



REPUBLIC OF KENYA



**Gatumia v Wambui & another (Civil Appeal E943 of 2022)
[2024] KEHC 9051 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9051 (KLR)

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

CIVIL

CIVIL APPEAL E943 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

PATRICK NGUNJIRI GATUMIA APPELLANT

AND

JANE NJERI WAMBUI 1ST RESPONDENT

WINFRED KATHAMBI STEPHEN 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. J. W Munene Resident Magistrate/
Adjudicator in SCCC/E1677/2022, delivered on 19th October, 2022)*

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Small Claims Court Case No. E1677 of 2022. In the said suit, the respondent (who was the claimant) sued the appellant (who was the defendant) for the sum of Kshs. 146,610/= being recovery by the claimant's insurance outlay under the insurance principle of subrogation.
2. The appellant was the driver of the motor vehicle registration number KBC 476Q which was involved in an accident with the respondent's motor vehicle registration number KBZ 652L along Eastern bypass. Both parties were defended and after the hearing the trial Magistrate/Adjudicator found the appellant to be wholly liable for the accident. It awarded special damages amounting to kshs. 137,430/= plus costs of the suit together with interest at court rates payable from the date of filing the claim.
3. The appellant being aggrieved by the whole judgment lodged this appeal dated 11th November, 2022 setting out the following grounds: -
 - i. The learned resident magistrate erred in law and in fact by holding that the appellant is 100% liable for the accident without any evidence in support thereof.



- ii. The learned resident magistrate erred in law and in fact by entering Judgement for the claimant against the respondent in the sum of Kshs. 137, 430/=, a fact not borne by the evidence and pleadings before her.
 - iii. The learned resident magistrate erred in law and in fact by holding that the respondent had supplied the Court with sufficient proof that motor vehicle registration Number KBC 476Q was sold and possession transferred to the third party, and that the third party was the beneficiary owner of the motor vehicle at the time of the accident on the one hand, and finding the respondent 100% liable on the other.
 - iv. The learned resident magistrate erred in law and in fact by ignoring the submissions of the appellant and in particular on liability, and the fact that the appellant had adduced evidence that the third party was the owner of motor vehicle registration number KBC 476Q.
4. The appeal was canvassed by way of written submissions.

Appellant's submissions

5. The appellant filed his submissions dated 25th October, 2023 through Kabaiku and company advocates. Counsel identified two issues for determination.
6. The first issue is who owned the motor vehicle as of the date of the accident and as such who was to blame for the accident. Counsel cited section 8 of the Traffic Act Cap 403 which stipulates as follows;

“The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”
7. He submitted that the appellant had discharged the burden of proof by adducing evidence of transfer of his motor vehicle registration number KBC 476Q to the 2nd respondent.
8. The second issue is on who should pay the 1st respondent damages for the loss occasioned. Counsel submitted that the appellant had brought forth evidence to prove that he had sold and delivered the subject motor vehicle to 2nd respondent. Therefore, that having enjoined her in the suit she ought to be held liable for the accident.
9. In support of this position, he cited the following cases; Muhambi Koja v Said Mbwana Abdi [2015]eKLR, Nancy Ayemba Naira v Abdi Ali Civil Appeal Number 107/2008 and Securicor Kenya Limited v Kyumba Holdings Limited Civil Appeal No. 73 of 2002 [2005] eKLR. Counsel also relied on Rule 16(1) of the Small Claims Court Rules, 2019, Order 1 rule 15 (1, a, b and c), 17 and 19 of the Civil Procedure Rules, 2010. He thus urged the court to enter judgment against the 2nd respondent.

1st Respondent submissions

10. The 1st respondent filed her submissions dated 15th November, 2023 through Samuel Gitonga and associate advocates. Counsel submitted on two issues and the first being, whether the claimant had proven her case.
11. He submitted that the onus was on the appellant to prove that at the time of the accident he was not the owner and/or in possession of the blameworthy vehicle. Further, that it was clear that indeed the appellant had filed sufficient proof that he had sold the motor vehicle to the third party. Therefore, that if the court then finds the appellant not liable, it should hold the third party liable for the damages accrued.



