



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 580 OF 2007**

**FELICINA MUTHONI WANG'ONDU (suing as administratrix**

**of the estate of**

**JOHN CHARLES WANG'ONDU MUCHIRI) .....PLAINTIFF**

**VERSUS**

**MOSES AMADI .....1<sup>ST</sup> DEFENDANT**

**JOHN MASINDE MAKOMERE .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This is a fatal road accident claim instituted by the plaintiff **Felicina Muthoni Wangondu** ( suing as administratrix of the estate of the deceased **Charles Wangondu Muchiri** ) against **Moses Amadi** and **John Masinde Makomere**, herein after called the defendants.
2. By a plaint dated 8<sup>th</sup> August 2007 the plaintiff claimed that on or about the 5<sup>th</sup> day of January 2007 the 1<sup>st</sup> defendant then driving, managing and or controlling motor vehicle registration No. KAN 039L belonging to the 2<sup>nd</sup> defendant, the said motor vehicle hit the deceased who was a lawful pedestrian along Moi Drive, Umoja Estate, Nairobi thereby fatally injuring the deceased, and that his estate has suffered loss and damage. The suit is brought under the Fatal Accidents Act and the Law Reform Act.
3. The plaintiff instituted this suit on her own behalf and on behalf of the estate and the dependants of the deceased namely **Joe Muchiri –son 23 years and Hilda Wangari Wangondu – 18 years.**
4. Only the 2<sup>nd</sup> defendant entered an appearance and filed defence to this suit. The 1<sup>st</sup> defendant neither entered appearance nor filed any defence and on 23<sup>rd</sup> January 2008 exparte interlocutory judgment was entered against him. The suit was thereafter set down for hearing after the plaintiff and 2<sup>nd</sup> defendant complied with all the pre-trial requirements under Order 11 of the Civil Procedure Rules.
5. Both sides called witnesses to support their rival positions with the plaintiff maintaining that the accident was caused due to the negligence and or recklessness of the 1<sup>st</sup> defendant driver /beneficial owner of the accident motor vehicle whereas the 2<sup>nd</sup> defendant was the registered owner of the accident motor vehicle.
6. The 2<sup>nd</sup> defendant on the other hand denied the plaintiffs claim and in particular stuck to his guns that the motor vehicle in issue did not belong to him at the material time of the accident

and that therefore he could not be held liable for the fatal accident and prayed for dismissal of the plaintiff's suit with costs.

7. **PW1 Abraham Kamau** testified on oath that on 5<sup>th</sup> January 2007 he was at work in Umoja Estate doing his usual grocery business when a Nissan matatu came in high speed from Moi Drive entering through a wrong side of the road and knocked a pedestrian who was walking beside the road. The pedestrian's name was **John Charles Wangonde** who was standing when he was knocked and pushed to a distance and he was thrown off before the matatu stopped. PW1 ran to the scene and saw the person who was knocked. The matatu driver and conductor came out of the vehicle, picked the injured pedestrian, placed him inside the matatu and left said they were taking him to hospital.
8. The witness followed the matatu to confirm to which hospital they were taking the injured pedestrian. He went to Emaus and Victory Hospitals but he never found any report of admission of the injured pedestrian. He therefore went and reported to the Chief's office at Umoja. He later informed the police on patrol at 10.00pm of the occurrence of the accident. He recalled that the accident occurred at about 9.30 pm. The accident car was KAN 039L although he did not know its driver and conductor.
9. PW 1 further testified that the following day, between 11 am and 12.00 noon he saw two youths asking whether he had seen any accident at the scene and he accompanied the two youths to their house where they found their mother whom the witness learnt was his customer and knew her well. She accompanied PW1 to Buruburu Police Station where the PW1 recorded his statement on 6<sup>th</sup> May 2007 on the occurrence of the accident. PW1 did not know the owner of the motor vehicle. She blamed the driver of the accident motor vehicle for driving carelessly and recklessly thereby knocking and fatally wounding the pedestrian who was off the road.
10. In cross examination by Mr Mugo Counsel for the 2nd defendant, PW1 stated that he had been a grocery dealer for many years. He denied knowing the 2nd defendant although he knew many churches in Umoja including Deliverance Church Umoja. He stated that he knew Bishop J.B. Masinde whom he usually saw on television preaching and whom he could recognize if he saw him. He stated that it was not the said Bishop that he saw driving the motor vehicle at the time of the accident. He confirmed visiting Emaus and Victory Hospitals as Mama Lucy Hospital had by then not been established. He stated that he did not visit Metropolitan Hospital. He further stated that he expected the driver to take the injured pedestrian to the nearest hospital for first aid. That if he saw the driver today he would not recognize him. That he recorded the registration number of the accident motor vehicle as there was sufficient light. He stated that there were other people at the scene and that he did not ask the driver as to what hospital they were taking the deceased as they picked him hurriedly.
11. PW1 further stated that he boarded a matatu and followed the offending vehicle and alighted at Umoja 2 near the Chief's office where Emaus and Victory Hospitals are when he saw the offending vehicle turn to Umoja 2 but he did not catch up with it. He denied knowing the deceased nor his two children who went to ask about the accident and whether anybody had witnessed the said accident.
12. The plaintiff testified as PW2. She took oath and stated that she was the widow to the deceased. She adopted her witness statement recorded on 26<sup>th</sup> May 2013 and filed in court on 29th April 2013. PW2 stated that on 5<sup>th</sup> January 2007 her husband never returned home. She tried searching for him but his telephone was off. The following morning she started contacting his friends to know whether they had information on the deceased's whereabouts but none of them was aware. At 8.00a, m. PW2 received a telephone call from Buruburu Police Station. She went there and reported and recorded statements. PW2 was later issued with a police abstract and she paid shs 400. She produced the receipt as P exhibit 2. An autopsy was carried out on the deceased's body. She produced the report of the mortician as P exhibit 3 and a receipt for shs 2600/- P exhibit 4 a and b being the mortician's charges. She also produced receipts showing funeral announcement as P exhibit 5 a, b and c. She produced receipts for the venue for funeral arrangement meetings as P exhibit 6. She also paid shs 4000/- at the mortuary for preservation of the body, P exhibit 7 receipt for coffin at shs 8500, P exhibit 8 transport cost for the hearse at shs 29,000, P exhibit 9a,b,e, produced a burial permit as P exhibit 10 and death certificate P exhibit 11. She also produced a grant in a succession cause from Milimani High Court as P exhibit 12 and receipt P exhibit 13 for shs 22,000/- being legal fees.

