KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Muiru v John & 4 others (Civil Appeal 731 of 2019)
[2023] KEHC 26480 (KLR) (Civ) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 731 OF 2019

CW MEOLI, J

DECEMBER 15, 2023

BETWEEN

MURAYA JOSHUA MUIRU .... APPELLANT

AND

PETER KAMAU JOHN .... 1ST RESPONDENT

NANCY WANJIKU KAMAU (BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE RUTH NJERI KAMAU) .... 2ND RESPONDENT

MICHAEL OMONDI ONYANGO .... 3RD RESPONDENT

KENNETH WAITHAKA KANYARA .... 4TH RESPONDENT

DENIS ITHUA .... 5TH RESPONDENT

(Being an appeal from the judgment of A.M. Obura (Mrs.) (SPM) delivered on 29th November 2019 in Nairobi Milimani CMCC No. 3955 of 2018))

JUDGMENT

1. This appeal emanates from the judgment delivered on 29.11.2019 in Nairobi Milimani CMCC No. 3955 of 2018 (hereafter the lower court suit). The suit was instituted on 11.05.2012 by Peter Kamau John and Nancy Wanjiku Kamau, the plaintiffs in the lower court suit (hereinafter the 1st & 2nd Respondent), in their capacity as the legal representatives of the estate of the late Ruth Kamau Njeri (hereafter the Deceased), via a plaint that was amended on 08.05.2017. They named Muraya Joshua Muiru, Michael Omondi Onyango, Kenneth Waithaka Kanyara and Dennis Ithayu as defendants (hereafter the Appellant, the 3rd, 4th & 5th Respondents respectively). The 1st and 2nd Respondents' claim was for damages, was founded on negligence and arose from an accident that occurred on 13.05.2009.

2. It was averred that the Appellant was at all material times the registered owner of and the 5th Respondent, either the owner in actual possession and or driver of the motor vehicle registration number KAJ 132G (hereafter the suit motor vehicle) which was at the time being driven by the 3rd Respondent, or the said defendants' authorized driver, agent and or servant. It was further averred that on the material date, the Deceased was lawfully crossing Waiyaki Way when the 3rd Respondent while conducting a road test and or driving the Appellant's and 5th Respondent's motor vehicle after repairing it, so negligently drove, managed and or controlled the suit motor vehicle that it lost control and knocked down the Deceased, occasioning her fatal injuries.

3. The Appellant filed a statement of defence on 11.10.2016 denying the key averments in the plaint and liability. He particularly averred without prejudice to the denials in the statement of defence that on the material date he was neither the owner, nor in control of the suit motor vehicle having sold and handed possession of suit vehicle to the 5th Respondent in the year 2005 after execution of the requisite ownership and transfer documents. It was further averred that any such occurrence of accident as the 1st and 2nd Respondents might prove, was solely caused and or substantially due to negligence on the part of the Deceased.

4. The 3rd, 4th & 5th Respondent were duly served with summons to enter appearance but failed and or neglected to enter appearance or a file defence. Upon the request by the 1st and 2nd Respondents, interlocutory judgment was entered against the 3rd and 4th Respondent on 12.04.2017 and against the 5th Respondent on 18.07.2017.

5. The suit proceeded to hearing during which only the Appellant and the 1st & 2nd Respondent adduced evidence. In its judgment, the trial court found, the 3rd, 4th & 5th Respondent liable on account of the interlocutory judgment entered against them and the Appellant vicariously liable for the negligence of the driver of the suit motor vehicle. The court thereafter awarded damages in favour of the 1st and 2nd Respondent as hereunder: -

   Pain and Suffering – Kshs. 50,000.00/-

   Loss of Expectation of Life - Kshs. 100,000.00/-

   Loss of Dependency - Kshs. 2,625,000.00/-

   Special Damages – Kshs. 46,913.00/-

   Total Kshs.2,821,913.00/-

6. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds; -

   1. That the learned trial Magistrate erred in law and in fact and misdirected herself by finding the 1st Defendant 100% vicariously liable for the accident in the absence of evidence to the effect that the motor vehicle registration number KAJ 132G was either being driven under his request or instruction express or otherwise.

