Kaweru and as the Appellant was in the process of disembarking, the Respondent by himself, his servant and or agent suddenly drove off without having ascertained that the Appellant was safely out of the vehicle. Accordingly the Appellant was injured on the frontal aspect of the chest, suffered multiple cut wounds on the left hand around the palm/wrist area, deep cut wound behind the right thigh extending to the right gluteus and multiple cut wounds right heel and ankle region. He blamed his injuries on the appellant because he drove off the motor vehicle when he was in the process of disembarking, failed to keep a sufficient or any look out for the passengers in the motor vehicle, controlled and or managed the motor vehicle in a carefree and inattentive manner and that the doctrine of *Res ipsa Loquitor* applied.

When served with the summons to enter appearance, the Respondent duly filed an appearance and subsequent thereto a defence through **MESSRS KINYANJUI NJUGUNA & CO. ADVOCATES**. In his defence, the Respondent denied ownership of the motor vehicle either by registration, actual, or beneficially. He also denied that the Appellant was a lawful passenger in the subject motor vehicle. He denied negligence attributed to him and the particulars thereof. Alternatively he averred that if the said accident occurred, then it was inevitable and occurred despite the exercise of reasonable skills and care on the part of the driver. His final parting shot was that if the alleged accident occurred, then the same was caused by or substantially contributed to by the negligence of the Appellant. He proceeded to give the particulars of negligence he attributed to the Appellant.

The case then proceeded for hearing before S. Ndambuki Ag. Principal Magistrate. Only the Appellant testified. His evidence was along the same lines as pleaded in the plaint. Suffice to add that as the Appellant was alighting and had stepped down with one foot, the vehicle started moving and he fell down. The vehicle dragged him along for some distance. It was not until members of the public screamed that it stopped. In the process he was injured and was taken to Murang'a District Hospital where he was admitted for treatment for five (5) days. Thereafter she made a report to Murang'a Police Station and he was issued with a Police abstract which he tendered in evidence. Later he attended on Dr. Kanyi Gitau who examined him and prepared a medical report in respect of the injuries he had sustained as aforesaid which report too was tendered in evidence. For the treatment, Police abstract as well as the

medical report, the Appellant incurred expenses to the tune of Kshs.1,990/= which he claimed as special damages. Before commencing the action, he had issued to the respondent and his insurers a Notice of his intention to sue. The same notice was tendered in evidence as well.

Following the closure of the Appellant's case the Respondent through his counsel on record informed the Court that he was not going to call any evidence. He therefore closed his case. Having carefully evaluated, analysed and considered the evidence, the pleadings and submissions of respective counsel, the learned magistrate reached the following verdict:

"Ownership of the suit vehicle is denied in the defence and in submissions. Counsel for the plaintiff has not produced certificate of search signed by the Registrar of Motor Vehicle to prove that the defendant was the owner of the vehicle. Neither did he explain what difficulty might have been experienced in obtaining the same In view of this, the plaintiff claim must fail. There are other issues for determination but practically they would be of no practical purpose in the matter as the issue of ownership and liability have not been proved against the defendant."

Aggrieved by the said judgment and decree, the Appellant lodged the instant appeal through **MESSRS J. N. MBUTHIA & CO. ADVOCATES** setting out four (4) grounds in his Memorandum of Appeal to wit:

1. "The Learned Ag principal Magistrate erred in law and fact in her finding that the ownership of the motor vehicle KAP 456H was not proved to vest in the respondent (sic) on a balance of probabilities.

2. The Learned Magistrate erred in law and fact in finding that liability for the accident had not been proved against the respondent.

3. The Learned Magistrate misdirected herself in fact in failing to asses the damages payable to the appellant in case she was subsequently found to be wrong.

4. The Learned Magistrate should have found that the respondent's deliberate failure to adduce evidence in his own case rendered the statement of defence unproved and the plaintiff's evidence unchallenged."

When the appeal came before me for hearing, the Appellant was present through his counsel. The same cannot be said of the Respondent. Though served with the hearing notice going by the affidavit of service on record, neither Respondent nor his counsel appeared for the hearing of the appeal. Satisfied that no reason had been advanced for their absence, I directed that the appeal proceeds to hearing the absence of the respondent notwithstanding. Counsel for the Appellant proposed and I agreed that he argues the appeal by way of written submissions. Subsequently he filed the submissions which I have carefully read and considered.

The issue for determination in this appeal is whether the learned magistrate was right in reaching the conclusion that ownership of the motor vehicle by the Respondent and therefore liability had not been proved. This is inspite of the Respondent not testifying. It is clear to me that the Appellant was able to prove on balance of probability that the Respondent, his driver, servant and or agent drove off the motor vehicle just when the Appellant was in the process of disembarking therefrom. This evidence was not controverted and or countered by any other evidence at all by the Respondent. Accordingly it remains unchallenged. The defence advanced by the Respondent was one of approbation and reprobation. The Respondent was breathing hot and cold at the same time. Such pleadings should be discouraged. On one hand he says that he was not the owner of the motor vehicle and that the Appellant was not a lawful passenger in the vehicle and finally he denied the occurrence of the accident. Yet in the same breath though in the alternative he states that if there was such an accident, it was inevitable and that if the Appellant was a passenger in the vehicle, then he caused or substantially contributed to the accident. The Respondent having not testified, the aforesaid allegations remained unproven. In my view the evidence before the trial magistrate on liability was sufficient to persuade her to make a finding that the owner of the subject motor vehicle was negligent. The Respondent did not testify to rebut the appellant's testimony on causation.

