**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 511 of 2003**

**(Being an appeal from the decree of the Senior Resident Magistrate (G. K. Mwaura, Esq) dated 18th July, 2003 in Muranga PMCC No. 13 of 2002)**

**PAUL MACHARIA WAGUNYA .....APPELLANT**

**V E R S U S**

**JAMES MURAGURI KIMANI .....RESPONDENT**

**J U D G M E N T**

This is an appeal from the decree of the lower court passed on 18th July, 2003. By that decree the Appellant's (plaintiff's) suit was dismissed with costs. He had claimed general and special damages on account of injuries he had received in a motor accident. His suit was dismissed upon the ground that he did not prove to the required standard that the Respondent (defendant) was the owner of the accident motor vehicle.

In paragraph 3 of the plaint the Appellant had pleaded that the accident motor vehicle in which he was travelling was being driven negligently by the "**plaintiff"** or his servant or agent. This was certainly a typographical error as surely it was meant to be the defendant. But the error was never corrected by an appropriate amendment. However, in his testimony the Appellant stated clearly that the accident motor vehicle was being driven by the defendant. He repeated this in cross-examination. The defendant never testified and did not call any witness.

There are only two grounds of appeal in the memorandum:-

1. That the learned trial magistrate erred in finding that the plaintiff had not on a balance of probabilities proved that the defendant was the owner of the accident motor vehicle.

2. That the learned trial magistrate erred in law in failing to find that even if the defendant was not the owner of the accident motor vehicle he was liable in negligence as the driver of the motor vehicle.

I have considered the submissions of the learned counsel for the Appellant, including the cases cited. There was no appearance for the Respondent whose advocate had been duly served with hearing notice. In the case of **THURANIRA KARAURI –vs- AGNES NCHECHE**, **Court of Appeal at Nyeri, Civil Appeal NO. 192 of 1996** (unreported) it was said:-

"**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."**

In that case, just as in the present one, only the plaintiff gave evidence. No evidence was led for the defence. The defendant in both cases filed defence denying, *inter alia*, ownership of the motor vehicle. In both cases the plaintiff produced a police abstract of the accident which stated that the motor vehicle was owned by the defendant. Also, in both cases, the plaintiff's oral testimony that the motor vehicle was owned by the defendant was uncontroverted as the defendant did not testify or call evidence.

But, as already seen, the Court of Appeal categorically stated that notwithstanding production of a police abstract and the plaintiff's uncontroverted oral testimony on ownership, so long as ownership was denied in the defence, it was incumbent upon the plaintiff to produce before the court a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the vehicle.

The Appellant's learned counsel cited a decision by a sister judge of this court (Okwengu, J) in the case of **SAMUEL MUKUNYA KAMUNGE –vs- JOHN MWANGI KAMURU, High Court at Nyeri, Civil Appeal No. 34 of 2002** (unreported). She held that:-

"**....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."**

It appears that the Court of Appeal case of **THURANIRA KARAURI –vs- AGNES NCHECHE** (supra) was not brought to the attention of Okwengu, J. In any case, that case is distinguishable in that letters of demand had been sent to the defendant accusing him of being the owner of the motor vehicle in question, and that he had not answered denying that he was. In the present case there was no evidence that such demand had been sent or that it had gone unanswered.

I therefore hold that the learned trial magistrate was correct in holding, upon the authority of the Court of Appeal case cited, that the Appellant had not proved to the required standard that the Respondent was the owner of the accident motor vehicle. I would therefore dismiss ground one of the appeal.

Regarding ground two, there was the Appellant's uncontroverted testimony that the Respondent was the driver of the accident vehicle. The Appellant was a passenger in the motor vehicle at the time of the accident, and therefore able to see who its driver was. Notwithstanding the clear typographical error in paragraph 3 of the plaint dated 18th January, 2001, it is clear that what the Appellant pleaded was that the Respondent (defendant) or his servant or agent was driving the vehicle at the time of the accident. His uncontroverted testimony that the driver of the vehicle at the time of the accident was the Respondent rectified that typographical error in the pleading, even though it would have been best if there had been an appropriate amendment.

The Respondent did not bother to testify or lead some other evidence to controvert the Appellant's testimony that he was the driver of the accident motor vehicle. The Appellant thus proved on a balance of probability that the Respondent was the driver. He was liable to the Appellant in negligence as such driver. The learned trial magistrate clearly erred in fact and law in not so holding. I would therefore allow the appeal upon the second ground in the memorandum of appeal.

The trial court assessed the general damages due to the Appellant as KShs. 220,000/00. I see no reason to disturb that. Special damages of KShs. 4,540/00 were pleaded. Only KShs. 2,440/00 was proved.

In the result I will allow the appeal. The judgment of the lower court is hereby set aside and substituted therefor judgment for the plaintiff in the sum of KShs. 220,000/00 being general damages and KShs. 2,440/00 being special damages. No interest was claimed in the plaint and none will be awarded. The Appellant shall have costs both in the court below and of this appeal. There will be orders accordingly.

**DATED, PRONOUNCED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2008.**

**H. P. G. WAWERU**

**J U D G E**