13. PW2 testified that she later learnt that Mr Moses Amadi the 1<sup>st</sup> defendant was charged before Makadara Law Courts with failing to keep the driver's employment records Contrary to Section 111 of the Traffic Act. He was convicted and fined shs 2,000/-. She produced copy of charge sheet as P exhibit 14 and proceedings from Makadara Law Courts as P exhibit 15 in Traffic case No. 2305/2007.
14. PW2 testified further that the deceased supported her with her children. She produced their birth certificates as P exhibit 15 a and b. That he was a businessman trading in the firm name of Wamu Commercial Enterprises. She produced the firm's registration certificate as P exhibit 16. That he used to earn about shs 75,000. She produced his bank statement as P exhibit 17 from KCB KICC Branch.
15. PW2 stated that she did not know the owner of the accident motor vehicle but she obtained search certificate/copy of records which she produced as P exhibit 18(a) and receipt for shs 5000 as P exhibit 18(b). She also produced demand letters to the defendants as P exhibit 19(a) and (b). She stated she had suffered loss. The deceased used to pay shs 10,000/- per month in college fees. She produced receipts as P exhibit 20 and that she now struggles to eke a living and cater for her family. She prayed for damages for the loss of her husband and the pain he suffered before his death and special damages.
16. In cross examination by Mr Mugo advocate for the 2<sup>nd</sup> defendant, the plaintiff stated that the traffic court proceedings showed that Moses Amadi was charged in court as the owner of the motor vehicle that had caused the accident and that she did not know the actual owner of the accident motor vehicle until after obtaining copy of records. The plaintiff also stated that she used to live in Inner core but that she now lives in Rongai and that she goes to Jehova's Witness Church. That she knew Deliverance Church Umoja and that she also knew Bishop J.B Masinde but that she was not told that he drove the accident motor vehicle at the material time save that the copy of the records revealed him as the owner of the accident motor vehicle. She denied even meeting the 1<sup>st</sup> defendant personally. In reexamination by Mr Mwenesi, for the plaintiff, PW2 stated that only a search certificate made her aware of the name of JB Masinde being the owner of the accident motor vehicle.
17. At the close of the plaintiff's case both parties advocates agreed to the production of police abstract by consent and it was produced as P exhibit 1.
18. The 2<sup>nd</sup> defendant called one witness DW1 **Jack Mutua Ndalania** who testified that he worked for Deliverance Church Umoja as the administrator under Senior Pastor Bishop John Masinde Makomere who is also one of the trustees of Deliverance Church worldwide and that he had full knowledge of this case.
19. DW1 testified that the motor vehicle registration number KAN 039L was registered in the names of John Masinde Makomere as the Trustee of the church. That the motor vehicle was bought by the church and registered in the trustee's name because at that time the church did not have a Personal Identification Number certificate as required by law. He produced a sale agreement dated 3<sup>rd</sup> May 2016 between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant wherein the vehicle was being sold to the 1<sup>st</sup> defendant and that after the said sale, all transfer documents in favour of the 1<sup>st</sup> defendant were surrendered to him and he even paid for the vehicle vide Electronic Funds Transfer in favour of Deliverance Church Umoja on 11<sup>th</sup> May 2006 through Barclays Bank Queensway Branch in the sum of shs 250,000.
20. DW1 also stated that the vehicle had been valued at shs 250,000 by AA of Kenya on 6<sup>th</sup> April 2006. That on 24<sup>th</sup> April 2007 the second defendant informed the Registrar of Motor Vehicles by letter that the vehicle had been sold to the 1<sup>st</sup> defendant on behalf of Deliverance Church Umoja and that as at 5<sup>th</sup> January 2007 the vehicle had already changed hands in May 2006 in favour of Moses Amadi the 1<sup>st</sup> defendant, when the accident took place hence the 1<sup>st</sup> defendant is the one who was in possession of the accident motor vehicle then, and not the 2<sup>nd</sup> defendant, since the vehicle had been sold to the 1<sup>st</sup> defendant.
21. According to DW1, it was the responsibility of the 1<sup>st</sup> defendant to cause the registration of the motor vehicle into his name as he was given all the title documents relating to the accident motor vehicle, prior to the material accident. DW1 produced nine exhibits as D exhibit 1-9 which included sale of the motor vehicle agreement, letter to Registrar of motor vehicles by the