In concluding that the appellant had not proved ownership of the subject motor vehicle, the learned magistrate relied on the case of **THURANIRA KARAURI V AGNES NDECHE CIVIL APPEAL NO. 192 OF 1996** (UR) in which the Court of Appeal held that the production of a Police Abstract in the

absence of an official search from the Registrar of Motor Vehicles is not sufficient proof of ownership of a motor vehicle. It should be recalled that in a bid to prove ownership of the motor vehicle, the Appellant tendered in evidence without any objection by the Respondent a Police abstract dated 7th December, 2005 which showed the Respondent as the registered owner of the motor vehicle. Apart from merely stating in the defence that he was not the registered owner, actually or beneficially, the Respondent did not tender any evidence to support that contention. However, since then Court of Appeal seems to have departed from that strict position for in the recent Court of Appeal decision in **SECURICOR KENYA LTD V KYUMBA HOLDINGS LTD, (2005) EKLR** the same court has now held ***"…..it was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under Section 8 of the Traffic Act when he states that the true owner of the motor vehicle is the appellant. That Section reads as:***

"The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." ***We think that the appellant had, by evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time of the accident occurred since it had sold it. Our holding finds support in the decision in OSABPIL V KADDY (2000) 1 EALA 187 in which it was held by the Court of appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose names the vehicle was registered was presumed to be the owner thereof unless proved otherwise…..".***

From the foregoing it is apparent that it is not absolutely necessary to avail a certificate of search from the Registrar of Motor Vehicles to prove ownership of the motor vehicle as held by the trial court. Apart from a search certificate other evidence may be tendered that may prove such ownership. Unchallenged evidence of a Police abstract is one such piece of evidence. In reaching this conclusion, I find comfort in the case of **Samuel Mukunya Kamunge V JOHN MWANGI** …… (2005)ekLR in which the learned judge held thus:-

"……It is true that a certificate of search from the Registrar of Motor vehicles would have shown who was the registered owner of the motor vehicle according to the records held by the Registrar of motor vehicles. That, however, is not conclusive proof of actual ownership of the motor vehicle as Section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often motor vehicles change hands but the records are not amended. I find that the trial magistrate was wrong in finding that only a certificate of search from the Registrar of motor vehicles could prove ownership of the motor vehicle. I find a Police Abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the respondent having offered no evidence to contradict the information on the Police abstract report, the Appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent……"

I am afraid the same situation obtains here. I appreciate that the aforesaid decision is a high court decision which is not binding on me. However, I agree that it succinctly sets out the current position in law over the issue. I adopt the conclusions thereof in this appeal as it is on all fours with the circumstances obtaining in this appeal.

There is no denying that the Respondent together with his insurers were served with a demand letter. They failed to respond. There is also no denying that there was no evidence tendered that contradicted the contents of the Police Abstract report and finally the Respondent did not testify to rebut the appellant's evidence. On the whole therefore the trial magistrate erred in holding that the Appellant had not proved that the Respondent was the owner of the subject motor vehicle.

When a trial court dismisses a suit for damages based on a running down claim, it is obligatory that it assesses damages that it would have otherwise awarded had it found favour with the Plaintiff's claim. In the circumstances of this case, the trial court decided not to assess the damages contrary to the usual practice aforesaid. That was an error on that part of the trial court as well. The practice is to assist the appellate court to determine the damages payable in the event that the appellate court finds for the Appellant as I have done in this appeal. That error notwithstanding, I believe I have jurisdiction to assess the damages. From the pleadings and the medical report tendered in evidence, the Appellant would appear to have suffered serious soft tissue injuries. According to Dr. Kanyi Gitau, the injuries took long to heal and was partially incapacitated while on treatment. Indeed he was admitted in Murang'a District Hospital

for five (5) days as a result of the injuries.

In his written submissions in the trial court, the Appellant had asked for Kshs.220,000/= as general damages for pain, suffering and loss of amenities. On the other hand, the Respondent had proposed Kshs.40,000/=. They all cited authorities in support of their respective positions. I have carefully read and considered them. It is, however, not lost on me that those authorities were decided in the early 1990's. Since then inflation has taken its toll on the Kenyan shilling. Doing the best I can in the circumstances and weighing one thing and against the other, I am of the view that a sum of Kshs.200,000/= as general damages will adequately compensate the Appellant for the injuries sustained.

In the result I allow the appeal and set aside the judgment and decree of trial court. In substitution I enter judgment against the Respondent both on liability and quantum. I assess general damages payable to the Appellant by the Respondent at Kshs.200,000/= and special damages of Kshs.1,990/=. The special damages shall attract interest at court rates, from the date of filing suit in the lower court whereas general damages shall attract same interest from 28th September, 2007, when the trial court dismissed the Appellant's suit. The Appellant shall have the costs of this appeal and of the court below.

Dated and delivered at Nyeri this 25th day of January 2010.

M. S. A. MAKHANDIA
JUDGE