



REPUBLIC OF KENYA



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**Clean View Limited v Kahuthu (Civil Appeal E185 of 2022)
[2025] KEHC 5794 (KLR) (At Nairobi) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5794 (KLR)

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

AT NAIROBI

CIVIL APPEAL E185 OF 2022

REA OUGO, J

APRIL 24, 2025

BETWEEN

CLEAN VIEW LIMITED APPELLANT

AND

JAMES GATHUNGU KAHUTHU RESPONDENT

(Being an appeal from the judgment of Hon. B.J. Ofisi (Mrs) RM and Adjudicator at the Small Claims Court at Nairobi delivered on 28/2/2022 in Small Claims Court No 537 of 2021)

JUDGMENT

1. The respondent filed a suit against the appellant at the subordinate court and obtained a judgment against it. According to the respondent, on 1/11/2018, the appellant's authorised driver drove the vehicle, KCJ 352H, negligently causing the same to crash into the respondent's vehicle, registration no. KCH 105A. The respondent's vehicle was extensively damaged, and he spent Kshs 152,363/- on repair costs, Kshs 200/- to obtain the police abstract and Kshs 550/- for a copy of the Motor Vehicle Records.
2. In its defence, the respondent denied the claim and averred that his motor vehicle was not involved in the accident. He argues that the driver of motor vehicle registration number KCJ 352H was neither named nor sued, therefore, the suit is incompetent as the appellant can only be vicariously liable.
3. After a full trial, the trial magistrate found the appellant 100% liable as he failed to avail the driver or any other witness to corroborate his averments. The respondent was awarded special damage claim of Kshs 156,363/-.
4. The appellant has filed its Memorandum of Appeal where he challenges the decision of the trial court on the following grounds:



1. The Honourable Magistrate erred in law and fact in failing to hold that the respondent failed to discharge his burden to prove the occurrence of the alleged accident on 1st November 2018.
2. The Honourable Magistrate erred in law and fact in failing to appreciate that the burden of proof lies with the prosecution and erred in transferring the burden from the prosecution to the defence.
3. The Honourable Magistrate erred in law and fact in failing to appreciate that the police abstract was not produced by its maker and, therefore, could not be relied upon as evidence.
4. The Honourable Magistrate erred in law and fact in failing to appreciate that the driver of the appellant's vehicle at the material time of the alleged accident was not named or sued, yet it is material to establish whether an employee acted in the course of employment of the principal, or was on a frolic of his own, before apportioning vicarious liability on the principal.
5. The Honourable Magistrate erred in law and fact in finding the Appellant 100% liable for the alleged accident without any evidence or basis.
5. The appellant prays that the lower court's judgment be set aside and replaced with an order dismissing the suit, with costs to the appellant.
6. The appellant faulted the trial magistrate for transferring the burden of proof to the defence, obligating the appellant to produce the driver of its motor vehicle and further witnesses to attest that the accident did not occur. The appellant was not notified of the accident until 2 years after the accident date. The prosecution was required to produce evidence that there was a driver in control of the motor vehicle, avail as a witness the policeman who was at the accident scene and produce the charge sheet with the name of the driver of the offending motor vehicle. He referred the court to section 107, 108 and 109 of the *Evidence Act* and the case of Wareham t/a A.F Wareham & 2 Others Kenya Post Office Saving Bank [2004] 2 KLR 91.
7. It was submitted that it was not established that the driver of motor vehicle KCJ 352H was under the instructions of the principal or whether he was out on his random frolic. In *Onesmus Kinyua Muchundu v Mishi Kambi Charo & another* [2021] eKLR, the court held that the employer will only be vicariously liable when the wrongful act occurs during the duties of the employee; however, if the employee was frolicking, then the employer is not liable.
8. The appellant submits that while assessing damages, the trial court relied on the wrong principles in reaching its findings. The appellant was not driving the vehicle at the alleged time of the accident, and neither was he notified of any accident.
9. The respondent submitted that they showed that they proved that the appellant was liable. The respondent needed to show that the accident was caused by the appellant's servant/agent's negligent act or omission. The respondent's driver testified as to the circumstances of the accident. The appellant did not adduce evidence to show that the accident did not occur. In *Mbuthia Macharia v Annah Mutua Ndwiga & Another NRB CA 297 of 2015* (2017) eKLR, the Court held that the legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. The appellant failed to adduce evidence on the non-occurrence of the accident. On the production of the police abstract, it was submitted that no objection was raised as to its production.
10. It further submitted that the failure to enjoin the driver was not fatal to the claim. In *Ndungu v Coast Bust Company Limited* (2000) 2 EA 462, the court held that the mere fact that the driver of an accident



motor vehicle is not joined in damages claim against his employer arising from his driving is not fatal. It was not the respondent's duty to inform the appellant that the accident occurred; rather, it was that of his employee. The employee's omission to inform his employer does not automatically mean that the accident did not occur.

