



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 941 of 2003**

**WAMBUI WAIRIA..... APPELLANT**

**VERSUS**

**GEORGE MBURU KIOI & ANOTHER..... RESPONDENT**

**J U D G M E N T**

On 23/11/04, the appellant, Wambui Wairia, moved to this Court by way of an appeal challenging the decision of the Resident Magistrate, Githunguri, delivered on 21/11/03, on the following grounds:

1. That the lower court erred in law by apportioning liability at 50:50 between the 3<sup>rd</sup> Party the appellant and 2<sup>nd</sup> Respondent.
2. The Lower Court erred in law in view of the compelling evidence to the effect that the cow which is alleged to have caused the accident was not her property but that of her now deceased husband who was alive on the date of the accident.
3. The lower court erred in law by finding that the appellant was vicariously liable for the acts of the cow.
4. The lower court erred in law by finding the appellant vicariously liable for the uncontrollable acts of a cow of which she is not the owner.

The appellant prays that the Lower court's judgment be set aside and the appeal allowed with costs against the Respondent.

The FACTS in this case are briefly that: on 23/9/97, at Thakwa, along Githunguri – Limuru Road, the Plaintiff [Respondent] was a lawful passenger in vehicle KXW 949 owned by the Defendant and driven by the 2<sup>nd</sup> Respondent – driver/agent of the 1<sup>st</sup> Respondent when the vehicle was so negligently driven, controlled and managed that it overturned thereby seriously injuring the Plaintiff. Arising from that the Plaintiff sought to hold the owner of the vehicle [1<sup>st</sup> Respondent] vicariously liable for the torts of his driver/agent.

The accident arose when the vehicle hit a cow which suddenly emerged from the adjoining land and unto the road. At the first hearing, the liability was all on the Defendant, owner of the vehicle. But later, the vehicle owner- the Defendant, sought to enjoin, and did enjoin, the alleged owner of the cow as a Co-Defendant, the argument then being that it was the cow which in fact caused the accident and its owner was vicariously liable.

The appellant herein, is actually the wife of the owner of the land from which the cow emerged and into the Road, where upon it was hit by the vehicle and died. Upon hearing the commotion, she came and in the heat of the moment, sat on the dead cow and reeled and cried that her cow was dead. That is apparently the reason she was enjoined as a co-defendant in the case, and the lower court, on the argument that the cow had not been properly taken care of, that it ran into the road and was hit by the Defendant's vehicle. She - the appellant, was alleged to have not only been negligent over the tending of her alleged cow, but she also owned the cow. On the above basis, the lower court apportioned liability on a 50:50 basis between the owner of the vehicle, and the alleged owner of the cow-the appellant herein.

It is that apportionment of liability that sparked this appeal, as per the grounds of appeal herein.

On 26/2/07, by consent, recorded in court, the parties agreed to dispose off the issue of ownership of the cow by written submissions, the understanding being that disposal of the thorny issue of who owned the cow would dispose of whether or not the appellant had been properly enjoined as a co-Defendant in the suit. In her submissions the Appellant went beyond the consent recorded in court. My understanding of what counsel for appellant did in her submissions is that after her submissions showing that the appellant was not the owner of the cow, she went on to show that even if appellant was the owner of the cow, no liability would attach given the current law in Kenya with respect to liability for animals.

My humble view is that that is perfectly within the law, assuming that the appellant was the owner of the cow and therefore properly enjoined as a co-defendant. It is a submission in the alternative.

The gist of the appeal herein, and the submissions by the parties, is the ownership of the cow alleged to have **"caused"** the accident.

The evidence before me is that from the time the appellant was enjoined as a co-defendant in the suit that is the time she denied owning any cow, much less the famous cow that was involved in the accident with the 1<sup>st</sup> Respondent's vehicle. She categorically stated that the cow belonged to her late husband, who died two weeks or so after the incidence.

Upon the allegation that the appellant owned the cow, the burden lay with the Respondent to prove that indeed the cow belonged to her.

In my view, that burden was not discharged by the Respondent. To reiterate, the appellant had not been enjoined as a co-defendant in the initial suit by the victim of the accident, who was a lawful passenger in the Respondent's vehicle. It was after the Defendant who had been found vicariously liable for the acts of his driver, who sought apportionment of the liability with the appellant – whom he alleged owned the cow.

Upon denial of ownership by the appellant and demand for the Respondent to prove his allegations, he submitted that the acts and utterances by the appellant were sufficient to pin her down on the ownership. And the lower court agreed with the Respondents submissions.

