



REPUBLIC OF KENYA



**Mark Holdings Ltd v Ndegwa & 2 others (Civil Appeal E409 of 2024)  
[2025] KEHC 699 (KLR) (Civ) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 699 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E409 OF 2024**

**AM MUTETI, J**

**JANUARY 15, 2025**

**BETWEEN**

**MARK HOLDINGS LTD ..... APPELLANT**

**AND**

**MWAI NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER MUIA MUMO ..... 2<sup>ND</sup> RESPONDENT**

**DOREEN NTINYARI KALUNGE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Small Claims Court at Nairobi delivered by  
Honorable V. K Momanyi on 23rd February 2024 in the Civil Claim No. E5759 of 2023)*

**JUDGMENT**

1. The 2<sup>nd</sup> Respondent filed suit against the appellant seeking damages for injuries suffered in a road traffic accident that occurred on 12/8/2021 involving motorcycle registration number KMFJ 230D along Mombasa road .The facts of the case were pleaded in the statement of claim dated 7/11/2023 filed in Millimani Small Claims Case No. E5759 of 2023
2. The trial court entered judgement in favor of the 1<sup>st</sup> respondent and apportioned liability at 100% against the appellant with further award of Ksh 200,000/= and ksh 7,079/= as general and special damages respectively .
3. Aggrieved , the appellant brings this appeal on GROUNDS THAT:
  1. The court failed to apply the provisions of Section 8 of the [Traffic Act](#)
  2. The court erred in its findings on failure to enter appearance by the third party and inherently attributing liability to the appellant.



4. The appeal was canvassed through written submissions. The appellant framed issues for determination as whether the appellant is the registered owner of the subject motor vehicle, whether the appellant was vicariously liable for the accident and whether service was properly effected on the 3<sup>rd</sup> respondent.
5. The appellant's case is that the motor vehicle was sold to the 3<sup>rd</sup> respondent as per the sale agreement dated 11/11/2020 between the appellant and the 3<sup>rd</sup> party. The 3<sup>rd</sup> respondent also collected the original log book. However, the transfer of ownership was not finalized because the 3<sup>rd</sup> respondent failed to provide her NTSA and TIMS account details.
6. That the appellant provided proof of payment of the transfer and that the court should take judicial notice that it takes the buyer and the seller input to effect transfer of a vehicle on the NTSA portal.
7. That there was conclusive proof that the vehicle was sold to the 3<sup>rd</sup> respondent contrary to the provisions of Section 8 of the [Traffic Act](#).
8. The appellant further relies on the case of Gichira Peter –Vs- Lucy Wambura Ngaku (2021) eKLR to argue that vehicle can change hands but records are not amended.
9. The appellant submits that the 1<sup>st</sup> respondent failed to establish the relationship between the 2<sup>nd</sup> second respondent and the appellant and that the evidence did not prove vicarious liability. Further, there was no evidence to prove that the insurance certificate found on the vehicle belonged to the appellant.
10. On whether the 3<sup>rd</sup> party was served, the appellant submits the 3<sup>rd</sup> party was served through her whatsapp number in line with the provisions of Order 5 rule 22. That the number were provided by the respondent during the sale transaction and an affidavit of service with attached delivery receipt was filed in court. The court was urged to apply the doctrine of adverse inference.
11. The appellant further argues that the respondent was aware of the suit following proof service but she failed to appear and disprove the facts against her.
12. The appellant placed reliance on the case of Kenya Akiba Micro Finance Limited Vs Ezekiel Chebii & 14 others (2012) eKLR where the court held:

“Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.” In the case of Kimotho -vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

and the provisions of Section 112 of the [Evidence Act](#) that states:-

“Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”

13. The 1<sup>st</sup> respondent submitted that the copy of records confirmed that the appellant was the registered owner of the suit motor vehicle. That oral and documentary evidence adduced did not prove the contrary or the exception under Section 8 of the [Traffic Act](#). That there can be beneficial or possessory ownership which is independent of registration and there was no evidence to prove that the 3<sup>rd</sup> party was in actual possession. The 1<sup>st</sup> respondent relied on Securicor Kenya Ltd Vs Kyumba Holding Ltd (2005) eKLR in support of that submission.



14. The 1<sup>st</sup> respondent went further to submit that the appellant submitted a book entry indicating the name of the 3<sup>rd</sup> party and purporting to sell it to her on 11/11/2020.
15. That three years have lapsed since the alledged sale without any transfer and further, that the appellant did not produce a sale agreement.
16. On service on the 3<sup>rd</sup> respondent, the 1<sup>st</sup> respondent submits that the court rightly found that there was no evidence to show that the number and the email used belonged to the 3<sup>rd</sup> respondent. That service was inconsequential since the vehicle was registered in the appellant's name.

### **Analysis And Determination.**

17. This being a first appeal the courts mandate is to analyse and reassess the evidence and to arrive at independent conclusions. This discretion is exercised with further consideration that unlike the trial court, this court did not get the opportunity to see or hear witnesses. See the case of *Kenya Horticultural Exporters Ltd vs. Julius Munguti Maweu Civil Appeal No. 9 of 2004*, where the Court of Appeal held that:

“On a first appeal the Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and bearing in mind that unlike the trial court it neither saw nor heard the witnesses...”