- 2<sup>nd</sup> defendant, as well as a letter notifying the plaintiff's advocate after receiving demand notice on the accident that the 2<sup>nd</sup> defendant was not the owner of the accident motor vehicle. He also produced transfer form duly signed by the 2<sup>nd</sup> defendant, the latter's national identity card, copy of log book, bank slip where the 1<sup>st</sup> defendant transferred purchase price into the account of the 2<sup>nd</sup> defendant on 11<sup>th</sup> May 2006, PIN for the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant, and AA of Kenya valuation/inspection report.
22. DW1 further testified that the 2<sup>nd</sup> defendant could not be held liable for the accident since he was neither the owner thereof nor a beneficial user or in possession of the accident motor vehicle at the material time vehicle and urged the court to dismiss the plaintiff's suit as against the 2<sup>nd</sup> defendant.
23. On being cross examined by Mr Njoroge counsel for the plaintiff, DW1 stated that the transfer of the motor vehicle was not done and that the letter D exhibit 1 was sent to the Registrar of Motor Vehicles by the 2<sup>nd</sup> defendant after the accident. In further cross examination, the 2<sup>nd</sup> defendant's witness stated that when they wrote the letter dated 24<sup>th</sup> April 2007 they had not received a demand notice from the plaintiff's advocate and were doing do out of diligence.
24. At the close of the respective parties' cases their advocates filed submissions. The plaintiff's submissions were filed on 18<sup>th</sup> December 2015 raising two issues for determination –one on liability of the defendants and the other on quantum of damages payable.
25. On liability, the plaintiff urged the court to find the 1<sup>st</sup> defendant automatically liable for the subject accident since he neither entered appearance nor filed defence as a result of which exparte interlocutory judgment was entered against him.
26. As against the 2<sup>nd</sup> defendant, the plaintiff's counsel submitted that the 2<sup>nd</sup> defendant is liable for the subject accident jointly with the 1<sup>st</sup> defendant for reasons that:
- i. The 2<sup>nd</sup> defendant was the registered owner of the material accident as evidenced by the copy of search from Kenya Revenue Authority. Further, that Section 8 of the Traffic Act is clear that “A person in whose name a vehicle is registered shall, unless the contrary is proven, be deemed to be the owner of the vehicle.”
  - ii. That the sale agreement showing sale of the vehicle to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant before the subject accident does not suffice for purposes of lifting liability against the 2<sup>nd</sup> defendant for reasons that:
    - a. It is not a valid agreement as it has no stamp duty affixed on it contrary to the provisions of Section 19 of the Stamp Duty Act which provides that :
 

“ No instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except (a) in criminal proceedings and (b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”
    - b. According to the plaintiff, the motor vehicle search records and the unstamped sale agreement both indicate that the 2<sup>nd</sup> defendant is the owner of the subject motor vehicle and that bank payment slips show that payment was made to Deliverance Church Umoja and not the 2<sup>nd</sup> respondent. That there was no nexus proven between the 2<sup>nd</sup> defendant and the named church hence the court cannot simply conclude that the 2<sup>nd</sup> defendant received any monies for the alleged sale.
    - c. Thirdly, that the subject motor vehicle was never transferred to the alleged buyer being the 1<sup>st</sup> defendant and that in the absence of proof that the car was actually sold, the court is bound to concur with the plaintiff's argument that both defendants are liable.
    - d. Further, that the letter of 24<sup>th</sup> April 2007 was written by the 2<sup>nd</sup> defendant to Kenya Revenue Authority after the occurrence of the subject accident hence it was done to cover up the actual state of affairs as the letter was not even stamped as received by Kenya Revenue Authority.
27. On the issue of quantum of damages, the plaintiff's counsel submitted that under the Law Reform

Act, the plaintiff was entitled to:

- a. Pain and suffering shs 100,000
- b. Loss of expectation of life shs 150,000

Under Fatal Accident Act

- a. On Loss of dependancy – The plaintiff submitted that the deceased

earned in excess of shs 75,000. He was aged 53 years. He would have continued with his business and settling all family utility bills for another 12 years. His dependancy ratio was proposed at 2/3 hence  $75,000 \times 12 \times 2/3 = 7,200,000$ .

- b. Special damages: shs 83,000
- c. on costs the plaintiff submitted that the defendants should be condemned to bear the costs of the suit jointly and severally.

28. In the end, the plaintiff pleaded for shs 7,533,300 damages together with costs.

29. In his opposing submissions, the 2<sup>nd</sup> defendant's counsel Mr Mugo submitted only on the issue of liability and costs of the suit. On liability attributed to the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant's counsel contended that he had adduced evidence to prove that albeit he was the registered owner of the accident motor vehicle at the material time, but that he had passed that ownership to the benefit of the 1<sup>st</sup> defendant by a sale at a consideration of shs 250,000/- on 11<sup>th</sup> May 2006 and that he did subsequently notify the Registrar of Motor Vehicles on 24<sup>th</sup> April 2007 informing him of change of ownership of the material motor vehicle KAN 039L.

