



REPUBLIC OF KENYA



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**Mulei v Charles & 2 others (Civil Appeal 14 of 2022)
[2023] KEHC 18219 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 14 OF 2022**

**SM GITHINJI, J
MAY 29, 2023**

BETWEEN

GEORGE KIEMA MULEI APPELLANT

AND

JAMES GITONGA CHARLES 1ST RESPONDENT

HERITAGE INVESTMENT LIMITED 2ND RESPONDENT

RIGEM INVESTMENT 3RD RESPONDENT

*(Being an appeal against the judgment delivered on 2nd February 2022 by
Hon. S.K Ngii Principal Magistrate in SRMCC NO. 218 OF 2019- Mariakani)*

JUDGMENT

1. This appeal ensues from the judgment and decree of Hon. S.K Ngii in Mariakani SMCC No 218 of 2019 wherein he entered judgment in favour of the plaintiff for the sum of Kshs 652,000 plus costs and interest and dismissed the plaintiff's suit against the 2nd defendant and the 2nd defendant's claim against the third party.
2. Dissatisfied with the judgment, the appellant preferred an appeal based on the following grounds;
 1. The learned magistrate erred in law and in fact in failing to find the 2nd Respondent vicariously liable for the accident yet she was the registered owner of motor vehicle registration number KBJ 977N.
 2. The learned magistrate erred in law and in fact in failing to find the Third Party vicariously liable for the accident as the insured owner of motor vehicle registration number KBJ 977N.



3. The learned magistrate erred in law and in fact in failing to find the 1st respondent was an authorized driver of the third party as per the evidence of the witness and hence the third party was also vicariously liable for the accident.
 4. The learned magistrate erred in law and in fact in dismissing the plaintiff's suit against the 2nd respondent and third party.
 5. The learned magistrate erred in law and in fact in finding that the search results availed did not prove the 2nd respondent's ownership of motor vehicle registration number KBJ 977N as at the time of the accident yet there was no narration in the NTSA search showing change of ownership from the 2nd respondent to any other owner.
 6. The learned magistrate erred in law and in fact when he disregarded the 2nd respondent evidence in the absence of proof against the 2nd respondent's evidence.
 7. The learned magistrate erred in law and in fact when he awarded the plaintiff Kshs 650,000 general damages a sum which was so inordinately low that it presented a miscarriage of justice.
 8. The learned magistrate erred in law and in fact when he declined to award the plaintiff the cost of special damages yet the same had been pleaded and proved.
 9. The learned magistrate erred in law and in fact when he failed to analyze the evidence on record before making his determination.
 10. The learned magistrate erred in law and in fact when he made an award that was not commensurate to the nature of injuries sustained by the plaintiff.
 11. The learned magistrate erred in law and in fact when he failed to appreciate the authorities cited by both parties.
 12. The learned magistrate erred in law and in fact when in making his award he failed to consider the passage of time and incidence of inflation.
3. The Appellant herein George Kiema Mulei had sued the Respondents James Gitonga Charles, Heritage Investments Limited and Rigem Investment Limited for damages arising out of a road traffic accident that occurred on 24th April 2019 along Mombasa- Nairobi road towards Mariakani.

Evidence at Trial

4. PW}}1 George Kiema the plaintiff adopted his witness statement dated 2/7/2019 as his evidence in chief. He added that following the accident he had sustained injuries on the leg, hip and head. The left leg was fractured and metal implants were used to stabilize the leg. That as a result of the accident he was hospitalized for one month. He produced as PEX 1-11, a bundle of documents as per the list of documents and supplementary list of documents dated 2/7/2019 and 31/10/2019 respectively. He blamed the driver of the motor vehicle that hit him for the accident as he encroached onto his lane.
5. Dw}}1 Patrick Mugai Mburu adopted his witness statement dated 4/12/2020 as his evidence in chief. He added that he was informed of the accident by the driver and his co-driver and he referred them to the police where they recorded their statements. A police abstract was issued to the insurance. He stated that he had bought the car from Heritage Investment Limited and was the owner of the car at the time of the accident and therefore assumed risk for use of the motor vehicle.



Submissions, Analysis and Determination

6. I have perused and understood the contents of the pleadings, judgment, and grounds of appeal, submissions and decisions referred to.
7. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should therefore make due allowance for that. This duty was well stated in *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* [1955], 22 EACA. 270).”

8. The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

9. The discretion of this court to interfere with the determination of the trial court also exercising its discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows:

“I think it is well settled that this court will not interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

10. The issues arising out of the appeal herein are;
 1. Whether the trial court erred in failing to find that the third party was vicariously liable for the accident as the insured owner of motor vehicle registration number No KBJ 977N.
 2. Whether the award of Kshs 650,000 in general damages was inordinately low?



