



Car and General (Trading) Limited v Chisembe & another (Civil Appeal E090 of 2023) [2024] KEHC 16855 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E090 OF 2023
SC CHIRCHIR, J
SEPTEMBER 26, 2024**

BETWEEN

CAR AND GENERAL (TRADING) LIMITED APPELLANT

AND

CHARLES MATOLO CHISEMBE 1ST RESPONDENT

IRENE K. KISKA 2ND RESPONDENT

(Being an Appeal from the judgment of Hon. R.S Kipngeno(PM) delivered on 16th May 2023 at Butali Chief Magistrate's court Civil suit No. 14 of 2019.)

JUDGMENT

1. The 1st respondent sued the Appellant and 2nd respondent at the lower court seeking damages for injuries he sustained following a road accident which occurred on 23rd May 2017 along the Chebwai-Shibanga road. The accident was between motorcycle registration number KMDN 500 D TVS STAR and the respondent who was a pedestrian on the said road.
2. In its judgment delivered on 16th May 2023, the trial court entered judgment on a 100% basis against the Appellant and the 2nd respondent, jointly and severally, and awarded damages of Kshs. 1,020,655/=to the 1st respondent .
3. The Appellant was aggrieved by the judgment , prompting this Appeal. It has set out the following grounds:-
 1. The learned trial magistrate erred in law and in fact by finding the Appellant jointly and severally liable for the accident despite having not addressed issues of ownership and/or liability against it.



2. The learned magistrate erred in law and in fact by entering judgment on liability against the appellant despite finding that the motorcycle registration number KMDN 500 D TVS belonged to the 2nd defendant , Irene Kisaka
3. The learned magistrate erred in law and in fact in making a finding on liability against the appellant without any evidence proving liability against it.
4. The learned magistrate erred in law and in fact in making a finding on liability against the appellant despite having appreciated the evidence tendered by the 2nd defendant that after the accident, the 2nd defendant claimed ownership of the suit motorcycle registration number KMDN 500 D TVS and the fact that she was charged in court with traffic offence and paid a fine of Kshs. 3000 and later said the motorcycle was released to her.
5. The learned magistrate erred in law and in fact by failing to put into consideration the Appellant’s pleadings, documents, submissions and oral evidence tendered in court that the appellant had sold the suit motorcycle registration number KMDN 500 YTVS to meena collections on 26/02/2015 prior to the date of the accident.
6. The learned magistrate erred in law and in fact by failing to appreciate that after the Appellant sold the motorcycle registration number KMDN 500 TVS it became a stranger to all activities pertaining to the said motorcycle.
7. The learned magistrate erred in law and in fact by failing to appreciate that there exists various forms of ownership i.e. beneficial, possessory and legal owner who are not necessarily the registered owners
8. That the learned magistrate erred in law and in fact in failing to appreciate the statutory requirements set down by NTSA for dealers to have motor vehicles and motorcycles to be registered in their names for purposes of sale and the Appellant’s name appearing on the NTSA records as only an owner by presumption only
9. The learned magistrate erred in law and in fact in making a finding on liability against the appellant despite there being no evidence or nexus to prove that there was an agent, servant and/or any employment relationship existing between the Appellant and the rider of the suit motorcycle registration number KMDN 500 TVS at the time of the alleged accident.
10. The learned magistrate erred in law and in fact in making a finding on liability against the Appellant despite having appreciated that after the accident the rider of the said motorcycle fled the scene of the accident and the 2nd respondent came forward and claimed ownership over the said motorcycle.
11. The learned magistrate further erred in law and in fact in making a finding on liability against the Appellant despite there being no evidence adduced to show that the rider of the suit motorcycle was acting on behalf of the appellant and/or using the motorcycle registration number KMDN 500D TVS on the instructions of the appellant at the material time of the accident.
12. The learned magistrate erred in law and in fact by failing to consider the issue of vicarious liability against the appellant and the rider of the suit motorcycle.
13. The learned magistrate erred in law and in fact in making a finding on liability against the appellant without any evidence proving vicarious liability against it.