30. Further, that the 2<sup>nd</sup> defendant at the time of accident was not in control or possession of the subject motor vehicle and that having sold it and passed possession to the 1<sup>st</sup> defendant, it is the latter who had the duty to cause the transfer thereof in his name. Reliance was placed on **Joseph Wango Kamau V German Agro Action [2010] e KLR** where the court reproduced Section 8 of the Traffic Act and held that where there was a sale agreement, transfer form of ownership of a motor vehicle to a third party, a signed form and report of transfer to the Registrar of Motor Vehicles, the respondent's ownership of the motor vehicle was divested as at the time of accident and especially where there was no evidence that the motor vehicle was being driven by the respondent's servant or agent or for the respondent's benefit.

31. It was therefore submitted that the facts of the above case being similar to the facts of this case bearing in mind that the 2<sup>nd</sup> defendant wrote to the plaintiff's advocates upon receipt of the demand notice, bringing to their attention the facts of the change of ownership of the motor vehicle, that it was therefore incumbent upon the plaintiff to follow up those leads and leave the second defendant out of the suit. The 2<sup>nd</sup> defendant therefore urged this court to find that this suit cannot stand against him and dismiss it with costs.

### **Determination**

32. I have carefully considered the pleadings in this case, the evidence adduced by both the plaintiff's and 2<sup>nd</sup> defendant's witnesses, the documentary evidence produced as well as the rival submissions filed by the parties' respective advocates and the 2 authorities relied on as well as the statute law cited. In my view, the following issues fall for determination.

- i. Whether the plaintiff has proved, on a balance of probabilities liability against the two defendants and if so
- ii. What is the quantum of damages payable to the plaintiff.
- iii. What orders should this court make.
- iv. Who should bear costs of this suit.

33. On the first issue of liability, this court will make a determination on liability by asking an

- ancillary question of who between the 1<sup>st</sup> and 2<sup>nd</sup> defendant was the owner of the accident motor vehicle at the material time of the accident; before making a finding as to who was to blame for the accident. This is so because liability can only attach to a party who will be found to be the actual owner of the material accident motor vehicle and on whose behalf or benefit the driver, agent or servant was found to have been driving at the material time.
34. The pleadings by the plaintiff are clear that the 1<sup>st</sup> defendant is the beneficial owner of the subject accident motor vehicle, whereas the 2<sup>nd</sup> defendant was described as the registered owner of the subject accident motor vehicle. On the part of the 2<sup>nd</sup> defendant, it was pleaded that albeit he was the registered owner thereof, but that he was not the actual owner of the accident motor vehicle, having sold it and passed possession to the 1<sup>st</sup> defendant by an agreement dated 11<sup>th</sup> May 2006, and receiving consideration by Deliverance Church Umoja for which he was a trustee. The 2<sup>nd</sup> defendant's witness DW1 did testify in court and produced copies of sale agreement in question, logbook, letters to Registrar of Motor Vehicles, evidence of payment/receipt of consideration from the 1<sup>st</sup> respondent, signed transfer form dated 12<sup>th</sup> May 2006, PIN certificates for both buyer and seller and AA of Kenya technical inspection report/valuation report made on 6<sup>th</sup> April 2006.
35. The plaintiff on the other hand maintained that ownership is by registration and that no contrary evidence was adduced by the 2<sup>nd</sup> defendant. Further, that the documents produced by the 2<sup>nd</sup> defendant were not genuine for reasons, among others, that the letter to Kenya Revenue Authority was written after the accident, the payments for sale were made in favour of Deliverance Church Umoja; and that the sale agreement was not sufficient proof of ownership of the accident motor vehicle by the 1<sup>st</sup> defendant and that in any event it had no stamp duty paid.
36. The law regarding ownership of motor vehicles is as was correctly cited by both parties advocates which is Section 8 of the Traffic Act which enacts that:
- “ 8. The person in whose name the motor vehicle is registered shall unless the contrary is proved be deemed to be the owner of the motor vehicle.”***
37. In the instant case, the plaintiff clearly pleaded at her paragraph 4 of the plaint filed on 10<sup>th</sup> August 2007 that the 1<sup>st</sup> defendant was the driver and/or beneficial owner of motor vehicle registration No. KAN 039L whereas the 2<sup>nd</sup> defendant was the registered owner thereof.
38. The police abstract obtained from the police dated 23<sup>rd</sup> January 2007 clearly indicated the owner of the accident motor vehicle to be one Moses Amadi of Box 273 Turbo. The said motor vehicle was insured by Blue Shield Insurance Vide No. 088/001115/06/05/B59.
39. In addition, the plaintiff's own exhibit, which is the court traffic proceedings in Makadara Chief Magistrate's Court in Traffic Case No. 2305 of 2007 is clear that on 6<sup>th</sup> February 2007 the 1<sup>st</sup> defendant Moses Amadi took a plea to the charge of failing to keep written records of the driver employed by him contrary to Section 111 of the Traffic Act. The date on which the offence was stated to have been committed was on 6<sup>th</sup> January 2007 and the motor vehicle for which the driver's records were not kept was KAN 039L. The first defendant, according to the proceedings, pleaded guilty to the charge as above and was convicted on his own plea of guilty and was fined a sum of shs 2,000/- in default, to serve one month imprisonment by Honourable S. Karani, Senior Resident Magistrate.
40. Even with such kind of glaring admitted evidence proving actual ownership of the subject motor vehicle, this court is left wondering why the plaintiff insists on ownership of the motor vehicle in question by registration.
41. Whereas ownership of motor vehicle would not *per se* be proven by the production of particulars contained in the produced police abstract which is a public record, in this case, the contrary was proved that despite the 2<sup>nd</sup> defendant being the registered owner thereof, he was not the actual/beneficial owner of the accident motor vehicle at the material time of accident. If that were not the case, one wonders why the 1<sup>st</sup> defendant would go to the extent of admitting to a traffic charge that he employed a driver to drive the said motor vehicle and that he failed