12. On the second issue regarding liability between the appellant and the third party/2nd respondent, counsel submitted that the third party/2nd respondent herein did not enter appearance even after being served by the appellant /respondent. Further, that Order 1, rule 19 of the Civil Procedure Rules, on Judgment against third party in default provides as follows;

“Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him: Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just.”

13. Counsel submitted further that the Judgment rendered was sound and that the appellant ought to satisfy the decree upon himself first then proceed to make an application for the judgment to be passed on the third party/2nd respondent.

Analysis and determination

14. This being a first appellate court, I am guided by the dictum in the case of *Selle v 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 conclusion.
15. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the issue for determination to be; whether the trial court erred in not finding the third party liable for the accident
16. In the case of *PNM & Another (The Legal Personal Representative of Estate of LMM) v Telkom Kenya Limited & 2 Others* [2015] eKLR in the same vein held: -

“Of the accident motor vehicle and whose agent was the 3rd defendant in view of the two positions- 1st defendant being registered owner whereas the 2nd defendant being the beneficial owner thereof. This court finds that albeit the search certificate/copy of records produced by the plaintiff showed that the 1st defendant Telkom Kenya Ltd was the registered owner of the accident motor vehicle at the material time, it is clear from the evidence gathered by the police investigating the accident, and the driver’s own statement and the vehicle’s insurance policy cover with Kenindia Assurance Co. Ltd, that the owner thereof was the 2nd defendant who was the beneficial owner as the vehicle was then being used for his benefit not the 1st defendant’s benefit. The latter had sold the accident motor vehicle and its possession and use thereof passed to the 2nd defendant...”

17. Further, in *Benard Muia Kilovoo v Kenya Fresh Produce Exporters* [2020] eKLR held as follows: -

“41. The Court of Appeal in these binding decisions is clearly stating:

(i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.



- (ii) Where there exists other compelling evidence to prove otherwise then the court can make a finding of ownership that is different from that contained in the logbook.
- (iii) Each case must however be considered in its own peculiar facts.”

18. In this case, prima facie, the 1st respondent was the registered owner of the accident motor vehicle as per the NTSA copy of records found at page 30 of the record of appeal. Nonetheless, the said vehicle had at the time of the accident been sold and its possession and use delivered to the 2nd respondent. The transfer of ownership documents found at pages 42 to 45 of the record of appeal attest to this. The 1st respondent’s counsel has acknowledged this position.

19. The trial court in its judgment on the second and third paragraphs on liability observed as follows;

“In the Police Abstract produced by the Claimant, the Driver of the motor vehicle registration number blamed KBC 476Q for the accident. NTSA copy of records indicates that the Respondent is the Registered owner of motor vehicle KBC 476Q. The Respondent has supplied this court with sufficient proof that the said motor vehicle was sold and possession transferred to the 3rd party.

This court finds the 3rd Party was the beneficial owner of motor vehicle registration number KBC 476Q at the time of the accident and the respondent is therefore found 100% liable for the accident.”

20. In my view and in light of the authorities above, I find that the trial court misdirected itself by holding that the 3rd party/2nd respondent was the beneficial owner of the subject motor vehicle but failed to find her liable for the accident, thus holding the appellant liable.

21. The reason why the appellant issued and served a 3rd party Notice on one Winfred Khatambi Stephen was her direct involvement in the matter. She was aware of the matter and even the hearing date but never acted on the same. Having been a party in the suit there is no reason why the trial Magistrate did not enter Judgment against her. In the circumstances I find that the trial Magistrate erred, and I find the appeal to be merited, and allow it.

22. I hereby set aside the Judgment delivered on 19/10/2022, and substitute it with a Judgment against the 2nd respondent Winfred Khatambi Stephen for Ksh 137, 430/= plus costs and interest. The 2nd respondent will also pay the appellant’s costs of the appeal.

23. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

