**Interpel Investments Limited v Mokaya (Suing as the Legal Representative of the Estate of the Late Reagan Onyancha) (Civil Suit E027 of 2023) [2024] KEHC 16426 (KLR) (23 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16426 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL SUIT E027 OF 2023**

**RN NYAKUNDI, J**

**DECEMBER 23, 2024**

**BETWEEN**

**INTERPEL INVESTMENTS LIMITED ..... APPELLANT**

**AND**

**JARED MOGENI MOKAYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE REAGAN ONYANCHA) ..... RESPONDENT**

**RULING**

1. Before me for determination is an application dated 11th October, 2024 expressed to be brought under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. The applicant seeks orders to wit: -

    a. This Honorable Court be pleased to review its judgment and orders delivered on 25th April, 2024, particularly on the issue of liability, and substitute them with appropriate findings that the Appellant was liable for the subject accident.

    b. That the Honorable Court do set aside its findings on liability, which were based on an error apparent on the face of the record concerning the ownership of the motor vehicle involved in the accident.

    c. That the Honorable Court be pleased to issue such further or other orders as it deems just and fit in the circumstances.

    d. Costs of this application be provided for.

2. The application is premised on 8 grounds together with an affidavit in support sworn by Jared Mogeni Mokaya. The applicant avers that:

a. The issue of ownership was conclusively dealt with in an interlocutory application before the Small Claims Court.

b. The appellant had raised the same grounds, and the application was dismissed on.

c. The Respondent did not appeal the dismissal of the said ruling, and the issue was therefore res judicata.

d. Raising the issue again on appeal was a breach of the principle of finality in litigation, as laid out in Section 7 of the *Civil Procedure Act*, which bars re-litigation of matters that have been conclusively decided.

e. The Small Claims Court's decision dismissing the Respondent's interlocutory application was final as no appeal was lodged against the ruling.

f. The Respondent's attempt to introduce the same issue on appeal amounts to an abuse of the court process, and this Honorable Court ought not to have entertained the issue.

g. It is in the interest of justice that this Honorable court corrects the error regarding liability based on the erroneous finding of ownership and recognizes that the issue of ownership was res judicata.

h. If the judgment is not reviewed, as the erroneous finding of liability will lead to undue prejudice.

3. In response to the application, the Respondent filed a replying affidavit dated 4th November, 2024 in which the deponent deposed as hereunder verbatim:

a. That in response to paragraphs *2* to *8*, the court properly directed itself in re-evaluating all evidence before the trial court and arrived at its own independent judgment as it has been held in the locus classicus case of Selle & Another v Associated Motor Boat Co. Ltd & others

b. That in response to paragraphs 5 of the supporting affidavit, the applicant have neither annexed the impugned Trial Court ruling delivered on 16th November nor the formal extracted decree, order or judgment delivered on 25th April, 2024 in respect of which the review is sought hence the application is fatally defective.

c. That I am aware that the interlocutory application dated 25th October, 2022 before the trial court sought to strike out the pleadings before the court on the grounds that the appellant was not the owner of the motor vehicle.

d. That I am aware that the trial court, in its ruling on the interlocutory application, disallowed the application to strike out and did not deal with the issue of ownership.

e. That I am advised by counsel on record that it is only upon hearing of both parties in the trial court that the ownership of the motor vehicle was properly dealt with hence subject to appeal.

f. That I am aware that the trial court, in its judgment on page 185 paragraph 3 of the Record of Appeal, concluded that the owner of the motor vehicle, KDH 200211486, is the Appellant herein, hence subject to appeal.

g. That based on this background, we moved to court to challenge the trial court's judgment on the ownership of the motor vehicle; this, the res judicata argument is misguided and does not constitute an error apparent on the face of the record.

h. That the doctrine of res judicata does not apply in this case, as the issue of ownership was not conclusively determined in the interlocutory application and was only fully addressed in the final judgment, which is now the subject of this appeal.

i. That in its judgment delivered on 25th April, 2024, this court made a finding on the issue after hearing the respective party submissions, and this cannot be said to have erred when determining the issue of ownership of the motor vehicle. Therefore, reviewing the said orders would change the substratum of the entire judgment or amount the court sitting as an appeal on its judgment.

j. That the applicant has not met the threshold for reviews as stated under order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.

k. That in response to paragraph *12*, the applicant is guilty of unreasonable delay in filing the instant application, as the judgment was delivered on 25th April, 2024, yet the Applicant filed the present application on 11th October, 2024, a delay of 5 months and 16 days (169 days) and the applicant has failed to render any explanation as to the what occasioned the delay.