14. The learned magistrate failed to address the issue of vicarious liability which was one of the defence of the appellant.
15. That the learned magistrate further erred in law and in fact in making a finding on liability against the appellant despite there being no evidence showing that the rider of the motorcycle was in course of lawful employment with the appellant at the time of the accident nor there being any nexus between the 1st and 2nd defendant.
16. The learned magistrate erred in law and in fact by failing to appreciate the particulars of the police abstract which did not connect the Appellant as the owner of the Motorcycle registration number KMDN 500 D but rather which connoted the 2nd respondent as the owner of the said motorcycle and who was charged in court for offence of permitting unlicensed driver and paid a fine of Kshs. 3,000/=
17. The learned magistrate erred in law and in fact by failing to appreciate that the appellant had discharged the case against it, proving its burden to the standard required by law.
18. The learned magistrate erred in law and fact by failing to consider the evidence tendered by the appellant to prove that it was neither the owner nor did it derive any benefit from the use of the suit motorcycle registration number KMDN 500 D having sold the motorcycle prior to the date of the accident.
19. The learned magistrate erred in law and in fact by applying improper standard of proof whereas the appellant had presented the trial court with sufficient proof to meet the legally required threshold on balance of probability.
20. The learned magistrate erred in law and in fact by failing to consider the testimony of the appellant's witness which proved the appellant's non- involvement with the subject matter of the suit and there was no relationship between both the rider and the Appellant herein.
21. The learned Magistrate erred in law and in fact by finding the appellant liable for the accident despite the 2nd respondent in her submission having admitted liability and sought that the award of compensation to be awarded at Kshs. 310,655/=
22. The learned magistrate erred in law and in fact by failing to appreciate the principles of stare decisis to the holdings in the Court of Appeal Authorities on the issue before the court holding contrary to the holding of the learned magistrate.
23. The learned magistrate erred in law and in fact by disregarding the documentary evidence adduced by the appellant which evidence was not countered or otherwise disproved by more compelling evidence by the 2nd respondent
24. The learned magistrate erred in law and in fact by holding the Appellant was liable for the accident and further misdirecting itself on the legal principle in awarding damages therein that were excessive in the circumstances.
25. The learned magistrate erred in law and in fact by failing to acknowledge that the suit motorcycle was not in possession or actual ownership of the appellant as the time of the accident and consequently holding it liable for the negligence acts as alleged by the 1st respondent.



26. The learned magistrate totally misdirected himself in delivering the judgment in favour of the 1st respondent as against the Appellant by failing to consider and appreciate the evidence on record tendered by the said respondent on behalf of the Appellant.
4. The appellant prays that the appeal be allowed ,and that the lower court's judgment be set aside.
5. The appeal was canvassed by way of written submissions.

Appellant's submissions

6. It is the Appellant's submission that the trial court erred by holding it jointly and severally liable for the accident ; that though the records show that it was the registered owner of the subject Motorcycle, the presumption of ownership by a registered owner as set out under section 8 of the *traffic Act* was rebutted and that the police abstract bore testimony to the fact that the 2nd respondent was beneficial owner of the motor cycle at the material time.
7. It is further submitted that despite the register of ownership showing that the Appellant was the registered owner at the time of the accident, the Appellant produced documents to prove that it had sold the motor cycle to a 3rd party, and that it was the duty of the purchaser to effect the transfer at the National Transport and safety Authority.
8. The Appellant further submits that there was sufficient evidence to show that the 2nd respondent was the one in possession and was the beneficial and insurable owner of the motor cycle; that the 2nd respondent in her defence admitted ownership of the motorcycle and faulted the trial court for failing to appreciate that parties are bound by their pleadings in any event.
9. It is also submitted that there was no evidence to prove that there was any master- servant or principal-Agent relationship between the Appellant and the Rider of the motor cycle, and consequently vicarious liability on the part of the Appellant was not proved.
10. The Respondent further submits that the judgment of the trial court was not based on evidence on record and that the court also ignored the fact that the burden of proof lies on the plaintiff.
11. The Appellant faults the trial court for holding the Appellant and 2nd respondent jointly and severally liable without determining the question of ownership and the issue of vicarious liability.
12. On costs, the Appellant submits that costs follow the event, and it should be awarded costs in this Appeal and the lower court.

