



**Gakui v Wambui & another (Civil Appeal E309 of 2023)  
[2024] KEHC 9055 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9055 (KLR)

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

**CIVIL**

**CIVIL APPEAL E309 OF 2023**

**HI ONG'UDI, J**

**JULY 26, 2024**

**BETWEEN**

**NDURUMO WA GAKUI ..... APPELLANT**

**AND**

**JOSEPHINE WAMBUI ..... 1<sup>ST</sup> RESPONDENT**

**KAGUNYI JOHN ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. J. A. Aduke Senior Resident  
Magistrate Milimani CMCC No. 5552 of 2019, delivered on 27th March 2023)*

**JUDGMENT**

1. Ndurumo wa Gakui the appellant herein sued the respondents herein for general and special damages arising from an accident that occurred on or around 30/04/2016 along Eastern Bypass road. It is stated in the plaint that the 1<sup>st</sup> respondent being the 2<sup>nd</sup> respondent's authorized driver negligently drove, managed and controlled motor vehicle registration number KBP 567W causing it to hit the appellant's motor vehicle registration number KBQ 239P resulting in extensive damage to the appellant's motor vehicle thereby occasioning him loss and damage.
2. The respondents in their defence denied the claim and the matter proceeded to full hearing, after which it was dismissed with no costs.
3. Being aggrieved by the Judgment the appellant filed this appeal citing the following grounds:
  - i. That the Learned Trial Magistrate erred in law and fact by finding the suit unmerited and thus dismissing it.



- ii. That the learned Magistrate erred in law and fact by not fully considering the Motor Vehicle copy of Records.
  - iii. That the Learned Magistrate erred in law and fact by finding that the Respondents were not liable for the accident.
  - iv. That the Learned Magistrate erred in law and fact by finding that there was no congruence between the police abstract and the copy of motor vehicle copy of records showing the registered owner as at the date of the accident.
  - v. That the Learned Magistrate erred in law and fact by not making an award on quantum.
  - vi. That the Learned Magistrate erred in law and fact by delivering a judgment that was lopsided and biased in favour of the Respondents.
  - vii. That the Leamed Trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant.
4. The Appeal was canvassed by way of written submissions.

### **Appellant's submissions**

- 5. These were filed by Julia Kariuki & Company Advocates and are dated 20<sup>th</sup> February, 2024. Counsel submitted the learned trial magistrate erred in law and fact by not fully considering the motor vehicle copy of records thus finding that the respondents were not liable.
- 6. Counsel submitted that the motor vehicle copy of records as certified showed that the 2<sup>nd</sup> respondent was the owner of motor vehicle registration number KBP 567W at the time of accident. She submitted that he proved ownership.
- 7. Counsel further submitted that the police abstract showed that the 1<sup>st</sup> respondent was the driver of the 2<sup>nd</sup> respondent's motor vehicle KBP 567W and that the said vehicle was blamed for the accident. She submitted that the appellant proved that the 1<sup>st</sup> respondent was liable for the accident.
- 8. She argued that the appellant was entitled to quantum as he also filed receipts to prove special damages of Kshs. 1,067,617/= and pleaded the same. She cited the case in Civil Appeal No. 42 of 1983 Hahn V Singh, in support.
- 9. Counsel submitted that he pleaded and proved loss of earnings from the filed bank statements that showed how much he earned daily from the vehicle. She argued that during hearing, the appellant asked for loss of user for 30 days as the vehicle was being repaired during the said period.
- 10. She further submitted that the appellant testified that there were days he would make more money but on average he made Kshs. 15,000/= daily. Counsel relied on the cases of *Samuel Kariuki Nyagoti V Johaan Distelbegger* (2017) eKLR, *Team for Kenya National Sports Complex & 2 Others V Chabari M'Ingaruni (Civil Appeal No. 293 of 1998)* and *Jackson Mwabili V Peterson Mateli* (2020) eKLR.
- 11. Counsel urged the court to consider the decisions relied upon in the trial court together with the submissions. She urged the court to find that the appellant proved his case against the respondents on a balance of probabilities.

### **Respondent's submissions**

- 12. These were filed by G. N. Mugo & Company Advocates and are dated 19<sup>th</sup> March, 2024. Counsel identified three issues for determination.