4. The parties filed their respective submissions in support of their arguments. The submissions have been summarized as hereunder:

**Applicant's submissions**

5. Learned Counsel Mr. Nyachiro for the Applicant identified two issued for determination:

a. Whether the finding on liability contained an error apparent on the face of the record.

b. Whether the principle of res judicata bars re-litigation of the ownership issue in this appeal.

6. On the first issue, counsel opined that the appellant herein was not vicariously liable for the negligence of the driver of the motor vehicle stems from the ownership argument adduced by the appellant. Essentially, according to the appellant, since it is their claim that they were not the insured and/or owners of the vehicle at the time of the accident, they are therefore not vicariously liable for the actions of the driver of the vehicle on the day of the accident.

7. Learned counsel argued that in cases of this nature, the burden of proof lies on the party who would fail if no evidence at all was given from either side. In the instant case, since the Respondent claimed during trial that the appellant's vehicle was being driven by his driver, agent, or person authorized by the Appellant, it was the Appellant's duty at trial to bring forth evidence to the contrary, and since this was not successfully done, no fresh evidence may be presented at this point by way of submissions. Counsel submitted that this argument places reliance on a question of fact that was already determined by the trial court and as such the argument is baseless and is itself re judicata. That since the appellant herein was indeed the owner of the vehicle as clearly indicated on the Certificate of Insurance which had been displayed on the vehicle on the day of the accident, then in the absence of evidence to the contrary, it is presumed that it was being driven by a person for whose negligence the owner is responsible.

8. It was further submitted for the Applicant that the Appellant herein had the option of enjoining a third party in line with the contention that the vehicle belonged to their client and this would have potentially indemnified it against all third party claims. Having not done so, it is by law deemed to be the insured with an insurable interest. Counsel argued that the issue of insurance and ownership cannot therefore be ventilated at this point. In support of this position, learned counsel cited the decision in Kansa v. Solanki (1969) EA 318.

9. Learned Counsel opined that the judgment contains a clear error in attributing non-liability to the Appellant on the erroneous basis that the vehicle was not owned by the Appellant. This error is apparent on the face of the record, as the issue of ownership was conclusively determined by the Small Claims Court, in an interlocutory application, (and no appeal was preferred against it) which ruled that the vehicle belonged to the Appellant, thereby establishing liability. In this regard, learned counsel cited the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

10. According to learned counsel, the police abstract serves as an official document issued by law enforcement agencies after verifying ownership details of a vehicle involved in an accident or incident. That in Kenyan legal practice, particularly in cases involving accidents, reliance on police abstracts to establish ownership is customary and widely accepted. Courts routinely admit police abstracts as credible evidence to establish the ownership or possession of a vehicle at a given time. This practice is grounded in the administrative procedures followed by law enforcement agencies and is recognized as valid evidence in legal proceedings. That the abstract in this matter was therefore properly admitted as evidence.

11. It was submitted for the Applicant that there is no requirement mandating the production of a search from the Registrar or motor vehicles to prove ownership in legal disputes. While such a search may provide additional confirmation of ownership details, the law does not prescribe it as the exclusive or mandatory method of proving ownership. Therefore, reliance on a police abstract, which is routinely accepted and relied upon in practice, did suffice in demonstrating ownership for the proceedings before the subordinate court as the motor vehicle was not registered thus proof of ownership can only be seen from the police abstract and on the same premise the Appellant took out the policy and assumed liability while the motor vehicle was on transit. He buttressed this position with the case of Nyambura Muthoni Kamau v Mungai Thuo & Another (2016) eKLR. In essence, counsel argued that the police abstract provided by the Respondent is adequate evidence of ownership of the vehicle in question. Requiring additional documentation beyond what law enforcement agencies provide could unduly burden litigants and unnecessarily complicate legal proceedings.

12. He concluded on this issue by submitting that the police abstract is a valid and sufficient document to prove ownership of the vehicle involved in the accident. This argument is supported by established legal practices, judicial precedents, and the absence of statutory requirements mandating alternative forms of proof.

13. Moving to the second issue, Mr. Nyachiro, Advocate for the Applicant submitted that the issue of ownership cannot be revisited in this appeal, as it was conclusively determined by the Small Claims Court and no appeal was lodged against the finding. That Section 7 of the *Civil Procedure Act* bars re-litigation of issues that have been previously adjudicated by a competent court. That the doctrine of Res Judicata prevents repetitive litigation and upholds the finality of court decisions.