   2. That the learned trial Magistrate erred in law and in fact and misdirected herself by finding the 1st Defendant 100% vicariously liable for the accident in the absence of evidence to the effect that the 2nd Defendant was driving the motor vehicle registration number KAJ 132G in the performance of a duty or task delegated to him by the 1st Defendant.

   3. That the learned trial Magistrate erred in law and in fact and misdirected herself by failing to appreciate that the 1st Defendant had neither an agency relationship nor a master- servant

relationship with the 2nd Defendant but continued to find the 1st Defendant 100% vicariously liable for the accident.

4. That the learned trial Magistrate erred in law and in fact and misdirected herself by failing to appreciate that a certificate of registration of motor vehicle is not proof of absolute ownership but rather a presumption that can be rebutted through production of evidence to the contrary.

5. That the learned trial Magistrate erred in law and in fact and misdirected herself by failing to consider and be guided by the evidence provided by the 1st Defendant rebutting the presumption that he owned Motor Vehicle registration number KAJ 132G.

6. That the learned trial Magistrate erred in law and in fact and misdirected herself by finding that a car sale agreement ought to be witnessed and thereby disregarding the sale of the motor vehicle registration number KAJ 132G to the 4th Defendant.

7. That the learned trial Magistrate erred in law and in fact and misdirected herself by completely disregarding blatant admissions by the Plaintiff in regard to ownership of the Motor vehicle registration number KAJ 132G and the master- servant or agency relationship between the 2nd Defendant and 4th Defendant.

8. That the trial Magistrate erred in law and in fact and misdirected herself by finding that the evidence by the 1st Defendant ought to have been corroborated by that of the 4th Defendant.

9. That the learned trial Magistrate erred in law and in fact and misdirected herself in awarding a grossly exaggerated quantum of damages for pain and suffering whereas the deceased died on the spot.

10. That the learned trial Magistrate erred in law and in fact and misdirected herself in awarding a grossly exaggerated quantum of damages for loss of dependency in complete disregard of the authorities provided for by the 1st Defendant.

11. That the learned trial magistrate erred in law and fact and misdirected herself by failing to consider and be guided by the submissions and authorities provided by the 1st Defendant on the issue of multiplicand applicable in the circumstances.

12. That the learned trial Magistrate erred wholly in disregarding the 1st Defendant's Defence and evidence adduced at the hearing thereof." (sic)

7. The appeal was canvassed by way of written submissions which on the Appellant's part were riveted on both liability and quantum of damages. Counsel anchored his submissions on the of-cited decision in Selle v Associated Motor Boat Co. Ltd concerning the duty of an appellate court on a first appeal. Addressing the issue of liability raised in grounds 1, 2, 3, 4, 5, 6, 7, 8 and 12 of the memorandum of appeal, counsel cited the decisions in Samuel Mukunya Kamunge v John Mwangi Kamaru Nyeri HC Civil Appeal No. 34 of 2002 and Securicor Kenya Limited v Kyumba Holdings Limited [2005] 1 KLR 748 as cited in Nancy Ayiemba Ngina v Abdi [2010] eKLR. To argue that the trial court misdirected itself by finding that the Appellant was vicariously liable on grounds that the purported sale agreement had not been properly executed and witnessed; that there was no proof of consideration in respect of the sale of the suit motor vehicle and the Appellant's failure to call the 5th Respondent to corroborate the asserted sale of the suit motor vehicle.

8. It was further submitted that the trial court disregarded the Appellant's evidence and particularly the 1st Respondent's evidence confirming that the 5th Respondent was sued as the actual owner of the suit motor vehicle. That further there was no evidence that the 3rd Respondent was at the material time

acting as an agent, servant, employee or under the instructions of the Appellant so as to support a finding that he was vicariously liable for his actions. The decision in Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another [2014] eKLR was called to aid in that regard.