18. Further the courts discretion is governed by principles and should be exercised judiciously. In *Mbogo & Another vs Shah*, [1968] EA, these principles were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

19. In *Khambi and Another vs. Mahithi and Another* [1968] EA 70, the court of appeal also applied this principle and in the appeal court's decision on liability, the court held that:-

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

20. The brief facts of the case are that the claimant was walking along Mombasa road and was about to cross when the 1<sup>st</sup> respondent in control of motorcycle registration number KMFJ 230D make Bajaj hit the claimant causing him to sustain injuries .
21. The claimant listed the particulars of negligence against the respondents and pleaded that the respondent drove the motorcycle recklessly and in high speed, in disregard to the claimant and the busy highway. The claimant further adopted his witness statement during evidence and produced the police abstract in prove of his claim on liability.



22. The appellant disputed ownership of the vehicle on ground that it had sold it to the 3<sup>rd</sup> respondent. The appellant also took out a third party notice and served the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent did not enter appearance in the matter .
23. I have considered the evidence, the grounds of appeal and the rival submissions of parties filed in the appeal. The issues for determination are : whether the appellant was the owner of the subject motor cycle, whether the appellant was vicariously liable and whether 3<sup>rd</sup> respondent was properly served with the 3<sup>rd</sup> party notice.
24. On whether the motorcycle belonged to the appellant at the time of the accident. Section 8 of the Traffic Act provides that the person indicated on the police abstract is the owner of the vehicle.
25. However, where ownership is dispute it is necessary to produce a copy of records to from the registrar of motor vehicle.
26. In the case of Joel Muga Opija –Vs- East African Sea Foods Ltd [2013] eKLR the court of appeal was specific 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.
27. However, where the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.” Also see the case of Wellington Nganga Muthiora –Vs- Akamba Public Road Services Ltd & Another (2010) eKLR and Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki [2016] eKLR
28. In this case, proof of ownership was based on the copy of records produced by the 1<sup>st</sup> respondent.
29. The appellant on the other hand relied on a sale agreement executed on 11/11/2020. The details included on the agreement are that the buyer has agreed to purchase the motorcycle. Particularly that the vendor was indemnified from all liabilities from the date of execution of the agreement while the buyer assumed full responsibility.
30. The appellant also attached a receipt for payment of transfer fees for the subject motorcycle dated 14/11/2023. The appellant cannot have been paying for the transfer of the motorcycle to a non-existent buyer. The evidence of the receipt serves to support the sale agreement to the 3<sup>rd</sup> respondent.
31. The letter dated 14/11/2023 to the plaintiff’s counsel advising that the motorcycle had been sold at consideration and the buyer had picked it on 11/11/2020 also serves as further evidence that the Appellant had lost control of the motor cycle.
32. The burden of proof was on the appellant to demonstrate that the ownership of the vehicle vested on a different party at the time of the accident. The evidence presented on sale was sufficient to discharge that burden.
33. In the case of Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001 Warsame J as he then was ruled that this burden is on a balance of probability and that mere denials in pleading was not sufficient.

“ ....Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation



by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act.”

34. It is also trite that evidence of sale or transfer to a different party is sufficient to prove the real owner of the vehicle. The material before the court was sufficient to invite inference of transfer of ownership notwithstanding the fact that the transfer had not been completed.
35. In the case of Jared Magwaro Bundi & another v Primarosa Flowers Limited (2018) eKLR. The Court of Appeal referred to its earlier decision in Muhambi Koja said v Mbwana Abdi [2015] eKLR, where the court held that

“.. It was therefore held in Muhambi Koja (supra) that Section 8 of the Traffic Act recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered”.
36. As stated above, the court did not find any issue with the sale agreement. I find that the challenge was on the proof of the 3<sup>rd</sup> party’s details for purpose of service was not properly taken and could not be sustained.
37. The appellant had demonstrated on evidence that the appellant dealt in Bajaj motorcycles and that the motorcycle had been purchased from Auto and sold to Doreen the 3<sup>rd</sup> respondent.
38. 1<sup>st</sup> respondent submitted at trial that there was no proof of consideration through mpesa statements although the appellant through the letter dated 14/11/2023 referred to mpesa statements and an ETR receipt. He also urges that the ownership could be beneficial ownership and that the appellant was still the registered owner and thus liable for the accident. The submission was therefore misconceived.
39. I note that the motor cycle had been sold 3 years before the claim and that there had been no dispute between the two parties on the terms of the sale and payment of consideration.
40. The evidence assessed in its totality proves on a balance of probability that the 3<sup>rd</sup> party was the owner of the motorcycle at the time of the accident. It also proves that the appellant was no longer in control or possession of the motor cycle and that all interests had passed to the 3<sup>rd</sup> party. The appellant’s evidence disproved the evidence on the copy of records.
41. Further, the letter dated 14/11/2023 and the sale agreement executed by the 3<sup>rd</sup> party also gave notice to the claimant on the real owner of the motorcycle at the time of the accident. The claimant therefore knew the proper party to pursue.
42. The 2<sup>nd</sup> respondent did not dispute the particulars of negligence and the details of the police abstract finding him to blame. The fact of not denying that he was negligent placed the burden on him as opposed to the appellant.
43. The appellant’s case was that the vehicle had been sold to the 3<sup>rd</sup> respondent as per documents adduced in evidence and the testimony and witness statement of John Thamara Mwangi.
44. On whether the liability attached to the appellant, the doctrine of vicarious liability imposes liability on employers for the wrongful acts of their employees as such an employer will be held liable for torts