14. It was submitted for the applicant that the erroneous exoneration of the Appellant on the basis of ownership was a manifest error that fundamentally impacts the judgment. The Small Claims Court had conclusively determined ownership, rendering this issue non-contentious and binding. That the error is therefore apparent on the face of the record. Regarding the issue if res judicata, learned counsel cited the decision in Kanorero River Farm Ltd and 3 others v. National Bank of Kenya Ltd (2002) 2 KLR 207, where the court affirmed that res judicata applies to interlocutory orders if the issue was conclusively adjudicated. That the Small Claims Court's ruling on ownership meets this threshold, precluding this court from re-litigating the matter and requiring adherence to the finality of the matter and requiring adherence to the finality of that determination. Counsel prayed that the application be allowed.

15. The Respondent on his part also filed written submission in which he couched issues of determination as follows:

    a. Whether the Application is fatally defective for failure to attach the order/Ruling sought is to be reviewed.

    b. Whether there is an error apparent on the face of the record

    c. Whether there was an unreasonable delay

16. On the first issue, learned counsel submitted that the application is fatally defective for failure to attach the order/Ruling sought to be reviewed. He argued that this court has taken a firm stance against parties who failed to attach the decree or order under review. On this he cited the decision in Suleiman Murunga v. Nilestar Holdings Limited & Another (2015) eKLR. Counsel opined that the case of Suleiman establishes that an application for review must include the decree or order in question to allow proper judicial assessment. That without this essential attachment, the application lacks necessary foundation, warranting its dismissal for procedural non-compliance.

17. As to whether there is an error apparent on the face of the record, learned counsel argued that the applicant's assertion that the matter is res judicata is without merit. That the trial court in its ruling dated 18th November, 2022, the trial court dismissed an application to strike out the matter, but notably, it did not make any determination regarding the ownership of the motor vehicle in question. Therefore, the applicant's argument that the matter is res judicata is unfounded, as no conclusive finding on ownership was made by the court in that ruling.

18. It was submitted for the Respondent that the matter is not res judicata for five reasons: First, this court, acting as an appellate court, was duty-bound to review the evidence presented before the lower court to ensure the decision was sound. Second, during trial, the issue of ownership of the motor vehicle was specifically contested by the Appellant and third, the trial court, in its judgment opened the matter to appeal, thus negating any claim of Res judicata. Fourth, the applicant had the opportunity to file submissions, a cross-appeal, or a preliminary objection on the memorandum of appeal but failed to act, thereby waiving their rights. They cannot now raise the argument that the matter is res judicata. Finally, that this court reached a determination on the issue of ownership after considering the submission from both parties. Thus, a review of the orders would alter the core of the judgment, essentially resulting in this court sitting as an appellate court on its own decision.

19. On the question of unreasonable delay, it was submitted for the Respondent that it is undisputed that the applicant delayed in filing this application by 5 months and 16 days (169 days) without offering any explanation for this inordinate lapse. This court has consistently held that unexplained delays of this length are unjustifiable. Counsel cited the decision in Edward Njunga Kangether v. Joel Kiema Mutinda & 2 others (2016) eKLR where a delay of five months was deemed excessive and treated as an afterthought, meriting dismissal. It was the similar position in Stephen Gathua Kimani v. Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR. With these cited decisions, it was submitted for the Respondent that the delay of 169 days is unreasonable, revealing a lack of diligence in pursuing this matter.

**Analysis and Determination**

20. Under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

21. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

22. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018* John M. Mativo Judge culled out the following principles from a number of authorities: -

> " i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
>
> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
>
> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
>
> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

23. The supreme court of Uganda in Edison Kanyabwera v Pastori Tumwebaze , provided for what constitutes an error apparent on the face of the record, (2005) UGSC 1it stated as follows;

> " It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, ie an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."

24. Let me address the procedural objection first. While it is correct that the formal order was not annexed, this court must be guided by Article 159(2)(d) of *the Constitution* which mandates that justice shall be administered without undue regard to procedural technicalities. The judgment sought to be reviewed is well within the court's knowledge and forms part of its own record. Therefore, while the better practice would have been to annex the order, this omission is not fatal in the circumstances.