Analysis and Determination

11. The jurisdiction of the Small Claims Court is set out in the *Small Claims Court Act*. There is only one chance of appeal to this court on points of law. Section 38 of the *Small Claims Court Act* provides as follows: -

“ 38. Appeals

- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

12. James Kahuthu Gathungu (Cw1) testified that on the material day, he was driving along Waiyaki Way heading to Kikuyu. At Kabete Police Station, he noticed a road block and slowed down with his hazard lights on and the brake lights to warn other drivers. Suddenly, the appellant's vehicle, which was following from behind, crashed into the rear part of his vehicle and caused extensive damage. Cw1 produced the documents he relied on, including the police abstract.
13. Vitalis Juma Masinde (Cw2), legal assistant at ICEA Lion General Insurance Co Ltd, testified that the respondent reported the accident and presented the police abstract that revealed that the appellant's vehicle was blamed. They instructed their internal assessor to assess and value the damage and repair costs to the insured's motor vehicle, who prepared a report for estimates. Kshs 152,363/- was paid for repairs, and Kshs 4,000/- was paid to the assessor.
14. Peter Mzungu (Cw2) is a motor vehicle assessor with ICEA Lion. He assessed the vehicle, noting that the rear had sustained damage. Upon negotiation, they authorised repairs of Kshs 153,363/-.
15. Isaac Mnyinyi Irungu (Rw1) testified that he is a director at the claimant. He explained that they owned the vehicle jointly with Family Bank. The appellant did not receive any report of the accident but was informed of the matter by an employee of Family Bank. He took the suit documents to his insurer, but they declined to represent him. Rw1 testified that the accident did not happen as none of his drivers acknowledged that the accident occurred. The vehicle is fitted with a tracking system, and he has never seen it at Kabete police station.
16. The respondent's claim was under the Insurance Principle of Subrogation. In the case of *Opiss v Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991* the court held as follows:

“ The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.” From the foregoing there appears to be three issues for consideration in this subrogation claim:

- i. Whether there was a binding and operative contract of indemnity between the Respondent and the Insurance company in the first instance



- ii. Whether the insurance company made payment to the claimant pursuant to the original indemnity contract to which they now seek reimbursement
 - iii. Whether the Respondent is entitled to the sum awarded by the Trial court.”
17. According to the police abstract, the respondent’s vehicle was insured by ICEA Lion. According to the Motor Accident Report Form, the respondent was the policyholder and the policy number was Comp/970-GO-142620-18. Cw2 testified that the insurance company instructed their internal assessor to assess and value the damage and repair costs to the insured’s motor vehicle. According to the assessment report, the estimated costs of repair parts and other costs was Kshs 152,363/-. They also produced a payment voucher showing that the money had been paid to Stan Auto Centre Ltd for the repairs. Cw2 also testified that Kshs 4,000/- was paid to the assessor as per the payment voucher.
18. The appellant in this appeal however is contesting the trial magistrate award on grounds that the respondent did not prove that it was vicariously liable. He argued that the driver of the KCJ 352H was never sued.
19. The English Court of Appeal in *Hewitt vs Bonvin*, [1940] 1 KB 188 while reviewing the decision in *Barnard vs Sully* [1931] 47 Times LR 557 stated:

“It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was the owner, and the court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself or some servant or agent of his; (*Barnard vs Sully*).”
20. In this case, the appellant produced a Motor Vehicle Copy of Records as exhibit. According to the report, Clean View Limited (the appellant) was the registered owner. Therefore, it is legitimate to draw an inference that the driver was some servant or agent of the appellant.
21. The evidence according to Cw1, the vehicle was used as a Matatu. The appellant denied liability but did not call any witness who could testify as to how the accident occurred. Cw1 testified that the road block at Kabete Police Station, he slowed down with his hazard lights on and the brake lights to warn other drivers but the appellant’s vehicle, which was following from behind, crashed into the rear part of his vehicle. He blamed the appellant’s driver for being negligent.
22. The respondent’s evidence on negligence was not challenged. On its part, the respondent testified that its drivers did not inform it of the accident, therefore, the accident could not have occurred.
23. The respondent produced a police abstract that revealed that an accident had occurred between the respondent’s and appellant’s vehicle on the material day. The evidence of the police abstract was not challenged. In my view, the trial magistrate cannot be faulted for finding that there was an accident that was caused by the negligent act of the appellant. As a result, the respondent’s vehicle was damaged and was repaired.
24. The respondent was therefore entitled to damages. The appellant did not make submissions on the award of damages. Therefore, respondent having availed the payment voucher utilized towards the repair of his vehicle, I find no merit in the appeal.
25. Consequently, the appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 24TH DAY OF APRIL 2025

R.E. OUGO



JUDGE

In the presence of:

Mr. Ndambiri -For the Appellant

Miss Maina h/b Mr. Mbigi -For the Respondent

Wilkister -C/A