committed while an employee is conducting their duties. The underpinning principles were addressed in the English case of *Yewens –Vs- Noakes* {1880} 6 QBD 530 where Bramwell LJ stated that:-

“...a servant is a person who is subject to the command of his master as to the manner in which he shall do his work.”

45. Further, in the case of *Bachu v Wainaina* ([CA No. 14 of 1976 Nakuru Automobile House Ltd v Zavdin CA 63 of 1986](#)), the court of appeal emphasized that :-

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

46. In this case, the particulars of negligence against the appellant had to be specifically pleaded and proved. The evidence did not prove that the 2<sup>nd</sup> respondent was the appellant’s employee servant or agent or that the respondent was acting under instructions of the appellant. The matter becomes even worse when one considers the evidence of sale

47. The claimant had to demonstrate that the negligent acts or omissions of the driver were permitted by the registered owner.

48. The court erred in holding the appellant jointly liable for the accident. In the courts view, the fact that the appellant had not served the 3<sup>rd</sup> party was not sufficient for the court to find the appellant jointly liable. The court did not interrogate whether the appellant was connected to the driver and whether vicarious liability attached.

49. Lastly, on whether the 3<sup>rd</sup> party was served, the provisions of order 5 rule 22B of the Civil Procedure Rules provide as follows;

1. Summons sent by Electronic Mail Service shall be sent to the defendant’s last confirmed and used E-mail address.
2. Service shall be deemed to have been effected, when the sender receives a delivery receipt.
3. Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

50. The appellant was granted leave to take out a 3<sup>rd</sup> party notice on 27/11/2023. The requisite notice was taken out on 1/12/2023 by the firm of Kabugu & Company Advocates, the court mentioned the matter on 6/12/2023 when the appellant indicated that it had served the 3<sup>rd</sup> party on 1/1/2023. The issue of service was not adequately considered by the court.

51. Parties have referred to the affidavit of Dickson Kimeu Mueke said to be filed on 5/12/2023, the 1<sup>st</sup> respondent submitted at the lower court that no mpesa or airtel money messages or screen shots were attached to show that the numbers used belonged to the 3<sup>rd</sup> party .



52. Further that there was no correspondence to prove that the email address belonged to the 3<sup>rd</sup> party. The court agreed with this proposition finding that there was no evidence of service. that decision by the trial court was made in error considering the totality of the facts.
53. Order 5 Rule 22B was introduced through L.N to allow an alternative mode of serve through electronic media , service is effected upon the defendant’s last confirmed email address .
54. Proof of service is through an affidavit of service attaching an electronic mail service delivery receipt. Similarly, service through mobile phone media is through the defendants last known and used telephone number and court process is deemed to be duly served when the sender receives a delivery receipt.
55. Again, that receipt should be attached to the affidavit of service. See the case of Real Time Company Limited v Equity Group Foundation & another [2022] KEHC 15313 (KLR) where the High court held that for the alternate service to be proper, Order 5 Rule 22B of the Civil Procedure rules requires the service to be effected upon the defendant’s last confirmed and used email address . That service shall be deemed to have been effected when the sender receives a delivery receipt to be attached to the affidavit of service of the officer of the court duly authorized to effect service”
56. The affidavit is not on record, however, from the provisions above it is clear that the court’s interpretation of electronic service was erroneous.
57. Further, the appellant’s evidence proved the 3<sup>rd</sup> party’s last known phone numbers in the sale agreement executed by the 3<sup>rd</sup> party produced as evidence
58. The details in the agreement dated and the signature of the 3<sup>rd</sup> party endorsed on the agreement were not disputed at the trial court. Further, there was no dispute that the two were involved in a transaction where contacts and personal information was exchanged.
59. The contacts provided by the 3<sup>rd</sup> respondents are the ones that were utilized by the appellant.
60. The trial court erred in law and in fact in finding that the appellant was liable for the accident, vicarious liability had not been proved.
61. The appellant was not in use possession or control of the vehicle at the time of the accident as per the evidence on record. In the circumstances the appellant was erroneously condemned to pay the 1<sup>st</sup> respondent.
62. Consequently, the appeal succeeds with costs to the appellant. The judgment against the appellant is hereby set aside.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY 2025.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Ms Wairimu for the Appellant

Mutonyi for 1<sup>st</sup> Respondent

