



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 91 OF 2016**

**NICHOLAS KING'OO KITHUKA.....APPELLANT**

**VERSUS**

**JAP QUALITY MOTORS.....1<sup>ST</sup> RESPONDENT**

**F. K WAMBUA.....2<sup>ND</sup> RESPONDENT**

**[Being an appeal from the judgment of the Principal Magistrate's  
court at Makueni before Honourable C.O Nyawiri-Senior Resident**

**Magistrate delivered on the 24<sup>th</sup> August 2016 in Makueni PMCC No.14 of 2013].**

**NICHOLAS KING'OO KITHUKA.....PLAINTIFF**

**VERSUS**

**JAP QUALITY MOTORS.....1<sup>ST</sup> DEFENDANT**

**F.K WAMBUA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The appellant herein sued the Respondents for damages arising from a road traffic accident which was alleged to have occurred on 4<sup>th</sup> October, 2012 when the Appellant was travelling in motor vehicle registration No. KBK 648T along Wote-Makindu Road. As a result of the failure by the 2<sup>nd</sup> Respondent, who was the 2<sup>nd</sup> Defendant to appear, a default interlocutory judgement was entered against it on 4<sup>th</sup> September, 2013. The matter was then set down for hearing.

2. The Appellant herein testified that on the said day he boarded the said vehicle at Wote, Kathonzwani Stage and when they reached Kyunzu there was a tyre burst. Thereafter he was taken to Makueni Hospital for treatment having sustained cuts on his hand, wrist and on his left thigh. Upon reporting the accident, he was given a police abstract and p3 form. He also testified that he carried out a search on the motor vehicle in question and produced a copy of its records. It was his evidence that the vehicle was driven at high speed and before the accident he heard people calling God after which there was a bang. In cross-examination, he stated that he did not know what caused the accident and denied that it was caused by a tyre burst.

3. After his testimony, he called **Dr Kimuyu Judith** who testified on behalf of her colleague who had examined the Appellant and found that the Appellant had sustained mild head injury, blunt injury to the left thigh, soft tissue injuries to the right hand and was treated at Makueni District Hospital.

4. The Respondent did not call any evidence.

5. In his judgement the learned trial magistrate found that from the copy of the register, the vehicle in question was registered in the name of the 1<sup>st</sup> Respondent and that there was no evidence as to who the beneficial owner was. He however found that the name of the person

indicated as the owner of the said vehicle in the police abstract was **F. K. Wambua**, the 2<sup>nd</sup> Respondent herein. He however held that police abstract alone cannot be evidence of ownership and that it was indicated thereon that the accident was pending under investigation and there was no evidence that the 2<sup>nd</sup> Respondent had been charged tried or convicted.

6. The learned trial magistrate further found that it was not pleaded that the accident was caused by the driver of the 1<sup>st</sup> Respondent and that no evidence was led to prove that fact. It was held that the Appellant failed to prove the relationship between the driver of the said vehicle and the 2<sup>nd</sup> defendant for the purposes of vicarious liability. The learned trial magistrate then proceeded to dismiss the suit with no order as to costs.

7. It is submitted in this appeal, the Appellant relied on the case of Nancy Ayemba Ngaira –vs- Abdi Ali [2010] eKLR where it was held that;

**“In judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; 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. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> defendant was one of the owners of the *matatu* in question. The trial Court, therefore, had no legal basis for limiting ownership to 2<sup>nd</sup> defendant whose name was shown on the certificate of registration for the motor vehicle. The correct decision would have been to attach liability not just to 2<sup>nd</sup> defendant, but to both defendants.”**

8. He also cited *Black’s Law Dictionary*, 9<sup>th</sup> Edition which defines a ‘beneficial owner’ as one who enjoys, uses and manages property as of right and can convey it to others; an equitable ownership.

9. In support of his submissions the Appellant further relied on the Court of Appeal’s decision in the case of Muhambi Koja vs. Said Mbwana Abdi [2015] eKLR quoted with approval the case of Nelson Yabesh Bichanga v Mary Omari KSM Civil Appeal No.43 of 2006 (UR) where the Court emphasized that;

**“The evidence availed by the production of other records from the Motor Vehicle department shows that the appellant was the registered owner of the subject vehicle as at the date of the accident. Thus the onus of proving the contrary was on him. He needed to prove that the ownership had actually passed on to the second respondent through a valid contract entered into between him and the second respondent under the provisions of Section 20 of the Sale of Goods Act... This is the reason why the learned Judge rightly decried the absence of any sale agreement which would have established that indeed such a sale did exist notwithstanding that the registered owner still remained the appellant.”**

10. In the Appellant’s submissions, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.

11. It was therefore submitted that the trial court misdirected itself in holding that the police abstract by itself alone was not sufficient evidence of beneficial ownership and the same was sufficient to determine that indeed the 1<sup>st</sup> Defendant indicated thereon in the Police Abstract as the owner was the beneficial owner. According to the Appellant, the onus was upon the 2<sup>nd</sup> Respondent herein to rebut and prove to the contrary the evidence that he was the registered owner since the Appellant had discharged his duty by producing the Copy of Records. In this respect, the Appellant relied on the case of Joel Muga Opija vs. East African Sea Food Limited Civil Appeal No. 309 of 2010 that;

**“It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter in the Thuranira case ... We agree that the best way to prove ownership would be to produce to the Court a document from the 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, its contents cannot be later denied.”** in the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms. The police abstract report which is usually completed after investigations are conducted by the police and which is admissible in evidence by virtue of Section 38 of the Evidence Act, is one such proof.”