9. Concerning quantum of damages, counsel placed reliance on the decisions in Satwidner Singh Bhogal v Satwidner Kaur Benawra & 2 Others [2004] eKLR and Harjeet Singh Pandal v Hellen Aketch Okudho [2018] eKLR to urge the court to disturb the trial court's award for pain and suffering to Kshs. 10,000/- as the Deceased died instantly. On loss of expectation of life, counsel cited Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja) v Kiarie Shoe Stores Limited [2015] eKLR to contend that an award under the said head would lead to double compensation as the beneficiaries would consequently benefit under the *Law Reform Act* and Fatal Accident Act. Hence urged that the award of Kshs. 100,000/- by the trial court ought to be set aside in toto.

10. On lost dependency, it was submitted that the trial court assumed an income of Kshs. 35,000/- per month in respect of the Deceased without any material proof. Counsel contended that given the age of the Deceased and the fact that she had just concluded her studies, the court ought to apply a multiplicand of 20 years, a dependency ratio of ¼ and earnings of Kshs. 30,000/- under the said head. The decisions in Ireri Moses v Peter Mutungi Muthike (suing as the legal administrator of the Estate of the later Mary Njeri Muthike) [2019] eKLR, Satwinder Singh Bhogal (supra) and YH Wholesalers Ltd & Another v Joseph Kimani Kamau & Another [2017] eKLR were called to aid. In summation, the court was urged to allow the appeal as prayed with costs.

11. The 1st and 2nd Respondent naturally defended the trial court's decision. Counsel for the 1st and 2nd Respondent after restating the evidence before the trial court submitted on the twin issues arising out of the Appellant's grounds of appeal. Addressing the issue of ownership of the suit motor vehicle, counsel cited Section 8 of the *Traffic Act* and Section 107(1) & 109 of the *Evidence Act* to submit that the copies of record produced at the trial showed that the Appellant was the registered owner of the suit motor vehicle, raising a rebuttable presumption concerning ownership. He dismissed the Appellant's sale agreement for want of witnessing or execution by the purported purchasers, and pointed out that the transfer form was equally not executed. Asserting in conclusion that the gaps in the Appellant's evidence indicated that no sale of the suit motor vehicle took place on or about the 14.07.2005 as alleged. Moreso, as the Appellant failed to call the 5th Respondent to corroborate the sale of the suit motor vehicle. He was of the view therefore that the Appellant's ownership evidence fell short of the standard of balance of probabilities

12. Concerning damages, counsel reiterated that the Deceased was aged 23 years, had completed her degree in ICT, was in good health and survived by her parents and that her expectation of life was cut short through the accident. His view was that the trial court's award was not so excessive as to warrant interference by this court. In support of the foregoing, counsel relied on Satwinder Singh Bhogal (supra) and Henry Waweru Karanja & Another v Teresiah Nduta Kagiri (suing as the legal representative of the Estate of Francis Wainaina Ng'ang'a) [2017] eKLR. The court was thus urged to dismiss the appeal with costs.

13. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the parties' respective submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account

of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 demeanor of a witness is inconsistent with the evidence in the case generally."

14. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. Upon a review of the memorandum of appeal and submissions by the respective parties it is evident that the appeal turns on the twin issue of liability and quantum of damages.

15. Pertinent to the determination of these issues are the pleadings, which form the basis of the parties' respective cases before the trial court. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

16. The overarching question for determination is whether the trial court's findings on the contested issues were well founded. Here, it may be apposite to quote in extenso the relevant portion of the judgment of the lower court. Upon restating the evidence tendered before it, the trial court proceeded to state as follows concerning liability; -

"I have given due consideration to the evidence on record and written submissions by M/S P. Kiiru Kamau & Co. Advocates on record for the Plaintiffs and M/S Kairu Mbuthia & Kiingati Advocates on record for the 1st Defendant. The issues for determination are 2-fold

1. Liability
2. Quantum

Liability

In light of the interlocutory judgment against the 2nd to 4th Defendants liability as against them is determined at 100 percent. As for the 1st Defendant, the copy of records (P. Exhibit

9(b)) shows that the motor vehicle registration number KAJ 132G was registered in his name as at 21/11/12. The accident occurred on 13th May 2009. I agree with the Plaintiff's that the same agreement dated 14/07/2005 is not witnessed and the transfer documents is incomplete. There was also no proof that money exchanged hands between the 1st and 4th Defendants.