- to keep the records of that driver thereby breaching section 111 of the Traffic Act.
42. This court does agree that the best way to prove ownership of motor vehicle is to produce to court a document from the Registrar of Motor Vehicles showing who the registered owner is but when there is overwhelming evidence from, not only the police records as per the abstract produced, the court proceedings in a traffic case showing that the owner of the accident motor vehicle was arraigned in court, charged and convicted for a traffic offence of failing to keep records of his driver of the material motor vehicle at the material time of accident as pleaded: it would be absurd to ignore such evidence and insist that the owner thereof is the registered owner and therefore the 2<sup>nd</sup> defendant in this suit.
43. The question of whether the suit motor vehicle was owned by the 2<sup>nd</sup> defendant is therefore settled on. It was pleaded by the 2<sup>nd</sup> defendant and his witness did testify on oath before this court that at the time of the accident he had on behalf of the Deliverance Church of Kenya as its Trustee/registered owner of the material accident motor vehicle sold the vehicle to one Moses Amadi and surrendered the log book and duly executed the transfer form and hence he did not have any interest in the management and/or control thereof. This Court appreciates that **Traffic Act** is an Act of parliament to consolidate the law relating to traffic on the roads; it is not an Act which decides *de facto* or *de jure* ownership of vehicles hence ownership of vehicles passes by sale and delivery and registration books are only evidence of title and property passes in accordance with the **Sale of Goods Act** when the contract of sale is made, as was held in the **Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 Others Civil Appeal No. 46 of 1996 case**.
44. Furthermore, this court finds that the 2<sup>nd</sup> defendant, on a balance of probabilities exonerated himself from being the owner of the accident motor vehicle by producing evidence of sale of the vehicle to the 1<sup>st</sup> defendant on 11<sup>th</sup> May 2006, receiving payments on 12<sup>th</sup> May 2006, parting with its possession by signing of a transfer forms and even writing to the Registrar of Motor Vehicles concerning such change of ownership. Albeit the plaintiff's counsel contended that there was no stamp duty on the sale agreement and that the recipient of the money was Deliverance Church Umoja and not John Masinde Makomere, there is more than sufficient evidence of not only the date as adduced by DW1 but of actual ownership by way of court proceedings and charge sheet produced by the plaintiff herself that Moses Amadi was the owner of the accident motor vehicle. In addition, DW1 clearly explained that the said vehicle had been purchased by Deliverance Church Umoja but registered in the name of John Makomere Masinde one of the Church trustees because the church did not have a PIN at that time. The plaintiff did not deny that the 2<sup>nd</sup> defendant was the Senior Pastor and Bishop at Deliverance Church, Umoja and or that he was one of the Church Trustees thereby creating a nexus between him and the church as well as explaining the reason why the purchase price paid by the 1<sup>st</sup> defendant was receipted in the church bank account and not in the 2<sup>nd</sup> defendant's personal account or name.
45. There was no evidence adduced that would suggest or make this court infer that John Makomere Masinde could have been so dishonest that he falsified documents relating to the accident motor vehicle to suit his defence in this case. To the contrary, the 2<sup>nd</sup> defendant's advocate did at the earliest opportune time notify the plaintiff's advocate, and which notification was before this suit was filed, that the 2<sup>nd</sup> defendant was not the owner of the motor vehicle herein. The 2<sup>nd</sup> defendant's counsel send to the plaintiff's advocate all documents proving that the 2<sup>nd</sup> defendant parted with possession and interest in the motor vehicle in favour of the 1<sup>st</sup> defendant but the plaintiff chose not to hear of it and insisted on filing this suit against the 2<sup>nd</sup> defendant on the basis of registration documents, yet the 2<sup>nd</sup> defendant had by his evidence parted with the original documents to facilitate transfer in favour of the 1<sup>st</sup> defendant.
46. On the issue of stamp duty not being paid on the sale of motor vehicle agreement, I can do no better than approve Makhanda, J (as he then was) in Bishop Henry Paltride vs. James Mugo Mbuthu & Another Nyeri HCCC No. 65 of 2001 where the learned Judge stated:

*“in regard to non-admissibility of unstamped instruments in evidence, although the law under*

section 19(1) of the Stamp Duty Act is that receipts not having a revenue stamp may not be admitted in evidence, it is noteworthy that the defendant's lawyer did not object to their production in evidence during the hearing. He cannot now take the objection in his written submissions."