12. The Appellant also relied on Samuel Mukunya Kamunge -vs- John Mwangi Kamuru [2005] eKLR where the Court held that:

**“I find that a police Abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264 A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle, and the respondent having offered no evidence to contradict the information on the Police Abstract report, the appellant had established on a balance of probability that the motor vehicle KAH 264H was owned by the respondent.”**

13. According to the Appellant, the Police Abstract was produced as documentary evidence in the Appellant’s possession to establish ownership and the same could not be challenged through oral evidence.

14. The Appellant also cited the decision in Simon Ngure Kirongo (Appealing as the Legal Representative of the Estate of Philisila Nyambura Cyrus Kironjo vs. John Muhia Kanotha [2016] eKLR where it was held that;

**“it is perhaps important first to consider the circumstances under which a court considers a Police Abstract sufficient proof of ownership. The position taken by various courts as conceded by both parties in this appeal is that a Police Abstract when produced as evidence is sufficient proof of ownership save where it is successfully challenged.”**

15. He also relied on the case of **Ibrahim Wandera –vs- P.N. Mashru Ltd. (Ksm C.A. Civil Appeal No. 333 of 2003** (unreported) where the court made the following observations;

**“The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J., proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned judge with respect to him, did not at all make any reference to the police abstract report which the appellant had tendered in evidence. In that document the accident bus is shown as KAJ 968W with Mashiru of P. O. Box 98728 Mombasa as owner. This fact was not challenged...”**

16. According to the Appellant, in civil cases the standard of proof is that of balance of probabilities. When an issue of ownership of a subject matter in a suit arises, a plaintiff or a party alleging it is required by law to prove the fact on a balance of probabilities. This is unlike the position in criminal law where the standard is higher to beyond reasonable doubt. It was therefore submitted that by expecting the Appellant herein to produce some other evidence in addition to the Police Abstract on the beneficial ownership of Motor Vehicle Registration Number KBK 648T where the situation did not demand, the trial court unnecessarily elevated the standard of proof to unnecessarily high levels of proof. He relied on the Court of Appeal decision in **Wellington Nganga Mathiora –vs- Akamba Public Road Services Ltd & Anor [2010]eKLR** where it was held as follows:

**“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even... challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as a proof of ownership in the absence of anything else as proof in civil cases was within the standard of probability and not beyond reasonable doubt as in criminal cases....”**

17. It was submitted that since the 2<sup>nd</sup> Defendant did not call any witness, the allegations contained in the 2<sup>nd</sup> Defendant’s statement of defence were not substantiated and reliance was placed on **Michael Keli Ngui alias Michael Keli v Hassanali Shabir Hussein Azizali & another [2020] eKLR**

18. Based on the foregoing, the Court was urged to allow this appeal with costs.

#### **Determination**

19. I have considered the foregoing as well as the submissions on record. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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.”**

20. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

21. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate**

court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

22. It was therefore held by the Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

23. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellant proved his case on the balance of probabilities. That the burden of proof was on the appellant to prove their case is not in doubt. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

24. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

25. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

26. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondents even if the appellant chose to remain silent. However, in this case, there was an interlocutory judgement against the 1<sup>st</sup> Respondent who defaulted in entering an appearance and to file his defence. The position as regards liability where an interlocutory judgement has been entered is now clear.

27. In Charles Ogendo Ayieko vs. Enoch Elisha Mwanyumba Mombasa HCCC No. 1035 of 1983, the Court held that:

“Where an ex parte interlocutory judgement has already been entered against the defendant the Court does not have to decide on the question of liability.”

28. The reason for that, according to the Court of Appeal in Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13 is that that:

“Judgement in default of appearance presupposes that there is a cause of action...The judge cannot set aside a Judgement without an application before him, as he has no jurisdiction to do so...Justice though must be done to both parties must be done in accordance with the law...Where judgement is entered in default liability is admitted and the Court must proceed to assess damages.

29. This was echoed in Julius Murungi Murianki vs. Equitorial Services Ltd. & Another Nairobi HCCC No. 2714 of 1988 where it was held that:

“The defendants herein filed no defence and they are deemed to have admitted the facts complained of under Order 6 rule 9(1) of the Civil Procedure Rules since failure to file a defence operates as an admission of all the allegations in the plaint except damages.”

