



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 636 OF 2008**

**NAAMAN OCHIENG HONO..... APPELLANT**

**VERSUS**

**ALFRED KENNEDY OBAGA..... RESPONDENT**

**JUDGMENT**

The appellant herein Naaman Ochieng Rono, sued Alfred Kennedy Obaga in Milimani Senior Resident Magistrate's Court Civil suit No.7717 of 2004 claiming both special and general damages following a road traffic accident which occurred on the 3<sup>rd</sup> day of February 2003 along Kibera drive within Nairobi area.

In the plaint filed in court on the 20<sup>th</sup> July 2004, the appellant who was a fare paying passenger in the respondent's motor vehicle registration number KAP 615U, blamed the respondent and/or his driver for negligence, which led to the accident, following which he sustained injuries. He set out the particulars of negligence in paragraph 6 of the plaint.

The respondent filed a defence on 25<sup>th</sup> February 2005 by which time, the appellant had already obtained an interlocutory judgment. The respondent filed an application dated 25th January, 2005 seeking to set aside the interlocutory judgment, which application was allowed by consent of the parties recorded in court on 31<sup>st</sup> March 2005.

In the said defence, the respondent averred that the appellant was not a lawful passenger in the aforesaid motor vehicle and denied the occurrence of the accident. He further denied the particulars of negligence attributed to him in paragraph 6(a) – (e) of the plaint among other denials. It is, however, noted that he did not deny being the registered owner of the motor vehicle KAP 615U that was involved in the accident.

The matter proceeded ex-parte before the lower Court as the respondent's counsel failed to attend court despite having been served with a hearing notice. The learned Magistrate dismissed the case mainly on the ground that the appellant did not tender requisite evidence to prove the ownership of motor vehicle KAP 615U and more particularly that it was owned by the respondent. For that reason, she found that there is nothing to connect the respondent to the suit, yet the burden of proof lay on the appellant.

The appeal proceeded ex-parte by way of written submissions. The respondent did not file his submissions despite having been given several chances by the court to do so.

This court has considered the grounds of appeal and the submissions filed by the appellant. The Court has also perused through the proceedings of the lower court and the entire record. When the matter came up for hearing before the learned Magistrate, only two witnesses testified; the appellant and one Cyprianus Okoth Okere, a doctor who prepared his medical report. The appellant on his part, gave evidence on liability and produced several documents which included a police Abstract. He, however, did not produce a copy of records to connect the respondent to the ownership of the vehicle and it is for this reason that the learned Magistrate dismissed the suit, following which he brought an application to review the judgment which was also dismissed culminating to this appeal.

In the application for review dated 12<sup>th</sup> September, 2008, the appellant annexed a copy of records which indicates that at the material time when the accident occurred, the vehicle was registered in the name of Obaga Kennedy Alfred, the respondent herein. In the said application, it has been deponed that the evidence concerning the ownership of the motor vehicle was inadvertently omitted as the respondent had not challenged the appellant's allegation in this respect. This court is persuaded by the appellant's assertion as stated herein before.

The respondent in his defence, has not denied being the registered owner of the motor vehicle and that being the case, the proof of ownership of the vehicle was not an issue for trial and the only problem is that the respondent failed to attend court during the hearing.

In that case, this court does not find it difficult to hold that, there was a sufficient reason for review and the learned Magistrate erred in not granting the application for review dated 12<sup>th</sup> September, 2008.

In the upshot, the appeal herein is allowed and the following orders are made;

- (1) The ruling and order made by the Resident Magistrate on the 12<sup>th</sup> November 2008 is hereby set aside.
- (2) The judgment delivered on 16<sup>th</sup> November 2007 dismissing the suit is also set aside and in its place, judgment is hereby entered for the appellant for Ksh.80,000/= general damages as assessed by the learned Magistrate. No special damages are awarded as no specific amount was prayed for.
- (3) Each party to bear its own costs of the appeal.

Dated and delivered at Nairobi this 2<sup>nd</sup> Day of February, 2017.

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**LUCY NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Appellant

..... for the Respondent