



REPUBLIC OF KENYA



**Ndungu v Ndungu (Civil Appeal E1276 of 2024)  
[2025] KEHC 2025 (KLR) (Civ) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2025 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1276 OF 2024**

**H NAMISI, J**

**FEBRUARY 7, 2025**

**BETWEEN**

**HANNAH GATHONI NDUNGU ..... APPELLANT**

**AND**

**LOISE NJERI NDUNGU ..... RESPONDENT**

*(Being an Appeal arising from the Judgement of the Small Claims Court at Nairobi delivered by Hon. Mochache, Resident Magistrate on the 8 November 2023 in SCCC No. E3062 of 2023)*

**JUDGMENT**

1. This appeal arises out of a suit filed in the Small Claims Court by the Appellant against the Respondent seeking the following orders:
  - i. Judgement in the sum of Kshs 220,108/=;
  - ii. Costs of the claim;
  - iii. Interest at court rates
  - iv. Any other relief as the Honourable Court may deem fit and just to grant.
2. The Appellant's claim arose out of an accident that occurred on 6 October 2021 along State House Road. The Appellant's driver, agent, servant and/or employee was driving motor vehicle registration number KCL 889V, registered to the Appellant when the said motor vehicle was involved in a road traffic accident with motor vehicle registration number KCU 969A, which was driven by the Respondent's agent, servant, driver and/or employee. As a result of the accident, the Appellant's motor vehicle was extensively damaged and the Appellant suffered loss as per the special damages claimed.



3. The Respondent entered appearance and filed a Response to the Statement of Claim, blaming the Appellant for the accident.
4. Parties agreed to proceed with the claim by way of submissions, by dint of section 30 of the [Small Claims Court Act](#).
5. In her submissions, the Appellant noted that the evidence presented by the Respondent regarding the occurrence of the accident did not contradict that of the Appellant. The Appellant contended that the special damages had been specifically pleaded and proved and should be awarded by the court. The Appellant relied on the case of *China Wu Yi Ltd & Anor -vs- Irene Leah Musau* [2022] eKLR.
6. On her part, the Respondent submitted that the existence of a Police Abstract alone, and in the absence of any charges being preferred against the Respondent does not amount to conclusive evidence to blame the Respondent for the accident.
7. The Appellant did not submit on the issue of vicarious liability. The Respondent, on the other hand, submitted that it is trite law that for the vehicle owner to be responsible for the negligence of the agent, that the agent must have been detailed to do a task beneficial to or on behalf of the owner. The Respondent relied on the case of [Nakuru Automobile House Ltd -vs- Nasirddun Ziaudin; Civil Appeal No. 63 of 1986](#).
8. In its judgement, the trial held that there was nothing to prove that the driver of the accident motor vehicle was acting as an agent, employee and/or he was acting for the benefit of the Respondent. Having failed to prove the same, the trial court held that the Respondent was not vicariously liable for the actions of the driver who has not been joined in the proceedings even after the Respondent filed a witness statement stating as much and served the Appellant. The trial court dismissed the suit with costs to the Respondent.
9. The Appellant, being dissatisfied by the judgement, lodged an appeal on the following grounds:
  - i. The Honourable Magistrate misdirected herself in finding that the Appellant failed to prove her case on a balance of probabilities and proceeding to dismiss the claim with costs to the Respondent;
  - ii. The Honourable Magistrate failed to consider the totality of the evidence placed before her proceeding to dismiss the Appellant's claim;
  - iii. The Honourable Magistrate, therefore, erred in law by disregarding and misapprehending the relevant provisions of the Law of [Evidence Act](#) on the burden of proof;
  - iv. The Honourable Magistrate erred in law in shifting the burden of proof of the allegations made by the Respondent on to the Appellant for the same.
  - v. The Honourable Magistrate erred in introducing extraneous matters of evidence which matters grossly misdirected her mind to come to a wrong conclusion;
  - vi. The Honourable Magistrate erred in law in finding that since the Respondent submitted that her motor vehicle was being driven by George Njoroge Ndungu, therefore, the issue of vicarious liability did not arise and by failing to appreciate that the Appellant was not aware of the allegation that the said George Njoroge Ndungu was the driver at all hence the claimant was not obligated to join him to the claim as he was a stranger;
  - vii. The Honourable Magistrate erred in law wrongly failing to appreciate that the Appellant properly sued the registered owner of the motor vehicle subject of the accident at the time of



the accident and that it was for the registered owner to enjoin the person she had lent the motor vehicle to thereby wrongly shifting the burden of proof;

- viii. The Honourable Magistrate gravely erred in law and principle by wrongly applying the doctrine of vicarious liability when determining the claim before her;
  - ix. In view of the circumstances set out herein above, the Honourable Magistrate totally misdirected herself by dismissing the Appellant's claim after failing to consider and appreciate the evidence on record tendered on behalf of the Appellant
10. The appeal was canvassed by way of written submissions.