The 1st Defendant did not also call the 4th Defendants to corroborate his testimony. He has also not pleaded that he will seek indemnity from the 4th Defendant in his defence dated 11th October 2016. The Plaintiff's were right in enjoining him in the suit in the circumstance. I find him vicariously liable for the negligence of the driver of motor vehicle registration number KAJ 132G. Liability is determined at 100 percent." (sic)

17. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

" In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary, and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was 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 recognises 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."

18. Hence, the duty of proving the averments contained in the plaint lay squarely on the 1st and 2nd Respondent. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

" [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason

of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

19. The occurrence of the accident on 13.05.2009 is not in dispute. The bone of contention being the ownership of the suit motor vehicle (KAJ 132G) concerning which the Appellant pleaded in his defence that at the time of the accident he was neither the real owner, nor in control having sold it and handed transfer documents to the 5th Respondent herein. During the trial the 1st and 2nd Respondent called three (3) witnesses in support of their case, while the Appellant testified on his own behalf.

20. Evidence relating to the disputed issue of ownership of the suit motor vehicle was tendered through the 1st Respondent testifying as PW2 and a police officer, Cpl George Ratemo Muthangari, who testified as PW1. PW1's evidence was confined to circumstances surrounding the occurrence of the accident as captured in the Occurrence Book (O.B) and the Police Abstract which was produced as PExh.1. James Kinuthia Kamau, the elder brother to the Deceased testified as PW3, primarily regarding events subsequent to the accident. The Appellant testified as DW1.

21. Adopting his written witness statement as his evidence-in-chief, PW2 stated that the Deceased, his last-born daughter, was involved in an accident with the suit motor vehicle and a report made at Muthangari Police Station. He produced the Grant of Letters as PExh.2, his identity card and that of his wife as PExh.3(a)&(b), Letter from the Chief as PExh.4, Copy of Death Certificate as PExh.5, Autopsy Report as PExh.6, Statutory Notice and Demand Letter in respect of suit motor vehicle KAJ 132G as PExh.7(a)&(b), Statutory Notice & Demand Letter for motor vehicle KAZ 324J as PExh.8(a)&(b), (3) Copies of Record as PExh.9, Letter from JKUAT as Pexh.10, Deceased KCSE Certificate as PExh.11, Transcript from JKUAT as PExh.12 and a bundle of receipts in respect of funeral expenses as PExh.13.

22. Under cross-examination PW2 stated that the suit motor vehicle was registered in the Appellant's name and that he was not aware of any sale agreement in its respect. On re-examination he stated that he sued the 5th Respondent as he had later learnt that the vehicle belonged to him and instructed his counsel to conduct a search on the suit motor vehicle. That while the first search on 07.08.2009 revealed that the suit motor vehicle was owned by the Appellant, the subsequent search on 21.11.2012 confirmed the fact.

23. The Appellant testifying as DW1 equally adopted his witness statement dated 02.03.2017 as his evidence-in-chief. He produced as DExh.1 the sale agreement dated 15.07.2005 and as DExh.2 the Kenya Revenue Authority (KRA) Transfer Form in supporting his pleadings on ownership. Under cross-examination, he asserted that DExh.1 was duly executed by him, and the 5th Respondent showed that he sold the suit motor vehicle prior to the accident. That DExh.2 on its part captured their respective details and that he had executed the same to facilitate the eventual transfer of the suit motor vehicle. He asserted that the latter document had no provision for execution by the purchaser and that he had not been aware that the suit motor vehicle was still registered in his name. On re-examination, he asserted that the 5th Respondent recorded a statement in respect of the issue.

24. The occurrence of the accident was not in contention, liability revolving primarily around the question of ownership of the suit motor vehicle. The initial burden of proof on the foregoing rested with the 1st and 2nd Respondent, and the duty of the trial court was to assess whether their evidence was credible and believable, and in the absence of rebuttal by the Appellant, could stand. The trial court having considered the rival evidentiary material found the Appellant liable in respect of the accident on two

accounts. Firstly, that the Appellant was the prima facie owner of the suit motor vehicle by virtue of registration, and consequently that he was vicariously liable for the negligence of the driver of the vehicle. The 5th Respondent was sued as "either the owner in use and in actual possession and or driver" of the suit motor vehicle while the 3rd Respondent was sued as the driver of the suit motor vehicle acting with authority as the agent of the owner at all material times.