13. The first issue was whether the appellant proved that the motor vehicle KBP 567W belonged to the 2<sup>nd</sup> respondent. Counsel submitted in the negative and relied on the case of Wellington Ngángá Muthiora V Akamba Public Road Services & Another [2010] and Section 8 of the Traffic Act. He submitted that the owner of the said motor vehicle as at 13<sup>th</sup> July, 2019 was Leakey Wahome Mwangi while the previous owner was John Thumbi Gitonga. He thus argued that the date of registration was 6<sup>th</sup> July, 2011 while the date of accident was 27<sup>th</sup> May, 2016 thus the owner was Leaky Mwangi. He stated further that the 2<sup>nd</sup> respondent's name in the motor vehicle copy of records was handwritten and that NTSA did not produce the same in court.
14. On the second issue, as to whether the appellant proved that the respondents were liable, counsel relied on the case of Nickson Muthoka Mutavi V Kenya Agricultural Research Institute (2016) eKLR and submitted that the appellant never discharged his duty of burden of proof that the 1<sup>st</sup> respondent was negligent. He also submitted that the appellant had the onus of calling an eye witness to corroborate his evidence but failed to do so. He cited the cases of Sally Kibii & Another V Francis Ogaro (2012) eKLR and Anthony Musita & Another V Purity Gatakaa HCC No. 2 of 2009 where the court held that the evidence of an investigating officer is not binding on the court as it is only an opinion unless corroborated by an investigation file and report.
15. Counsel submitted that PW3 only produced the police abstract but did not adduce any evidence of causation of the accident. On this he relied on the case of Lochab Brothers Ltd & Another V Jobana Kipkosgei Yegon [2017] eKLR. He submitted that in agreement with the trial court, the 1<sup>st</sup> respondent was not negligent. He cited the Court of Appeal case in Gideon Ndungu Nguribu & Another V Michael Njagi Karimi [2017] eKLR where the court stated that determination of liability in a road traffic case is not a scientific affair.
16. Lastly, counsel urged the court to find that the appeal herein lacked merit and dismiss the same with costs in the instant appeal and trial court suit.

### **Analysis and determination**

17. This being a first appellate court, I am guided by the dictum in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1968] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions.
18. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the court stated with regard to the duty of the first appellate court, as follows:
 

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
19. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the main issue for determination is:
  - i. Whether the appeal is merited.
20. Section 8 of the Traffic Act provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.



21. The Court of Appeal in *Securicor Kenya Ltd -v- Kyumba Holdings Ltd* (2005) eKLR held as follows: -

“In the case before us, it was proved that at the time of the accident the appellant was no longer the owner of KWJ 816. It had sold it to G.M. Thangwa to whom possession had been transferred. It appears that Mr. Karume had not been put into possession of it by the appellant. Moreover, KWJ 816 was not being driven by appellant’s driver or its employee on an occasion in which the appellant had any interest, matatu business not being its concern. There was no relationship whatsoever between the appellant and the 2nd defendant. Indeed, there was no agency relationship. It is difficult therefore to see how the trial Judge could import into the case the doctrine of vicarious liability. It was simply not applicable.

Moreover, if, which we do not consider to be the position, the appellant was still the owner by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of everyone who happened to drive it.”

22. The appellant argued that the trial magistrate erred in law and fact by finding that there was no relationship between the police abstract and the copy of motor vehicle search.

23. This court notes that the trial Magistrate in her judgment under the paragraph 5 found as follows:

“with respect to liability, I have seen the police abstract which blames the driver of motor vehicle KBP 567W for causing the road accident. I have also seen a copy of motor vehicle records dated 13<sup>th</sup> July, 2019 confirming the owner of the motor vehicle as Leaky Wahome and the previous owner as Thumbi Gitonga...”

24. I have also perused the court records and I am of the view that indeed the motor vehicle search records as produced by the appellant confirmed that the previous owner of KBP 567W was Thumbi Gitonga while the current owner is Leaky Wahome.

25. This court appreciates that there are exceptions to Section 8 of the *Traffic Act* however, the appellant failed to prove that there was any connection between the respondents and the owners of the motor vehicle KBP 567W as listed in the motor vehicle search dated 13<sup>th</sup> July, 2019.

26. In view of the above, I find that the trial Magistrate was right in her finding that there was no conclusive proof of ownership of the said motor vehicle and hence the respondents were not liable.

27. The practice has been that even if the suit is dismissed the trial court should assess the damage and offer a proposed award of what he/she may have given if the claim was successful.

28. In this case however, the claim was not for general damages but special damages. And it would be the duty of the claimant to specifically prove his/her claim. In this case the finding is that it is the wrong party who was sued. It would serve no purpose for the court to do the assessment as requested by the counsel for the respondents.

29. The upshot is that the appeal lacks merit and is hereby dismissed with costs.

30. Orders accordingly.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 26<sup>TH</sup> DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