One of the submissions by the Respondent in support of his case was that **"there is no title deed to a cow"**. The implication of that defies both common sense and the available law in this country. Apart from the appellant's evidence, and her sons evidence that both the land from which the cow emerged and the cow belonged to his late father, there are many other ways of identifying ownership of different assets. Title Deed is only confined to land. But is only one of the ways of ascertaining an owner of an asset/property. For instance, with vehicles, we use the logbook, not a title deed. Closer home to cattle we have the Branding of Stock Act, Cap. 357, Laws of Kenya

h provides for the registration of brands of stock. There is no evidence before me to prove that the appellant owned the cow. The evidence before me, and the lower court, was that both the cow and the land from which the cow suddenly emerged from and into the road, belonged to somebody else – not the appellant.

I need also to observe that to rely on unsubstantiated claims of ownership of whatever asset can be conducive to anarchy. The courts are also manned by human beings who should understand certain customs and cultural practices, which even though not reduced into law, are an integral part of the lives of the people we serve.

For instance, a married woman, within most of the tribes and communities in Kenya, will call her husband's land and livestock hers, even though the title deed and stock brands are registered in her husband's name. The concept of ownership under those circumstances is not a claim of ownership in the way ownership is understood in the statutes. The claim there is a right of use, not title. A married woman, like the Appellant herein, has every right to use her husband's land and livestock. That however cannot be said to constitute ownership as expressed in a Title Deed or a log book to a vehicle.

With all due respect, that aspect of the cultural norms and practice clearly escaped the attention of the learned Magistrate, leading to failure to consider the actual evidence tendered by the appellant together with her son.

All in all, in the absence of proof that the cow belonged to the appellant, I have reached the finding and conclusion that the appellant was wrongly enjoined as a co-defendant.

The material before me contains no evidence that the appellant has been appointed as an Administrator of the estate of her late husband, the person who should have been sued or enjoined as a co-defendant.

Having held as herein above, the issue of apportionment of liability does not arise, and cannot be relevant where the appellant is shown to have been clearly a wrong party to have been dragged into a suit like the one before me.

All in all, and for the reasons herein above, the appeal herein succeeds and I set aside the Lower Court's judgment, delivered on 21/11/2003.

I further order that costs of this appeal be borne by the 2<sup>nd</sup> Respondent – the owner of the vehicle.

In conclusion, and by way of orbiter, in a proper case, for instance if the appellant had been shown to be the owner of the cow which allegedly "caused" the accident, liability for animals would be analysed. But for now, suffice it to observe that our law is, in the absence of a statute on Animals, the common law of England, by virtue of the provisions Section 3 (1) (c) of the Judicature Act, Cap. 8, Laws of Kenya, (1967) in force on the 12<sup>th</sup> August 1897. Under that law, there is no duty for an owner of land adjoining the highway to maintain a fence or restrain his animals from straying onto the highway. And if the animals stray to the highway and injure a highway user such as a motorist, the owner is not liable unless it is shown that the owner was aware of the animal's vicious propensities.

The classic English case on this is SEARLE V. WALLBANK, [1949] 1 ALL E.R. 12 which concerned a cyclist who was injured by a horse which strayed from a field adjoining the highway, through a defective fence. In the course of the judgment, the House of Lords reviewed the previous decisions, including MASON V. KEELING, an old case decided in 1699, where it had been held that **"If the owner (of land) puts a horse or an ox to grass in his field which is adjoining to the highway and the horse or the ox breaks the hedge and runs into the highway and kicks or gores some passenger, an action will not lie against the owner, unless he had notice that they had done such a thing before."**

At page 21, LORD DU PARCQ said, in part:

**".....where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect.....The argument takes little account of rural conditions. The truth is that at least on rural roads and market towns, users of the highway including cyclists and motorists, must be prepared to meet, from time to time, a stray horse or cow, just as they must expect to encounter a herd of cattle in the care of a driver. An underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it, must show mutual respect and**

**forbearance. The motorist must put up with the farmer's cattle; the farmer must endure the motorist. It is commonly part of a man's legal duty to his neighbour to tolerate, the untoward result of his neighbor's lawful acts. The stray horse (cow) on the road does not seriously interfere with the exercise of a common right and is no more a nuisance in law, merely by reason of its presence there, than the fallen cart-horse or its modern analogue, the lorry which has temporarily broken down."**

It is thus obvious that even if the appellant had been proved to be the owner of the cow, under the facts and circumstances before me, and the applicable law, the appellant would still not be liable. And that, I believe, is the appellant's alternative argument, over and above the issue of the ownership of the cow.

DATED and delivered in Nairobi this 16<sup>th</sup> Day of May, 2007.

**O.K. MUTUNGI**

**JUDGE**