25. Section 8 of the *Traffic Act* 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." It is settled that although a copy of record is prima facie proof of ownership, the presumption is rebuttable. The Court of Appeal in Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, while addressing itself to the issue observed that; -

> " It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise.
>
> Section 8 of the Traffic Offences Act 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."
>
> This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of Osapil v. Kaddy [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only prima-facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.
>
> This Court adopted the interpretation above in the case of Securicor Kenya Ltd v. Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O'Kubasu' Deverell JJ.A) and held that;
>
> "Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise."
>
> Also recently, this Court in the case of Joel Muga Opinja v. East Africa Sea Food Ltd [2013] eKLR restated this position as follows:
>
> "We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied."

26. In Jared Magwaro Bundi & Another v Primarosa Flowers Limited [2018] eKLR, the Court of Appeal reviewed previous decisions on the beneficiary ownership of a motor vehicle, before holding the respondent therein liable, based on possessory ownership and usage of the accident vehicle. In reviewing past decisions on the matter, the Court stated inter alia that: -

> " It was therefore held in Muhambi Koja (supra) that section 8 of the *Traffic Act* recognizes registration book or the Registrar's extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner, or a possessory owner. Such an owner

though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.

The position taken by the court in Jael Muga Opija (supra) and Mohamed Koja (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case …"

See also Nancy Ayemba Ngaira v Abdi Ali [2010] eKLR.

27. The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR while discerning the question of legal and evidential burden held inter alia.

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

28. Thus, in this case, the initial onus of proof was on the 1st and 2nd Respondent to demonstrate that the Respondent was as at 13.05.2009 the registered owner of the suit motor vehicle, which they did through production of PExh.1 and PExh.9. The former (police abstract) merely captured the suit motor vehicle's insurer and the driver at the time of the accident, therein stated to be the 3rd Respondent. With respect to PExh. 9 (copies of official record), official searches conducted on 07.08.2009 and 21.11.2012 both revealed that the Appellant was the registered owner of the suit motor vehicle as of 13.05.2009. Hence the 1st and 2nd Respondent discharged their initial burden of proof regarding ownership. However, as earlier noted, the presumption raised by production of the copy of records is rebuttable.

29. This brings us to the Appellant's rebuttal evidence. Right from the pleadings, the Appellant denied ownership of the suit motor vehicle as of the date of the accident, asserting that he had sold the vehicle to the 5th Respondent. He relied on DExh.1 and as DExh.2. The former (sale agreement) was on the face of it duly executed by both the Appellant and 5th Respondent. The latter was the transfer form. The 1st and 2nd Respondents challenged the sale agreement on the basis that it was not witnessed and was not executed by the purported purchaser, and regarding the transfer form pointed out that it was not executed. The trial court accepted this position and further asserted that there was no proof of payment of any monies between the Appellant and 5th Respondent.

30. In the court's view and with respect, attestation is not a mandatory legal requirement for all types of agreements. The law prescribes that certain agreements should be attested, for instance, contracts relating to disposition of an interest in land. See Section 3(3) *Law of Contract Act*. Given the nature of the agreement between the Appellant and 5th Respondent, it was not a mandatory legal requirement that the same be witnessed. In that regard, the court agrees with sentiments expressed by Onguto J. (as he then was) in Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR to the effect that:

> " Generally, as well, attestation is necessary in some but not all agreements. It is not a pre-condition, in my view, to the existence of contractual obligations or relations. It operates as

an assertion that one signed an agreement and is not necessary (unless the statute dictates otherwise) where the execution or signing is not denied."

