



**Gichuki v Lalji Ramji Filing Station Limited & another (Civil Appeal  
6 of 2020) [2023] KEHC 20742 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20742 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL 6 OF 2020**

**J WAKIAGA, J  
JULY 27, 2023**

**BETWEEN**

**FRANCIS KARIUKI GICHUKI ..... APPELLANT**

**AND**

**LALJI RAMJI FILING STATION LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MAFUKO INDUSTRIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an amended Plaintiff dated April 29, 2019, the Appellant sued the Respondents in respect of a road traffic accident involving motor vehicle registration number KCB 891 M in which the same was traveling as a loader/Alternative driver on July 19, 2016 along Kenol – Nyeri Road which was negligently driven thereby causing the same to veer off the road hit a stone and rolled and burst in flame thereby occasioning severe injuries to the same.
2. By a defence dated May 28, 2019, the 1<sup>st</sup> Respondent denied being the registered owner of the said motor vehicle at the time and stated that the Appellant was in the said motor vehicle in the course of his employment as the driver which fact he had not disclosed and that the said accident was caused by the Appellants own negligence.
3. The 2<sup>nd</sup> Respondent by a statement of defence dated March 27, 2019 denied being the beneficial owner of the said motor vehicle and that the Appellant was travelling therein as a loader but was the driver thereof with full control and management of the same in the course of his employment as such and attributed the cause of the accident to the Appellants own negligence.
4. By a judgement thereon dated the May 19, 2020, the Court dismissed the Appellants suit with cost on the ground that there was no proof of negligence on the part of the Respondents.



5. Being aggrieved by the said determination, the Appellant filed this Appeal and raised the following grounds of Appeal;
  - a) The trial Court erred in law and fact in holding that the Respondents were not vicariously liable to blame for the said accident in spite of the evidence to that effect thereby occasioning miscarriage of justice.
  - b) The Court erred in not finding the Respondents negligence contrary to the evidence on record.
  - c) The trial Court erred in law and fact by not assessing damages payable had the claim succeeded, thereby occasioning miscarriage of justice.
  - d) The Court applied wrong principles in dismissing the Appellant's case.
  - e) The Court applied wrong principles of law on the doctrine of vicarious liability.
  - f) The Court did not apply its mind to the pleadings and the evidence on record and failed to evaluate the said evidence and submissions as presented by the Appellant.
  - g) The trial Court erred in law and fact by taking into account extraneous and irrelevant consideration thus arriving at an erroneous finding in the judgement.

### Submissions

6. Directions were given on the hearing of the appeal by way of written submissions and on behalf of the Appellant it was submitted that the principles of vicarious liability were set on in the case of *Tabitha Ndubi Kinyua v Francis Mutua Mburu & another* [2014] eKLR to the effect that it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. It was submitted that the Respondents were the registered and beneficial owners of the subject motor vehicle which was being driven by one Charles Kariuki and that there was no evidence that the Appellant was the authorised driver thereof at the material day.
7. It was submitted that the Court failed to analyse the scope of Respondent's liability for the acts of the deceased driver and that the Respondents did not provide the Appellant a safe system of work while carrying fuel which was a highly flammable material. It was contended that the Court erred in applying the doctrine of *volenti non fit injuria* and *ipsa loquitar* in dismissing the Appellant's case. It was submitted that the Appellant as per the evidence on record was to take over from Embu to Meru and at the material time was on the co-driver's seat and that the Investigators evidence was not reliable and that the burden shifted to the Respondents as held in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] e KLR.
8. It was submitted that the trial Court had the duty to assess damages even where the suit failed in support of which the following cases were tendered *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR and *Lei Masaku v Kaplama Builders Ltd* [2014] eKLR. It was therefore contended that an award of Kshs 800,000 would have been an adequate compensation based on *Yunis Noor Mohamed Mangia v The AG* [2004] eKLR where an award of Kshs 120,000 was given in respect of 2<sup>nd</sup> degree burn to the buttocks thighs and feet, *Lilian Otieno v Joseph K Kimani* Kshs 150,000, *Ngala Shedi v Jackson M Nyambu*, Kshs 250,000 and that the Court should take into account the ages of the said cases.
9. It was submitted that it was not disputed that the Respondents were the registered owners or beneficial owners of the subject motor vehicle and that the delivery notes showed that the deceased Charles Kariuki was the authorized driver at the time and that the burden of disapproving the same was with



the Respondents as per *The Commissioner of Transport v TR gobil* [1959] EA 936 where the Court held that it was sufficient to plead that the driver was a servant, the presumption then arises that the defendant is responsible for any negligence on his part.