25. The Respondent in this matter has delved into various issues regarding the exercise of review jurisdiction by this court in reference to the impugned judgment as canvassed by the Applicant. Some of the key features underpinned in the Respondent's objection for the court to revisit the impugned judgment revolve around the doctrine of Res judicata under section 7 of the *Civil Procedure Act* on

the issue of ownership of the offending motor vehicle registration No. KDH 200211486. Great weight on appeal was given by this appellate court against the judgment of the trial court as to who was the registered owner of the motor vehicle to bring into perspective the question of vicarious liability. It is true from the record the trial court of the first instance determined this issue by making the following findings as deduced from the credibility and demeanor of witnesses, who gave evidence on oath and thereafter subjected to cross examination: "The Claimant also led evidence confirming that motor vehicle KDH 2002011486 was also at the time of the accident registered in the name of Interpel Investments who were the insureds at the time of the accident. This was also confirmed by the Respondent's witness in cross examination."

26. A consideration of this aspect when measured with the findings of this court in the impugned judgment on primary facts deposed by the witnesses especially when the trial court findings is based on the credibility or bearing of a witness and subsequently formed an opinion drawing a proper inference from it going by the principles in Peters v. Sunday Post [1958] E.A. 424 and p. 429 E Sir Kenneth O'Connor P, those questions of facts are undoubtedly dependent upon the appreciation of the oral evidence adduced in the case. It is trite law that in such cases, the appellate court was required to bear in mind that it has not the advantage which the trial court had in having the witnesses before her and of observing the manner in which he adduced that evidence in court. The rule of evidence and procedure is that when there is a conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial court's notice or there is sufficient balance of evidence to displace that finding by the trial court, the appellate court should not interfere with the findings of that court on a question of facts.

27. The area in which the question of review lies in the present case is the fact of perceptive evidence as it relates to ownership of the subject motor vehicles. Having considered the evidence, this court moved to introduce the role of Nation Transport and Safety Authority (NTSA) which is a statutory body domiciled in Kenya mandated with the registration of locally owned motor vehicles and not the other way round as it was the case for the offending motor vehicle which was purely on transit to the neighboring country of Uganda. I am unable to accept the said submissions by the Respondent expressing that if there is a procedural irregularity on the findings as to the ownership of motor vehicle even if accrued unknowingly or unfortunately that could not be encouraged as bringing into question the impugned judgment of this court. I have given my thoughtful consideration in the matter by the taking into account the entire conspectus of the case to the conclusions arrived at on the point laid down as to the registered owner of the offending motor vehicle during the occurrence of the accident. Taking care of the earlier observations by giving my view made on this issue by giving prominence to the instruments of registration like a logbook in that context such evidence was not applicable for the vehicle was not meant for the local market or jurisdiction. It is important to mention that errors of facts and law in this writ of review cannot be left to stand based on the arguments advanced by the Respondent that the issue is res judicata under Section 7 of the *Civil Procedure Act*. The arguments of the Respondent supporting the claim to strike out the review application by the applicant cannot be allowed to see the light of day given the other highlights of the evidence adduced before the trial court. The doctrine of Res Judicata is to protect courts from having to adjudicate more than ones on issues arising from the same cause of action. At this point, in my deliberations of this review application, I consider it befitting to state that the issue of NTSA and the search certificate for the subject motor vehicle in this appeal and review jurisdiction, was a piece of evidence not in the evidence but a new perspective by this court in the impugned judgment. So in short, the cause of action and liability ought to have been confined whether the evidence advanced by both parties placed the offending motor vehicle KDH 200211486 at the scene of the accident. Having examined all the evidence before me

as to what matters constituted the prior claim in terms of the tort of negligence and the claim being pursued by the Claimant (now herein the Respondent) against the background of the law on the cause of action, I am minded to state that Res judicata does not apply to the circumstances of the case. It is my considered view that the appeal process which underwent the full cycle of litigation and the findings made does not necessarily render misapprehension of issues of facts and law res judicata.

28. The material question instead would be whether the Respondent's claim in the current proceedings is seeking to defeat the end of justice that was determined against it in the earlier proceedings by relying on the wrong finding that the motor vehicle registration No. KDH 200211486 certificate of search from NTSA would have been a necessary pre-requisite documentary evidence for recovery of damages to be granted by the trial court to the applicant. It is settled, first, that the admission of a fact fundamental to the decision cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact. In the litigation history of this case, weight must be given to the unchallenged documentary evidence of a police abstract dated 26 August, 2022 with the following particulars and content as recorded by the officer in charge Ainabkoi Police station. The specifics of it include: that an accident occurred on 19.12.2019 at around 4:30 AM involving motor vehicle KDH 200211486 and KCQ 732M. Prima facie evidence indicates that the name and address of the owner of the motor vehicle was Interpel investments and as at the time, it was insured by Trident insurance company with the policy no. A0/080/1/120835/2019 commencement date being 18th December, 2019 and an expiry period of 31st December, 2019.