30. That decision was based on the decision in Cleaver-Hume vs. British Tutorial College (Africa) Ltd [1975] EA 323 to the effect that:

“The effect of Order 6 rule 9 (which deems to be admitted pleadings not traversed) is to ensure that the parties are ultimately, but definitely, brought to an issue, and that at the close of the pleadings the issues between the parties are clearly and precisely defined. Thus if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there is no issue between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted and the plaintiff or defendant, as the case may be, may enter, or apply for, judgement in default of pleading...A failure to file a defence must now be regarded, save as to damage, as an admission of each of the allegations in the plaint. This is a far-reaching provision which should reduce in some measure the expense and delays in undefended suits.”

31. What these decisions state is that once a default judgement is entered, the issue of liability is also determined and the only issue for determination is quantum of damages, if any. The Court cannot either ignore the fact of the said judgement or purport to *suo moto* set it aside after hearing evidence on quantum and then proceed to dismiss the suit against the defaulting party as the learned trial magistrate respectfully did. Accordingly, as far as the 1<sup>st</sup> Respondent was concerned liability against him was a foregone conclusion.

32. Regarding the 2<sup>nd</sup> Respondent, the only evidence on record as regards how the accident occurred was given by the Appellant. The case was dismissed on the ground that the Appellant had not proved that the 2<sup>nd</sup> Respondent was the beneficial owner of the said vehicle since, according to the trial court, a police abstract cannot prove ownership. Based on the decisions cited by the Appellant hereinabove, there is now clear that a party may prove ownership of motor vehicle by production of a police abstract if the same is not challenged as was not done in this case.

33. The Learned Trial Magistrate’s decision seems to have been influenced by the fact that the 2<sup>nd</sup> Respondent was not charged and convicted of a traffic offence. As regards the relevancy of criminal or traffic proceedings to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in Calistus Ochien’g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

34. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

“It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim...”

35. In Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998, it was held by the Court of Appeal that:

“Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings as it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is clear and unambiguous...It is not for the Judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness...Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination.”

36. Platt, JA in Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74 opined that:

“It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case...It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party’s conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages.”

37. According to Apaloo, JA (as he then was) in the same case:

“It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court

may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."

38. Accordingly, in Ochieng vs. Ayieko [1985] KLR 494, O'kubasu, J (as he then was) held that:

**"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."**

39. Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 was of the opinion that:

**"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it... Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent...The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."**

40. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. Not much therefore should be read into the fact that the Appellant was charged and acquitted of the traffic offence.

41. It is therefore my view that the Learned Trial Magistrate erred in dismissing the suit against the 1<sup>st</sup> Respondent when there was an interlocutory judgement on record. Further, he erred in finding that the police abstract which was produced by consent could not be proof of ownership beneficial or otherwise.

42. The learned trial magistrate also found that there was no evidence that the motor vehicle in question was being driven by an agent of the 2<sup>nd</sup> Respondent for the purposes of vicarious liability. The Court of Appeal in Mwona Ndoos Vs. Kakuzi Ltd. (1982-1988) 1 KAR 523 held that:

**"But once it is conceded that (i) the servant was doing something in his working hours, (ii) on his employer's premises and (iii) that his act had a close connection with the work which he was employed to do, then the onus (in the sense of evidential burden) shifts to the employer to show that the act was one for which he was not responsible. In other words, it is presumed that the vehicle is being used for his master's purpose if the servant has authority to use it at all."**

43. In this case, having found that the Respondents were, based on the evidence and the law deemed as the registered owners and/or beneficial owners of the suit vehicle, the burden of proof shifted to the Respondents to prove that the same was not being driven for their purpose. In The Commissioner of Transport vs. T R Gohil [1959] EA 936, it was held that:

**"It is sufficient to plead that the driver was a servant of the defendant. The presumption then arises that the defendant is responsible for any negligence on the part of his servant. If the servant was not driving in the course of his employment, this would absolve the defendant from liability but this fact being peculiarly within the knowledge of the defendant and one that it might be very difficult if not impossible for a plaintiff to establish need not be pleaded."**

44. The Appellant having pleaded that the vehicle was being driven by the Respondents' driver, servant and/or agent, that was sufficient plea since vicarious liability is a rule of evidence. on their authority.

45. In this case, the Respondents did not call any evidence to rebut the Appellant's evidence as to how the accident occurred. The consequences of a party failing to adduce evidence were restated in the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 where it was held that:

**"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the**

**Counter-claim must fail”.**

46. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

47. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J** (as he then was) held that:

**“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.**

48. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.**

49. Similarly, in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J.** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

50. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

51. I therefore find that the learned trial magistrate clearly took into account matters which were not relevant and failed to take into account relevant ones and failed to take account of the particular circumstances and probabilities material to the estimate of evidence hence arriving at an incorrect decision in dismissing the suit.

52. In the premises, this appeal succeeds, the decision dismissing the case is hereby set aside. Judgement is hereby entered jointly against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. As for the damages, I award the Appellant Kshs 150,000.00 general damages. The said award will accrue interest at court rates from the date of the judgement in the trial court till payment in full. The Appellant will also have the costs of this appeal as well as in the trial court.

53. Orders accordingly.

**Judgement read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of February, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Mrs Kalinga for Ms Kamau for the Appellant**

**Mr Musya for Janet Jackson for Respondent**

**CA Geoffrey**