### **Analysis & Determination**

11. Section 38 of the *Small Claims Court Act* provides as follows:
1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
  2. An appeal from any decision or order referred to in sub section (1) shall be final.
12. In the case of *Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd* [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.
- “This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”
13. Similarly, in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:
- “This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
14. The duty of this Court, in this instance, is similar to that stated herein above, which is essentially on points of law. In the case of *J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:
- “In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.



In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

15. I have considered the Record of Appeal and the submissions by the respective parties. In their submissions, both parties identified the following issues for determination:

- i. Whether the trial court misapplied the standard of proof;
- ii. Whether the trial court misapplied the doctrine of vicarious liability;

16. The issues raised relate to points of law, which fall within the jurisdiction of this court sitting on appeal from the Small Claims Court. I choose to address the issue of vicarious liability first.

17. In the trial court, the Appellant pleaded the doctrine of vicarious liability against the Respondent, who was the registered owner of the motor vehicle KCU 969A. In the statements presented by the Respondent, the Respondent identified the driver as one George Njoroge Ndungu, who was neither her agent or employee. The said driver merely borrowed the Respondent's and used the same to run his personal errands. A statement filed by George Njoroge Ndungu confirmed the same, indicating that at the time of the accident, there was no employer-agent relationship between the Respondent and the driver.

18. The Appellant submitted that the law dictates that owners of motor vehicles are vicariously liable for the negligence of their agents, servants, employees or any other persons whom they knowingly allow to drive their motor vehicles. The Appellant relied on the case of *Ali Lali Khalifa & 8 Others -vs- Pollman's Tours and Safaris Ltd, Diamond Trust Bank (K) Ltd, Salim Khalid Said* [2003] eKLR which provides that liability can attach to the owner of motor vehicle vicariously. Further reliance was placed on the case of *Ormrod -vs- Crosville Motor Services Ltd* [1954] 2 All ER 753 where it was held:

"The law puts a special responsibility on the owner of a vehicle who allows it to on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver."

19. In response thereto, the Respondent contended that vicarious liability is a principle that holds one person responsible for the tortious actions of another person based off on their relationship. The Respondent relied on several authorities including the case of *Kenya Bus Services Ltd -vs- Dina Kawira Humphrey* [2003] eKLR, [\*Consolidated Bank of Kenya Ltd -vs- Mwangi & Anor \(Civil Appeal E056 of 2021\)\*](#).

20. In addressing the issue of vicarious liability, I reviewed the UK case of *Barclays Bank plc v Various Claimants*, [2020] UKSC 13 Supreme Court of the United Kingdom (Lady Hale, Lord Reed, Lord Kerr, Lord Hodge, Lord Lloyd-Jones, SCJJ) April 1, 2020, where the Court had this to say on vicarious liability:

"Vicarious liability, the normative foundation of which rested on the theory that it was fair, just and reasonable to hold a defendant liable for the acts of the tortfeasor on the ground that the tortfeasor was in fact engaged in the defendant's enterprise, could not possibly be extended to tortious acts committed by an independent contractor, who, by definition, was



engaged in his own enterprise. There was simply nothing fair, just and reasonable about imposing secondary liability on a defendant in such a situation.”

21. Whereas the Appellant relied on the Ormrod case (*supra*), she seems to have cited only part of the holding therein. I reproduce the same herein below, which part is relevant to this case.

“The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner’s business or for the owner’s purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.” (emphasis added)

22. In the case *Khayigila v Gigi & Co Ltd & another* [1987] KECA 53 (KLR), the Court of Appeal, in determining an appeal on the sole issue of vicarious liability, opined thus:

“For the vehicle owner to be responsible for the negligence of the agent, that agent must have been detailed to do a task beneficial to or on behalf of the owner. The recent decision of this court in [\*Nakuru Automobile House Ltd v Nasiruddin Ziaudin Civil Appeal No 63 of 1986\*](#) based its decision on *Morgan v Launchbury and Others* [1972] 2 All ER 606 and held that the owner of the car was not vicariously liable for the negligence of the driver of the car who had borrowed it to enjoy the rally. The driver was not at the time of the accident driving the vehicle as a servant or an agent of the owner. In the present appeal, the second respondent was not driving the vehicle as a servant or agent of the first respondent. The second respondent was not driving for the benefit of the first respondent nor did he have a task to do for and on behalf of the first respondent. He was driving the car for his own benefit and interest. I would also dismiss this appeal.”

23. I doubt there much more I could add to the views rendered in the above cited authorities. Based on the foregoing, it is clear that the Respondent could not have been vicariously liable for the acts or omissions of the driver, who was not an agent, employee or servant of the Respondent, nor was he acting for the benefit of the Respondent.
24. Having answered the question on the vicarious liability of the Respondent in the negative, it goes without saying that the response to the question- whether the trial court misapplied the standard of proof – will also be in the negative.
25. As a result, the appeal does not succeed. The same is dismissed with costs to the Respondent assessed at Kshs 40,000/=.

**DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF FEBRUARY 2025.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

..Ms. Mbirwe..... for the Appellant

,Wairegi ..... for the Respondent

Libertine Achieng .....Court Assistant