47. The above situation is what exactly transpired in this case. No objection having been raised before the document was produced, it would be prejudicial to the 2<sup>nd</sup> defendant to allow such an objection at the submissions stage as he was never given an opportunity to be heard on that issue substantially. But even if that were not the case, the case of **DIAMOND TRUST BANK (K) LIMITED VERSUS JAS WINDER SINGH ENTERPRISES (1999) 2 EA 72** decided by the Court of Appeal provides an answer to whole question of failure to comply with section 19 of the Stamp Duty Act. The court was referred to the judgement of Owuor JA (as she then was (now rtd)). At page 79 line 18 from the bottom the learned judge (as she then was) made the following observations:-

*"The learned judge also found that the agreement could not be enforced because they contravened section 31 of the stamp duty Act (chapter 480). In view of my above findings, it suffices to state section 19 (3) 20, 21, and 22 of the same Act (Stamp duty Act) provided relief in a situation where a document or instrument had not been stamped, when it ought to have been stamped. The course open to the trial judge was as in the case of **SUDERJI MANJI LIMITED VERSUS BHALOO (1958) EA 762 at 763** where law J ( as he then was) quoted with approval the holding in Bagahat Ramu Raven Chand (2) (1930) AIRal 854 that:-*

*"Before holding a document in admissible in evidence on the sole ground of it not being properly stamped, the court, ought to give an opportunity to the party providing it to pay the stamp duty and penalty.....the applicant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee, on which he sought to rely in his support of his claim against the second Defendant/Respondent and he must be given the opportunity. Although it was the respondent was relying on the unstamped agreement, there was the offer by the appellant counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19 (3) of the stamp duty Act."*

I accept the above holding and add that indeed, it is not fatal for a party to fail to pay stamp duty on an agreement for sale of a motor vehicle where such duty could be paid at a later stage. I therefore find the plaintiff's arguments devoid of merit and dismiss them as far as the agreement for sale of the subject accident motor vehicle produced by the 2<sup>nd</sup> defendant is concerned.

48. I am in total agreement with the 2<sup>nd</sup> defendant's submission that it was the duty of the plaintiff to prove that the 2<sup>nd</sup> defendant was the actual owner of the accident motor vehicle KAN 039L having pleaded and proved that the 1<sup>st</sup> defendant was its beneficial owner. In **Lukungu V Lubia Uganda Supreme Court case No. 4/2001 LLR No. 162 (SCU)** the court held that:

*".....in order for the appellant to fix liability on the respondent for the negligence of Kawuma it was necessary to show that the driver was using the vehicle at the owner's request, either express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner."*

49. In this case, there was indeed clear and uncontroverted evidence that the 1<sup>st</sup> defendant was the beneficial owner and in possession of the accident motor vehicle at the material time of the accident. Further, the police records and court proceedings too attest to that fact of the 1<sup>st</sup> defendant's ownership of the subject motor vehicle. In **Nancy Ayemba Ngara V Abdi Ali HCCA 107/2008 [2010] e KLR** Ojwang J ( as he then was ) observed 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 this 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 person, may be the defector owners of the motor vehicle, and so the traffic Act had an opening for any evidence in proof of such differing ownership to be given.*

*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 purpose, 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 a police abstract showed on a balance of probabilities, that the 1<sup>st</sup> defendant was one of the owners of the matatu on question....”*

50. Quite recently, the Court of Appeal in **Joel Mugo Apila V East African Sea Food Limited**, CA 309/2010[2013] e KLR further observed that:

*“ In any case in our view, in exhibit in evidence and in this case, the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and onman’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence we think, with respect, that the learned judge in failing to consider in depth the legal position in respect of what was required to prove ownership, erred on a point of law on that aspect. 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.”*

51. The same Court of Appeal in **Securicor Kenya Ltd V Kyumba Holdings Ltd** held that:

*“ We think that the appellant had by the evidence it had led, proved, on a balance of probabilities that it was not the owner of KWJ 816 at the time of the accident occurred since it had sold it. Our holding finds support in the decision of **Osapil V Kaddy** [200] 1 EALR 187 in which it was held by the Court of Appeal of Uganda that a registration card or log book was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be owner thereof unless proved otherwise.”*

52. The above decisions find support in **Morgan V Launchbuy** where the court, in making a finding on the question of vicarious liability held that:

*“ In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was the owner’s servant or at the material time the driver was acting on the owner’s behalf as his agent. To establish agency relationship it is necessary to show that the driver was using the car at the owner’s request, express or implied or on its instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner.”*

53. In the instant case, there is absolutely no evidence that the undisclosed /unknown driver of the accident motor vehicle was driving, managing or controlling the said motor vehicle for the benefit of or on the instructions of the 2<sup>nd</sup> defendant or that he was in employment of the 2<sup>nd</sup> defendant. The admission of the traffic charge of failing to keep records of a driver in his employment by the 1<sup>st</sup> defendant sums it all as was held by the Court of Appeal in the case of **Pritoo V West Nile District Administration** [1968] EA 428 and **Karisa V Solank** [1969] EA 318 that :

***“ Where it is proved that a car has caused damage by negligence, then in the absence of any evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”***

54. Under the provisions of Section 44 of the Evidence Act, a conviction by the traffic court is conclusive evidence of negligence. **Section 47A of the Evidence Act** further provides:

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall ---- be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

55. Although the traffic case subject of this case was not one of negligence, but it related to ownership of the accident motor vehicle in that only the owner of a motor vehicle could be charged with such an offence of failing to keep records and particulars of the driver. The owner thereof having admitted the offence as charged, this court does not find any merit in the plaintiff's insistence that the 2<sup>nd</sup> defendant is jointly liable with the 1<sup>st</sup> defendant.