29. It is instructive to note that the Respondent in its defence placed reliance on the following documents:

    a. Gate pass dated 18th December, 2019

    b. Proforma invoice dated 17th December, 2019.

    c. Receipt dated 16th December, 2019

    d. Invoice dated 16th December, 2019

    e. Bill of lading

    f. Release/delivery order dated 13th December, 2019

    g. Import declaration form

    h. Authority to testify from the defendant.

30. To go even further, I have taken the liberty to analyze the documentary evidence within the four corners of their respective fundamental evidential material. It is not in dispute that the Respondent company was involved in the importation and clearance of the subject motor vehicle as supported by the pro-forma invoice dated 5th December, 2019. This function was performed on behalf of the respective importer Sadat Zahid Investment LTD (UG). Similarly, it is a fact that the motor vehicle by dint of a release delivery order dated 13th December, 2019 was destined for Uganda in favor of Sadat Zaid Investments. In essence, prima facie Interpel the Respondent to the application and Appellant in the main appeal was ceased of any possessory or beneficial rights. As at the time of the accident, it was under the physical control of the Consignee, Sadat Zahid Investment LTD. Having taken into account the various perspectives expressed on the subject matter by the witnesses for the Claimant and Respondent in the primary suit and thereafter on appeal between the Appellant and Respondent, any driver, servant employee tasked with the duties of delivering the vehicle to Uganda could only have been under the directions and instructions of the importer positively identified in the Bill of Lading

and other collateral documents as Sadat Zahid Investment. This accident occurred in Ainabkoi many Kilometers from the registered offices of the Respondent.

31. For the claim lodged by the Applicant and Respondent in the main appeal which is the root cause of this review application, he ought to have satisfied the doctrine of vicarious liability. The learned author Flemming on the Law of Torts 9th Edn, 1998 (Reprint) 409-410 defined this doctrine as following

> " Vicarious liability is a legal responsibility imposed on an employer although he is himself free from blame, for a tort committed by his employee in the course of his employment. Flemming observed that this formula represented a compromise between two conflicting policies. On the one hand, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant. On the other hand, a hesitation to foist any undue burden on business enterprise. The expression vicarious liability signifies the liability which A may incur to see for damages caused to see by the negligence or other tort of B. it is not necessary that A shall have participated in any way in commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship. The commonest instance in modern law is that liability of a master for the thoughts of his servants done in the cause of their employment. The relationship required is the specific one of master and servant and the tort must be referable to that relationship in the sense that it must have been committed by the servant in the course of her employment."

32. On the same subject matter, learned author Salmond on the Law of tort 19th edition (1982) page 510 stated as follows on the definition of an employee:

> " Being any person employed by another to do work for him on the terms that he, the servant is to be subject to the control and directions of his employer in respect of the manner in which his work to be done. It must follow that an employee is who is bound to obey any lawful orders given by the employer as to the manner in which his work shall be done. The employer retains the power of controlling him in his work and may direct not only what he shall do but how he shall do it. Whether the job is assigned daily or by task is of no moment.

33. The facts of this case required of the claimant to adduce evidence to positively place the Respondent to this application and appellant in the main appeal within this well-known passage in Flemming and Salmond on the Law of Torts which has been approved in a myriad of courts and described as the jurisprudential test in this area on the tort of negligence. The learned trial magistrate relied heavily on the police abstract with incomplete investigations as to the blameworthiness and ownership of the motor vehicle. The question of a sticker pasted on the body of a motor vehicle and the transit insurance did not create possession or beneficial interest rights. In tort, the law states that a master is liable for acts which are so connected with acts which he has authorized an employee to perform can be presumed to have taken effect upon release and delivery of the motor vehicle on 13th December, 2019 to Sadat Zahid Investment. In the instant case, the Claimant was injured by the negligent driving of the servant who took physical control and ownership of the motor vehicle upon release by the respondent from their go down on the 13th December, 2019. The driver embarked on a journey using this motor vehicle for the purpose of and means of delivering it to the Republic of Uganda. The servant or driver must have been employed on the due date of 13th December, 2019 and at the time of the accident, he was in control of the entire operations of the motor vehicle. If this approach to the nature of employment was adopted, then the issue of insurance should not have carried the day in considering the question

of vicarious liability on the basis that the importer, Sadat Zahid Investment may have been entrusted by the Respondent on release of the motor vehicle to do all acts as a pertains the delivery of the motor vehicle to Uganda.