1st Respondent's submissions

13. It is the respondent's submission that the Appellant's assertion that it had sold the motor Cycle by the time of the occurrence of the accident was not sufficiently proved. ; that the logbook dispatch register was not signed, and that there was no sale agreement to show that such a sale ever took place.
14. It is further submitted that whereas the Appellant alleged that it had sold the motor cycle to Meena Collections, Bungoma ,it failed to take out 3rd party proceedings against the alleged purchaser.
15. Further, the respondent submits, the Appellant did not seek to have its name struck off from the proceedings, prior to conclusion of suit.
16. The 2nd respondent did not file any submissions.
17. Each party has relied on several decisions which I have perused.



Analysis and determination

18. This is a first Appeal and the role of this court is well settled:- It is to review the evidence afresh, evaluate it and arrive at its own conclusion. (see *Selle & Ano vs Associated Motor Boat Co Ltd & others* (1968) EA 123 and *Gitobu Imanyara & 2 others vs AG* (2016) e KLR)
19. The Appellant has set out several grounds of Appeal, however on considering them , I find that there are only two issues for determination, namely:
 - a). Whether the Appellant was the owner of the subject motorcycle
 - b). If the appellant was vicariously liable for the accident.

Ownership of the Motorcycle

20. On the issue of ownership, Section 8 of the *Traffic Act* provides as follows;
21. “The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”
22. The 1st respondent, who was the plaintiff in the suit, produced a search certificate showing that the Appellant was the registered owner. Thus to the extent that the 1st Respondent had proved that the registered owner was the Appellant his duty in this regard ended there. The onus was on the Appellant, in compliance with section 8 of the *traffic Act* as aforesaid to prove “the contrary”.
23. The 1st respondent however further testified that while the appellant was the registered owner ,the 2nd respondent was the actual owner of the motor cycle. He further stated that the 2nd respondent is the one who went to claim back the motor cycle from the police station.
24. The Appellant’s witness was one Joseph Mulwa Mwangi. He told the court that the Appellant was not the owner of the Motor cycle at the time of the accident; that it was sold on 26th February 2015 to Meena collections , Bungoma ; that the Appellant had no control of the vehicle and was not deriving any benefit from the use of the said vehicle at the time of the accident. He produced a cash sales receipt for motor cycles sold to Meena Collections and a logbook dispatch register of the vehicles.
25. The kind of ownership referred by both the 1st respondent and the Appellant’s witness was expounded in the case of *Nancy Ayemba Ngana vs. Abdi Ali* (2010) e KLR where the court stated:

“There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.”



Also see P.N.M. & Ano. (the legal personal representative of estate of L.M.M.) vs. Telcom Kenya limited & 2 others (2015) e KLR and Charles Nyambuto Mageto v Peter Njuguna Njathi [2013] eKLR