56. Accordingly, it is my finding that it is not the ownership of a motor vehicle by registration alone that would determine who the actual owner of a motor vehicle is, where there is evidence to the contrary like in the instant case. In the end, I find that the 1<sup>st</sup> defendant as correctly pleaded by the plaintiff, was on the available evidence the beneficial/actual owner and in possession and use of the accident motor vehicle at the material time of the accident involving the deceased.

57. Further, I find that there is absolutely no evidence and or reason why the 2<sup>nd</sup> defendant was enjoined to these proceedings since prior to institution of suit herein, he had supplied to the plaintiff's counsel all the information and documentation regarding ownership of the subject motor vehicle. I therefore have no option but to order as I hereby do, that the name of the 2<sup>nd</sup> defendant John Makomere Masinde aka Bishop J.B Masinde be and is hereby struck out of the suit herein. He was in my view, wrongly joined to the proceedings herein. The claim against him is hereby dismissed.

58. What remains is the cause of action against the 1<sup>st</sup> defendant Moses Amadi whom this court safely finds that he was the beneficial and actual owner of the accident motor vehicle. Despite being served with summons to enter appearance, he neither entered an appearance nor filed a defence to rebut or controvert the evidence adduced by the plaintiff both an liability and quantum.

59. On liability, it is not disputed that indeed there was an accident on the 5<sup>th</sup> day of January 2007 involving the deceased **Charles Wangondu Muchiri** and motor vehicle registration No. KAN 039 L belonging to the 1<sup>st</sup> defendant Moses Amadi ( now sole defendant) and being driven by a driver in the employment of the said defendant , and whose driver's records the defendant failed to keep leading to a traffic charge being preferred against the defendant, that of failing to keep records of a driver in his employment contrary to Section 111 of the Traffic Act.

60. It is also not rebutted that the deceased was lawfully walking along the road Moi on Drive Umoja Estate in Nairobi when he was fatally knocked down by a driver who veered off the road, hit him, stopped, picked the deceased, drove him off to unknown destination only for the deceased's body to be traced at the city mortuary. The driver disappeared. Fortunately the plaintiff, PW1 **Mr Abraham Kamau** who is also named as a witness in the police abstract was at the scene of accident and was able to take the particulars of the accident motor vehicle. PW1 was clear in his uncontroverted evidence that the driver of the accident motor vehicle was careless because he knocked d the deceased pedestrian who was off the road and that the driver was driving in the wrong direction.

61. It is now trite law that motor vehicles which are well driven, well maintained and well managed do not just cause or get involved in accidents. There must be a cause. In this case,

the driver did not testify to tell the court why he veered off the road and followed and knocked the pedestrian fatally. He must have been negligent by driving without due and care or other road users especially the deceased pedestrian who was off the road. In the circumstances, and on a balance of probabilities, I find the plaintiff has proved that the driver of motor vehicle registration No. KAN 039L was grossly negligent in the manner he drove, steered/ managed and or controlled the above motor vehicle registration No. KAN 039L thereby causing it to knock the deceased and occasioning him fatal injuries. Therefore, the driver thereof was 100% liable for the accident. There is evidence from the traffic court proceedings that the driver in question drove the said motor vehicle as the employee of the defendant and was in the course of his employment with the defendant when the accident occurred. Accordingly, the 1<sup>st</sup> defendant is vicariously liable for the negligent acts of his driver, agent and or servant. Both are found and held liable at 100%.

62. On what quantum of damages are payable to the plaintiff, the uncontroverted evidence on record supporting the pleadings is that the suit herein was instituted under the Fatal Accidents Act (Cap 32) Laws of Kenya and the Law Reform Act (Cap 26) Laws of Kenya. It was brought on behalf of the dependants of the deceased under Fatal Accidents Act and on behalf of the estate of the deceased under the Law Reform Act. The dependants are listed as:

1. Felicina Muthoni Wangondu – widow
2. Joe Muchiri Wangondu ( son- 23 years)
3. Hilda Wangari Wangondu ( daughter 18 years)

63. The deceased was said to be a businessman. That he used to earn shs 75,000 per month from his business. The plaintiff produced evidence of registration of his business in the name of Wamu Enterprises along Ronald Ngala Street, Nairobi on plot 209/816. She also produced receipts for rent, school fees payment for his children in colleges; electricity bills; and bank statements from KCB for the Wamu enterprises. The children's birth certificates were also produced as exhibits.