34. I stress that there was need to avoid terminological issues and to adopt a broad approach by the trial court to the context of the tortious conduct under the employment. This motor vehicle should not have been released to proceed with the international drive to Uganda without first the driver answering to the tortious liability of his acts of driving the motor vehicle in question. We are told of the driver having been blamed of the accident but one wonders in deciding this question why the investigating officer did not find it fit to prefer a traffic offence of causing death by dangerous driving. One of these steps in this opinion by the investigating officer usefully could have elicited a proper imposition of vicarious liability against the driver or the servant in control of the motor vehicle within the scope of his employment.

35. The law on how to establish negligence in now settled under common law and even in our local jurisprudence through the many decisions which have been determined by the various levels of our legal system. The Learned Authors Clerk and Lindsell on Torts 18th edition concisely set out the requirements which I claimant must prove to establish a defendant's negligence as:

    a. The existence in law of a duty of care situation.

    b. Careless behavior by the defendant;

    c. A causal connection between the defendant's careless conduct and the damage;

    d. Foreseeability that such conduct would have inflicted on the particular claimant the particular damage of which he complains; (once (a) to (d) are satisfied, the defendant is liable in negligence and only then the next two factors arise);

    e. The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible;

    f. The monetary estimate of that extent of damage.

36. In the instant case on the issue of liability the court looks to the facts that there is no evidence on the Claimant's case herein the Respondent of any cogent evidence from the investigating officer who blamed the appellant (the defendant in the primary suit) on any skid marks on the road leading to the point of impact as between the two motor vehicle, subject matter of these proceedings. The investigating officer's evidence which the court accepted as that of a credible witness is of such a characteristic that it even strengthens this court's view that there existed no evidence to prove negligence within the context outlined by the learned authors Clerk and Lindsell on Torts. It is not disputed that there was an accident involving two motor vehicles, one on transit to Kampala Uganda and another within our territorial jurisdiction. This other motor vehicle happened to be carrying the claimants in primary suits being; Eldoret Small Claims Court Civil No. E182 of 2023, E183 of 2022 and E184 of 2022. Therefore, while the extent of the damage to the vehicle in which the Claimants were travelling can be useful in determining the speed of the Appellant's vehicle and breach of duty of care, the court is mindful that the blameworthiness noted in this case as per the investigating officer may not have been the direct effect of the Appellant's vehicle colliding with that other vehicle herein being the vehicle in which the Claimant was travelling.

37. In this case, the appellants to this appeal and defendants in the primary suit was put to his defense at the close of the Claimant's case in which he elected to call his employee who happened not to be a driver, an employee, an agent or a servant of the registered owner of the motor vehicle or an authorized person

who was in control of the motor vehicle during the occurrence of the accident. Having considered all of the evidence presented, it is assumed that the Claimant had produced evidence that the appellant/ defendant was driving the offending motor vehicle, carelessly, recklessly or without proper due care and attention and in the then obtaining circumstances as pleaded in the Plaint, an accident occurred injuring the Claimants who pleaded the tort of negligence seeking an award of damages. Incidentally from the record, that was not the case. It further emerged that specific emphasis was laid on the insurance sticker particulars as captured by the investigating officer in the police abstract without even a copy of the insurance policy documents.

38. This is a case in which the doctrine of Res ipsa loquitor is not applicable in this case. By this doctrine where an accident happens which by its nature is more consistent with it being caused by negligence for which the defendant is responsible than any other causes, the burden of proof shifts to the defendant to explain and to show that the accident occurred without any fault on his/her part

39. My reading of the testimony by the Claimants to the primary suit produced no direct evidence to support the key particulars in point of the tort of negligence to apportion liability for any of the motor vehicles on the road at that particular time. Having made this finding, the Respondent had failed to prove on a balance of probabilities that the appellant/defendant was negligent when a collision occurred on 19th December, 2019.

40. In view of the above, the application for review fails and the impugned judgment the trial court as earlier ordered remain to be set aside with all consequential orders in accordance with law and on its merits.

41. The costs of this application shall be borne by each party.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF DECEMBER 2024**

**.....**

**R. NYAKUNDI**

**JUDGE**

In the Presence of:

Mr. Yunis, Advocate for the Appellant