26. The 1st Respondent has taken issue with this witness testimony and the documents submitted. The respondent contends that the logbook dispatch was not signed and there was no sale agreement . It is also stated that the alleged purchaser was someone from Bungoma; and finally that there is contradictions between the Appellant pleading and the evidence tendered in regard to whom the motor cycle was sold to.
27. I have considered the evidence and the documents produced . There is a cash sale receipt No. DIST000007495, it contain the chassis numbers of several motor cycles which were sold on 26th February 2015 to Meena collections, Bungoma. The receipt is duly signed and stamp with the official stamp of the Appellant. The logbook dispatch register has the subject Motor cycle , KMDN 500D chassis No. A24322. . This chassis Number appears listed in the cash sales receipt. It was dispatched on 27.3.2015 to Meena collections via G4S. The register has a stamp of the Appellant but the signature is missing on the particular page where the subject motor cycle is listed. The rest of the pages were signed.
28. The 1st Respondent has discredited this document for want of signature. I agree with the respondent in this regard. For cash sales to constitute a contract, the sales receipt must be accompanied by a delivery note. That is to say that there must be evidence that the goods were not only purchased, but were also delivered to the purchaser. It follows therefore that where there is no valid delivery note, then the sale cannot be said to have been complete.
29. However evidence by the appellant the police abstract indicating that the 2nd defendant had taken out an insurance with Xplico as the owner was not contested. The police officer's testimony that the 2nd respondent picked the motor cycle from the police station was also not contested.
30. Further and more significantly, the 2nd respondent admitted ownership of the Motor cycle in her defence. In paragraph 3 of her defence, she admitted interalia, paragraph 5 of the plaint. Under paragraph 5 of the plaint, the plaintiff had pleaded that the 2nd defendant was the owner of motor cycle Registration No. KMDN 500D. It suffices to state here that the rules of Evidence require no proof of admitted facts.
31. Am satisfied that the evidence on record sufficiently demonstrated that the 2nd respondent was the owner of the motor cycle. It bears remembering that the standard of proof is on a balance of probabilities.
32. What amounts to a balance of probabilities was discussed in the case of Miller Vs Minister of Pensions (1947) 2 ALL ER 372 cited in the case of Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of had this to say: "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow..... "
33. Kimaru, J in William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLE 526 described the concept as follows: "In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of



the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

Vicarious liability

34. In the case of P.A Okello & M.M Nsereko T/A Kaburu Okello & Partners v Stella Karimi Kobia & 2 Others (2012) eKLR cited by the Appellant the Court of Appeal described the term as follows: “Vicarious liability arises when the tortious act is done in the scope of or during the course of one’s employment or authority”
35. In John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR the Court of Appeal again , stated:

Vicarious liability is not pegged on legal ownership but on employer/employee or agent/ principal relationship with particular emphasis on who employed and controlled the tortfeasor.(Emphasis added)
36. In the case of Rentco East Africa Ltd vs. Dominic Mutua Ngozi [2021] eKLR the court cited the case of Kansa vs. Solanki [1969] EA 318 where the concept was further explained as follows: “ Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”
37. The appellant submitted that the rider of suit motorcycle registration number KMDN 500 TVS D was employed by the 2nd Respondents and therefore, he was operating and/or controlling the said motor cycle under express or implied instructions from the 2nd Respondent during the course of their employment.
38. PW2 , the police officer told the court that after the accident it was the 2nd defendant who came out as having employed the rider as a boda boda operator and she was charged at the traffic court for allowing an unlicensed rider on the road and fined Kshs. 3000/= . Whereas there was no evidence of the alleged traffic charges , this witness testimony to the effect that the Motorbike was collected by the 2nd respondent was not contested or rebutted.
39. It follows that it was upon the 2nd respondent to rebut the presumption referred to in solanki’s case(supra). She did not ,as she never testified
40. The only conclusion therefore is that the Rider of the Motor cycle had the motor cycle in the course of his employment or as an Agent of the 2nd respondent. It follows that 2nd Respondent was vicariously liable for the negligence acts of her Rider.
41. The Appellant has faulted the trial court for arriving at the conclusion , it did on liability, without addressing these twin issues of ownership and vicarious liability. I have perused the judgment and it is true that the trial court never addressed these issues. To that extent I agree that the trial court erred. Having failed to address the two issues, it is not surprising that the trial magistrate arrived at the conclusion that he did .
42. In the end this Appeal succeeds and I hereby proceed to make the following orders:
 - a). The judgment of the lower court limited to its finding on liability is hereby set aside.



- b). Judgment is hereby entered for the plaintiff as against the 2nd defendant on a 100% basis
- c). The award on damages remain undisturbed
- d). The suit as against the 1st defendant is hereby dismissed with no orders to costs
- e). costs of this Appeal is awarded to the Appellant , as against the 1st respondent.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER 2024.

S.CHIRCHIR

JUDGE

In the presence of :

Godwin Luyundi- Court Assistant.

Ms Muthee for the Appellant

Mr. Mulama for the 1st Respondent.