31. DExh.1 was on the face of it, even without evidence of payment, a valid sale agreement between the Appellant and the 5th Respondent. The Appellant, having duly executed DExh.1, the responsibility fell on the 5th Respondent to transfer the suit motor vehicle into his name. It appears that he did not, because of which as of 21.11.2012 the subsequent search revealed that the suit motor vehicle was still registered in the Appellant's name. However, in the amended plaint, it was averred against the 5th Respondent that he had testified in a criminal case to be the owner of the suit motor vehicle, hence his joinder as owner and driver thereof, introducing a second possible driver of the suit vehicle in addition to the 3rd Respondent. And further doubt on the issue of the vicarious liability of the Appellant.

32. It appears from the foregoing pleading that a traffic charge, as intimated in the police abstract, was indeed mounted against the 3rd Respondent who is stated therein to be the driver of the vehicle at the material time. None of the parties thought it prudent to produce copies of these proceedings at the trial, and on the evidence on record, no connection was established between the Appellant and the 3rd Respondent. Nor was it shown that the 5th Respondent was acting as an agent of the Appellant, if indeed he was the driver of the vehicle as pleaded in the amended plaint. Suffice it that from the police abstract the 3rd Respondent was driving the suit vehicle at the material time,

33. Thus, by their own pleadings, the 1st and 2nd Respondents disclosed uncertainty regarding the ownership of the suit motor vehicle and in whose behalf the 3rd Respondent, or indeed the 5th Respondent, was driving the suit motor vehicle at the material time. In view of the uncertainty, it behoved the 1st and 2nd Respondents, especially in light of the denials mounted by the Appellant, to go beyond the mere copy of records, to demonstrate the Appellant's actual connection with the motor vehicle and its driver at the material time. The issue of vicarious liability against the Appellant depended on these matters.

34. Applying the dicta in Jared Magwaro Bundi (supra) to the facts of this case, the court is of the considered view that the Appellant sufficiently rebutted the evidence tendered by the 1st and 2nd Respondents regarding ownership, by showing that in the material period, he was neither the de facto, beneficial, or possessory owner of the suit motor vehicle. At the same time, it was not demonstrated that the person driving the suit vehicle at the material time, whether the 3rd or 5th Respondent, were acting in the capacity of the Appellant's servants or agents to support an inference of vicarious liability against the Appellant.

35. In that regard, the Court of Appeal in John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR stated regarding vicarious liability that;-

> 14. The main issue that fell for determination by the first appellate court was whether, in the aforesaid circumstances, the appellant was vicariously liable for the negligent acts of the 2nd respondent, the lawful driver of the motor vehicle. Black's Law Dictionary, 9th edition at page 998 defines vicarious liability in the following words:
>
> "Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."
>
> 15. In HCM Anyanzwa & 2 Others v Luigi De Casper & Another [1981] KLR 10, this Court held that "vicarious liability depends not on ownership but on the delegation of tasks or duty." We believe the learned judge misdirected himself when he addressed himself to the issue of legal

ownership of the motor vehicle in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent, who was an employee of the third respondent. It is the third respondent who had supervisory power over his driver and not the appellant. The appellant cannot therefore be held to be vicariously liable.

16. The reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle in a case of this nature, to the total exclusion of employer/employee relationship, would amount to grave injustice to the appellant." (sic)

36. As observed earlier, the 1st and 2nd Respondent failed to establish the necessary nexus between the Appellant and the 3rd Respondent who was driving the suit motor vehicle according to police records, while the evidence of the Appellant appeared to negate the existence of a master/servant or agency relationship between the Appellant and the 5th Respondent. In the court's view, the finding of the trial court that the Appellant was vicariously liable for the actions of the driver of the suit vehicle was erroneous and based on a misapprehension of evidence and the law and cannot stand.

37. The appeal is therefore allowed and trial court's judgment regarding the Appellant's liability is hereby set aside, the court substituting therefor an order dismissing the 1st and 2nd Respondent's case against the Appellant. In these circumstances no useful purpose will be served by delving into consideration the challenge to the quantum of damages. Given the circumstances of the case, the court will direct that the Appellant and the 1st and 2nd Respondents shall bear their own costs in the lower court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant: Ms. Kihenjo h/b for Mr. Kiingati

For the 1st and 2nd Respondents: Ms. Omondi h/b for Mr. Kamau

C/A: Emily