11. In addressing the first issue, I start by considering Section 8 of the [Traffic Act](#). This Section is in the following terms: -

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”

12. In the case [Nancy Ayemba Ngana v Abdi Ali \[2010\]](#) Eklr it was held that: -

“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.

13. 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.

14. Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question...”

15. Further, 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. Section 8 of the [Traffic Act](#) Cap 403 of the Laws of Kenya 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.”

16. In this case, *prima facie*, the 1st defendant was the registered owner of the accident motor vehicle. Nonetheless, the contrary was proved, that the said vehicle had at the material time of the accident been sold and its possession and use delivered to the 2nd defendant.

17. It suffices to state that what the decided cases clearly show was considered in the case [Benard Muia Kilovoo v Kenya Fresh Produce Exporters \[2020\]](#) eKLR and was summarised 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. It follows that the provision of Section 8 of the Traffic Act or the NTSA extract of record is only prima facie evidence and the same is rebuttable. Dw1 told the trial court that he purchased the motor vehicle from the 2nd defendant and admitted that he was in possession and use of the same at the time of the accident and assumed risk as the owner of the motor vehicle. A sale agreement was produced as DEX 1 for the sale of the motor vehicle. The trial court in its judgment on the first paragraph at page 6 stated as follows;

“the claim by the 2nd defendant that it had sold the motor vehicle to a third party on July 31, 2012 vide an agreement of even date which was produced in evidence as D ex 1 was not convincing to me. I say so because there is no evidence that the 2nd defendant was the registered owner of the motor vehicle as at the date of the agreement. There is no evidence of payment of the purchase price by Dw1 who claimed to have bought it on behalf of the third party; Rigem Investment Limited...”

19. In my view and in light of the authorities above, I find that the trial court misdirected itself by holding that the 1st defendant was the owner of the subject motor vehicle. More so, by fact that Dw1 claimed beneficial ownership of the motor vehicle, the trial court ought to have held as much. Dw1 testified that the 1st defendant was his driver from time to time. On the material day of the accident he was driving the said motor vehicle. From the police abstract that was produced as evidence at the trial court, the 1st defendant was faulted for the occurrence of the accident. He did not testify to rebut the same or substantiate contributory negligence. I find that the 1st defendant was 100% liable and the third party was vicariously liable as well.

20. I now turn to the issue of quantum. The trial court awarded Kshs 650,000 in general damages which the Appellant states was inordinately low. On their part, the 3rd Respondent urges the court to review the award downwards to Kshs 400,000/=. I have reviewed the authorities by all the parties before the trial court to acquaint myself with what guided the learned trial magistrate in arriving at the award of Kshs 650,000. Appellate courts have reviewed awards upwards only when they are convinced that the award is inordinately low.

21. From the medical report dated June 21, 2019, the appellant sustained the following injuries; compound (open) fracture left tibia, mid shaft, cut wound on the occipital region, blunt trauma to the left shoulder, bruises on both hands, blunt trauma to the left shoulder, bruises on both hands, bruises on right hip area and bruises and abrasions on the right leg. In addition, the report states that the permanent partial disability suffered is 4%. In determining the award of damages, the court has to rely on recent comparable awards and this was appreciated by the Court of Appeal in Mbaka Nguru and Another vs James George Rakwar NRB CA Civil Appeal No 133 of 1998 [1998] eKLR where it was held that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court



has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

21. In Aloise Mwangi Kahari v Martin Muitya & another [2020] eKLR the plaintiff had sustained compound fracture of right tibia and fibula, bleeding from left lower limb and swollen leg and was awarded Kshs 500,000 as general damages. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR the plaintiff sustained compound fractures of the tibia/fibula bones on the right leg; deep cut wound and tissue damage on the right leg; head injury with cut wound on the nose; blunt chest injury and soft tissue injury on the left lower limb involving the thigh and ankle region. The court set aside the trial court award of Kshs 600,000/- and substituted it with an award of Kshs 400,000/-.
22. I have considered the nature of the injuries sustained by the appellant herein. I have also considered the nature of the injuries in the authorities I have cited above. It is trite that no injuries are similar and assessment of quantum of damages is discretionary. I find that the award of Kshs 650,000 by the trial court was fair and that there is no reason for me to interfere with the same.
23. In sum therefore, judgment is entered in favour of the plaintiff in the following terms;
 1. The 1st defendant is held at 100 % liable whose actions the third party is vicariously liable.
 2. The award in general damages for Kshs 650,000/= is upheld as well as;
 3. Special damages, pleaded and proved of Ksh 2,000/=.Total damages awarded Kshs 652,000/=
24. In the end the appeal partially succeeds and the appellant is awarded half costs of the appeal.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Atieno holding brief for Mr Mbago for the 3rd Respondent
2. Mr Kamau is for the Appellant-absent

Ms Atieno;- I apply for 30 days stay of the Judgment.

Court;- The 30 days' stay is granted.-

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S.M. GITHINJI

JUDGE

29/5/2023