10. It was contended that the Respondent witness was biased and that had the Appellant caused the accident, as alleged, he would have been charged, it was contended that the Court relied on hearsay evidence and did not address its mind on the pleadings and evidence on record and therefore the Appeal should be allowed.
11. On behalf of the Respondents, it was submitted that this Court did not have jurisdiction as the Appellant was injured in the course of his employment as per the provisions of Sections 16, 23 and 52 of the [work injury Benefits Act](#) as confirmed in [Joseph Muthee Kamau & another v David Mwangi Gichure & another](#) [2013] eKLR to the effect that when a suit is filed in a Court without jurisdiction, it is a nullity as confirmed by the Court of Appeal in [Phoenix of EA Assurance Company Ltd v S. M Thiga t/a Newspaper service](#) [2019] eKLR and the Supreme Court in [Law Society of Kenya v AG](#) [2019] eKLR where the Court all matters must be settled under Section 52 of [WIBA](#) and that parties have no legitimate expectation that their cases would be concluded under the judicial process they had invoked.
12. It was contended that the Appellant claim was fraudulent as he was the driver at the material time and that since the motor vehicle lay on its left side at the time of the accident, the person on that side would not have escaped. It was contended that the Appellant being the driver thereof at the right side was logically capable of escaping and that any negligence attributed to the Respondent was caused by the Appellant. It was contended that there was no nexus between the injuries sustained and negligence on the part of the Respondents as was stated in [Caren Auma Oyugi Okwiriv Emergency Relief Supplies ltd & another](#) [2017] eKLR
13. On general damages it was submitted that the Appellant pleaded that he sustained 2<sup>nd</sup> degree burns on the scalp and face and that an award of damage was not meant to put the plaintiff in a better position than he would have been had he not been injured as was stated in [James Nyabogo Masogo v Kipkebe Ltd](#) [2007] eKLR and further that an award must be reasonable not meant to punish the defendant as *per* [Crown Food ltd v Emily Wangui](#) [2011] eKLR. An award of Kshs 200,000 was proposed based on the cases of [Smokies Bar & Restaurant v Reuben Kieti](#) [2015] eKLR where Kshs 250,000 was awarded and [Eldoret Steel Mills Ltd v George Ochieng Owino](#) [2011] eKLR where Kshs 2000,000 was awarded.
14. On special damages it was submitted that only Kshs550 was pleaded and proved. The Court was urged to dismiss the appeal with cost.

## Proceedings

15. This being a first appeal, the Court is required to re-evaluate and re-assess the evidence tendered before the trial Court to come to its own conclusion thereon as was stated in *Selle v Associated Motor Boat Co Ltd* [1968] EA 123 and restated in [Abok James Odera t/a A. J ABok & Associates v John Patrick Machira t/a Machira & Co Advocates](#) [2013] eKLR.
16. The Appellant testified as PW1 and stated that he was a driver and that he left Nairobi on 19<sup>th</sup> July 2019 with his colleague Charles Karaka whom he was to relive at Embu. At Kakuzi the motor vehicle hit a stone and rolled four time and burst into flame but he managed to get out. He recorded his statement with the police on the same day and that the motor vehicle fell on the driver's side but the final resting place was the left side but confirmed that the door was intact on the left.
17. DW1 Gabriel Kalanda a loss Assessor stated that the motor vehicle was trying not to hit a motor cycle and swerved off the road to the left hand side and overturned and exploded, the co-driver was trapped.



## Analysis and Determination

18. From the pleadings, proceedings and submissions by the parties, the following issues are identified for determination:
  - a) Whether this Court has jurisdiction over this Appeal.
  - b) Whether the trial Court had jurisdiction.
  - c) Whether the Appellant proved its case against the Respondent.
  - d) What order should this Court make.
19. The issue of jurisdiction was raised by the Respondents in their submissions and since jurisdiction is everything, the Court ought to dispose of the same at the first instance as was stated in the now famous *Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* [1989] eKLR and that even if the Respondent admitted jurisdiction, the same does not clothe the Court with jurisdiction as was stated in *Jamal Salim v Yusuf Abdullahi Abdi & Another* [2018] eKLR as the same can be raised at any time of the pleadings.
20. From the pleading, the following issues are not disputed, that the Appellant was in the subject motor vehicle by virtue of his employment as alternative driver / loader according to his testimony and as a driver according to the Respondent and that he was injured in the course of the said employment and therefore the claim is subject to the provisions of WIBA which stipulate how work related claims are to be institute.
21. Having established that the relationship between the Appellant and the Respondent is that of Employee – Employer, it follows that the Appeal arising for the decision of the lower Court should have been filed at the Employment and Labour relations Court and as such this Court has no jurisdiction to hear the appeal herein as Section 12(5) (b) of the *Employment and Labour Relations Court Act* give that Court the power to hear and determine appeals from any other local tribunals. In this I find support in the decision in *Said Mohamed v Diamond Industries Ltd* [2018] eKLR and *Elizabeth Njeri Nderi & Another v Highway Carries Ltd* [2019] eKLR where the Court of Appeal held that the appellate Court in employment matters is the Employment and Labour Relation Court and whereas the Appellant had pleaded that his injuries were caused by negligence, the relationship established by the evidence on record is substantially that which falls within the jurisdiction of that Court.
22. Now that I have found that this Court has no jurisdiction to hear the Appeal it follows that I am not best suited to make determination on the issues raised on the Appeal and by the Respondent on the jurisdiction of the trial Court in view of the provisions of WIBA and having noted that this Appeal was admitted by this Court and has been pending before it for the last two years in view of the provisions of Article 165 of *the Constitution* the best course of action is to transfer the Appeal to the Court with the right jurisdiction to determine the issues raised.
23. In this I find support in the decision of the Court in *Slok Construction Ltd v Erick Odhiambo Odongo* [2022] eKLR where the Court stated and I agree with the same that it would not advance the course of justice to terminate these proceedings and since the disputed facts can be properly dealt with by the ELRC, the order that commands itself that this appeal be undertaken by the Court with jurisdiction to hear the appeal.
24. The file shall therefore be placed by the ELRC court at Nyeri for further directions thereon.
25. And it is ordered.



**DATED SIGNED AND DELIVERED AT MURANGA THIS 27<sup>TH</sup> DAY OF JULY, 2023.**

**J. WAKIAGA**

**JUDGE**

**In the presence of;**

Ms Mwangi for Mr. Magua for Applicant

Mr. Ratemo for Mr. Nyuthe for Respondent