64. Although it was submitted that the deceased earned shs 75,000/- per month, no audited accounts of his business was provided to show his drawings. The bank statements show that he also had loans to service hence at times the accounts were overdrawn. It is however not denied that on the evidence available, the deceased eked a decent leaving from his business. I would in the circumstances peg his monthly income at shs 50,000/- less 30% Government Income Tax. He was aged 53 years. He would have actively continued to do his business upto age 65 as a healthy business man. There was no evidence of his health being an issue. He paid all his family bills, fees for his children and rent. I would take a dependancy ratio of 2/3 of his earnings applied towards his family.

65. Thus,  $50,000 \times 30/100 = 15,000$  tax. Earnings per month = 35,000. Dependancy ratio = 2/3 . Multiplier = 12 years

Dependancy =  $35,000 \times 12 \times 12 \times 2/3 = 3,360,000$  based on the authority of **Peggy Frances Hayes & Others V Chunibhai J Patel & Another CA/173/1956** where the Court of Appeal held that:

*“ The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased i.e. his income less tax and the proportion of his net income which he would have made available for his dependants.”*

66. As it is not easy to get the exact monthly income from the bank records produced, I would apply the principle espoused in **Constance Kanyorota Ngugi V Coast Bus Company Ltd & Another Nairobi HCC 3444/94** where Mulwa J stated that:

*“ This income was based on the invoice he had compiled . He said this figure did not take into account the tax element. The figures given represented the gross income of the deceased per month. I note that it is difficult to get the correct figure of income from the records as they were and doing the best I can do, in the circumstances I would take the deceased's income to be shs 20,000/- per month. The text would be kshs 6,000/-.”*

67. On pain and suffering, there is no evidence as to whether the deceased died on the spot but the death certificate shows he died on the material date of accident on 5<sup>th</sup> January, 2007. The plaintiff proposed shs 100,000/- based on the case of **HCC 487/99 Nancy Wanyonyi Maina v Stephen Thungu & Another**. I would award shs 100,000/- under this head as prayed.

68. Under loss of expectation of life I award a conventional figure of shs 100,000/- based on the decision of **Makano Makonya Monya Uche V Helen Nyangena [2014] e KLR**. Total general damages; shs 3,560,000

69. On Special damages, the law regarding special damages is that they must not only be specifically pleaded but must also be strictly proved. In this case, the plaintiff pleaded particulars of special damages as follows:

- a. 2 police abstract forms shs 400
- b. Certificate of death shs 50.00
- c. Search fees shs 500.00
- d. Legal and filing fees for grant of letters of administration shs 22,150.00
- e. Cost of proceedings in traffic court shs 120.00
- f. Funeral expenses shs 3400.00

Post mortem report shs 100

Post mortem fees shs 2500

Coffin shs 8500

Venue for funeral meetings shs 500

- g. Hearse 29,000

Advertisement 16080

Total shs 83,300.00

70. The plaintiff produced receipts to prove the above specials. I have no reason to deny her the same. I award her shs 83,300.00 special damages. I also award to the plaintiff costs of this suit and interest both on general damages at court rates from date of this judgment until payment in full and on special damages from date of filing suit until payment in full.

**71. Total general damages Kshs 3,560,000; Special Damages: Ksh83,300.00. total damages awarded=3, 643,300**

72. For avoidance of doubts this judgment is as against the 1<sup>st</sup> defendant alone following the striking out from the suit of the 2<sup>nd</sup> defendant and the plaintiff's suit against him having been effectively dismissed.

73. On costs for the 2<sup>nd</sup> defendant although costs follow the event and a successful party should not be denied costs except for good cause as espoused in section 27 of the Civil Procedure Act, Cap 21 Laws of Kenya, in this case, however, I note that the plaintiff relied entirely on the specialized legal advice of her advocates on record, who were in a position to advise her on whether or not to enjoin the 2<sup>nd</sup> defendant to these proceedings. There is no evidence that she insisted that the 2<sup>nd</sup> defendant must be enjoined and or remain a party to these proceedings to the very end. She was in my view, misled by her advocates. I would in the circumstances, have condemned her advocates to pay costs to the 2<sup>nd</sup> defendant since they are officers of the Court who ought to have known the legal position as explicitly set out in the various decisions of this court and of the Court of Appeal which are binding. However, considering that the 2<sup>nd</sup> defendant who is a renowned clergy, being the Bishop of Deliverance Church Umoja and Trustee of the Deliverance Church in Kenya and Internationally, and who has ably exonerated himself from liability in this matter, although the 2<sup>nd</sup> defendant deserved costs of the dismissed suit, in order to promote the spirit of forgiveness and reconciliation in society which I believe the good

Bishop espouses, I order that the 2<sup>nd</sup> defendant Bishop John Makomere Masinde bears his own costs of this suit herein which he has nonetheless vigorously defended with meekness, with the able representation by his counsel Mr Mugo to whom this court is grateful for his reverential conduct in this matter.

74.I further order that before the award under loss of dependancy is recovered and paid out; it must be apportioned between the dependants under the supervision of the court.

Those are the orders of this court.

Dated, signed and delivered in open court at Nairobi this 14<sup>th</sup> day of April 2016.

**R.E. ABURILI**

**JUDGE**

In the presence of:

N/A for the plaintiff

N/A for the 1<sup>st</sup> Defendant

Mr Mugo for the 2<sup>nd</sup> defendant

Henry: Court Assistant