



**Abson Motors Limited v Nyangweso (Suing as the legal representative
of the Estate of Aggrey Ndalo Khwasi) & another (Civil Appeal
E106 of 2023) [2024] KEHC 13382 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E106 OF 2023
JK NG'ARNG'AR, J
OCTOBER 30, 2024**

BETWEEN

ABSON MOTORS LIMITED APPELLANT

AND

**FIBI OKUTOYI NYANGWESO (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF AGGREY NDALO KHWASI) 1ST RESPONDENT**

DORAH EGHWA MWALUFU 2ND RESPONDENT

*(Being an appeal against the Judgment of Hon. J. Akee (SRM) delivered on
2nd May 2023 in Mombasa Chief Magistrate's Court Civil Suit No. 1808 of
2021, Fibi Okutoyi Nyangweso (Suing as the Legal Representative of the Estate
of Aggrey Ndalo Khwasi) v Dorah Eghwa Mwalufu & Abson Motors Limited)*

JUDGMENT

1. The background of the appeal is that on or about 24th February 2021, the deceased was walking on the pavement of the road at Miami area along the Ukunda – Likoni Road the Appellant's and 2nd Respondent's motor cycle registration number KMEZ 153X Hadjin veered off the road and knocked the deceased occasioning him fatal injuries. The 1st Respondent prayed for judgment against the 2nd Respondent and Appellant for a sum of Kshs. 882,650.00, interests at 14% per annum from 2nd May 2023, and cost and incidentals to the suit.
2. The suit was heard in the trial court and judgment delivered on 2nd May 2023. The court entered judgment for the 1st Respondent as against the Appellant and the 2nd Respondent who were held 100% liable. The court awarded general damages of Kshs. 500,000 under loss of dependency and Kshs. 125,000 under loss of expectation of life, and for special damages, it awarded Kshs. 257,650, which amounts came to a sum total of Kshs. 882,650.00, with costs and interest of the suit.



3. Being dissatisfied, the Appellant appealed against the judgment through the Memorandum of Appeal dated 10th May 2023 on grounds that the learned trial magistrate erred in law and fact by holding the Appellant 100% liable for the occurrence of the accident, the learned trial magistrate erred in law and fact in determining that the Appellant was vicariously liable for the acts of the 2nd Respondent, that the learned trial magistrate erred and misdirected himself and failed to apply precedents and tenets/principles of the law applicable in awarding damages, and that the learned trial magistrate erred and misdirected himself by awarding a sum in respect of damages which was inordinately high in the circumstances occasioning a miscarriage of justice.
4. The Appellant prayed for orders that the appeal be allowed with costs, that judgment delivered on 2nd May 2023 by the trial court be set aside and the award made therein be reassessed, that the honourable court do apportion liability to the Respondent accordingly, and that cost of this appeal be borne by the Respondent.
5. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 4th June 2024 while the 1st Respondent filed submissions dated 26th July 2024 which have been considered by this court.
6. The role of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
7. I have considered the Record of Appeal dated 16th November 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether the Appellant should be held liable for the accident
 - b. Who should bear costs of this appeal.
8. The court in *The Court in Ciabaitani M’Mairanyi & Others V Blue Shield Insurance Co. Ltd*, CA No.101 of 2000 (2005) 1EA 280 held that: -

“Whereas under section 107 of the *Evidence Act*, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes, the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”
9. The Appellant submitted that its witness, Mercy Kananu Murithi, in her evidence produced a copy of sale invoice and delivery note together with a copy of indemnity to prove that the motor cycle was sold to the 2nd Respondent and that the Appellant was indemnified from any future liability concerning the said motor cycle. The Appellant further submitted that the 2nd Respondent was supposed to conduct transfer of the motorcycle but failed and that the Appellant was held liable jointly with the 2nd Respondent on the basis that it was still the registered owner.
10. Section 8 of the *Traffic Act* provides that: -

‘The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle’.



11. In interpreting the provisions above, the court of Appeal in *Securicor Kenya Ltd V Kyumba Holdings Ltd (2005)* eKLR held as follows: -

“... it was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party ... a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose names the vehicle was registered was presumed to be the owner thereof unless proved otherwise ...”

12. This court further relied on *Equity Bank Limited v Naftal Anyumba Onyango & 2 Others (2014)* eKLR which held as follows: -

“The appellant’s involvement regarding the motor vehicle herein was purely that of financier and the same was extinguishable upon the finances being recovered and the transfer and title effected to the borrower as per the terms of the loan agreement entered into ... Lastly, I do find and hold that co-registration between appellant and 3rd respondent was a security measure between the appellant and the 3rd respondent herein. The appellant’s interest remained that of financier which could not invite any risk or otherwise. There was no relationship either in employment, agency or servant between the appellant herein and the driver who drove the motor vehicle which allegedly caused the said accident.”

13. This court has established that the Appellant in their evidence and production of a copy of sale invoice and delivery note together with a copy of indemnity to prove that the motor cycle was sold to the 2nd Respondent and that the Appellant was indemnified from any future liability concerning the said motor cycle is sufficient proof that the Appellant was only a financier and could not be held liable for the risks involved regarding control of the motorcycle.

14. I therefore find that the appeal has merit and is allowed. The 2nd Respondent to bear 100% liability. Costs to the Appellant.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF OCTOBER, 2024.

J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

Katisya Advocate for the Appellant

No appearance Advocate for the 1st Respondent

No appearance Advocate for the 2nd Respondent

Court Assistant – Mr. Samuel Shitemi

