



REPUBLIC OF KENYA



KENYA LAW
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**Muruga v Makau (Civil Appeal E217 of 2024)
[2025] KEHC 4525 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E217 OF 2024
FN MUCHEMI, J
APRIL 3, 2025**

BETWEEN

JOSEPH GITHENGI MURUGA APPELLANT

AND

PATRICIA MWIKALI MAKAU RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. V. Asiyo (PM)
delivered on 13th August 2024 in Thika CMCC No. 529 of 2019)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Principal Magistrate in CMCC No. 529 of 2019 in a claim that arose from a road traffic accident whereby the trial court apportioned liability at the ratio of 70 : 30 in favour of the respondent as against the appellant. The court awarded the respondent general damages of Kshs. 150,000/- and special damages of Kshs. 13,005.86/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding that the burden of proof in regard to the appellant's identity was upon him while not appreciating that he raised the issue of identity when he entered appearance by way of notice of appointment.
 - b. The learned trial magistrate erred in law and in fact in holding that the appellant failed to produce evidence by way of an agreement for the hire of the suit motor vehicle which was never raised in the pleadings, in court or in the respondent's submissions and failed to appreciate that ordinarily such a written agreement is not mandatory hence arriving at the wrong conclusion and determination.



- c. The learned trial magistrate erred in law and in fact by finding that the appellant failed to rebut the evidence that he was the beneficial owner and was in actual possession of the said motor vehicle at the material time whereas there was no iota of evidence that showed that he was in actual possession as the driver of the suit motor vehicle at the material time.
 - d. The learned trial magistrate erred in law and in fact by finding that the appellant was the beneficial owner of the subject motor vehicle and was in actual possession of the said vehicle at the material time but failed to adduce evidence that the driver of the said motor vehicle was not his agent or driver or was on a frolic of his own thereby contradicting himself by concluding that the respondent had proved that the appellant was vicariously liable for the acts of the driver hence arriving at the wrong conclusion and determination.
 - e. The learned trial magistrate erred in law and in fact by failing to evaluate the appellant's evidence and submissions and further failing to take cognizance of the principle of stare decisis.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the respondent throughout the pleadings referred to him as John Githengi Murunga but he maintains that he is Joseph Githengi Muruga. The appellant submits that having disputed and challenged the said name as sued it was upon the respondent to prove on a balance of probabilities that he was known by such name appearing in the police abstract and his phone number which was indicated as 0721149854. The appellant further argues that once he disclosed his name the respondent ought to have sought the leave of the court and amend the plaint as provided under Order 1 Rule 10 of the Civil Procedure Rules. The appellant relies on the case of Apex International Limited vs Anayo Leasing and Finance International Finance Limited vs Kenya Anti-Corruption Commission (2012) eKLR and submits that joining the proper parties in a suit is very paramount.
5. The appellant relies on the cases of Zephyr Holdings Ltd vs Mimosa Plantations Ltd & 2 Others (2014) eKLR; William Kipromo Towett & Others vs Farm Land Aviation Ltd & 2 Others (2016) eKLR; Local Building & Construction Ltd vs Institute of the Blessed Virgin Mary Loreto Msongari & 2 Others (2019) eKLR and Departed Asians Property Custodian Board vs Jaffer Brothers Ltd (1999) 1 EA 55 and submits that a suit shall not be defeated for reasons of misjoinder or nonjoinder of a party but however the court shall either suo moto or an application by a party grant leave to have the plaint amended by having the name of the person or entity wrongly sued struck off and be substituted by the name of the proper party to the suit. However in the current suit, the distinction with the said cases is that neither did the court by itself move or grant such leave nor was the court moved by the respondent to grant such leave thus the judgment of the trial court was a nullity.
6. The appellant refers to the case of Ali Abid Mohammed vs Kenya Shell & Company Limited (2017) and submits that a contract may be in writing or be derived from the conduct of the parties. The appellant submits that he testified that he had hired the suit motor vehicle on 4th April 2019 from the 2nd defendant to transport his avocados to the airport at Nairobi and by the trial court holding that the appellant ought to have tendered a hire agreement in court to prove the same was tantamount to opening a pandoras box.
7. The appellant submits that the trial court erred in finding that he failed to rebut the evidence that he was the beneficial owner and was in actual possession of the suit motor vehicle at the material time yet there was no iota of evidence to prove that he was in actual possession as the driver of the subject motor vehicle at the material time.



8. The appellant argues that since it was the respondent's case that the suit motor vehicle never stopped after the accident but was stopped at an undisclosed road block by police officers who allegedly arrested the driver, she should have summoned any of the police officers to give evidence that it was him who was driving the suit motor vehicle. The appellant further argues that the respondent's evidence remains hearsay evidence since the police are the ones who told her at the hospital that they had arrested the driver.
9. The appellant relies on the cases of Vegiro (K) Ltd vs Rose Kerubo & 2 Others (2021) quoted in the decision of Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another (2010) eKLR and Mugambi Koja vs Saus Mbwana Abdi (2015) eKLR and submits that it was upon the respondent to prove that he was a beneficial owner of the suit motor vehicle for instance an insurance policy which would indicate his name and confirm the allegations that he was the beneficial owner of the suit motor vehicle. Instead PW1 testified that the OB showed that he was the driver of the subject motor vehicle yet he never produced an extract of the said OB in support of the allegations.
10. The appellant submits that the trial court did not consider his submissions and authorities relied upon in his defence of the claim.

The Respondent's Submissions.

11. The respondent relies on Section 107(1) of the *Evidence Act* and submits that she testified that she had been involved in a road traffic accident on 5th April 2019 which involved motor vehicle registration number KAR 710S. She produced a police abstract dated 27/6/2019 to support her case. The document indicated that John Githengi Murunga was the owner of motor vehicle registration number KAR 710S. As such, the respondent sued the appellant pursuant to Order 1 Rule 3 of the Civil Procedure Rules.
12. The respondent argues that the appellant testified that his name is Joseph Githengi Muruga yet he never produced even a copy of his national identity card to prove that assertion pursuant to Section 107(2) of the *Evidence Act*. The respondent submits that when the appellant was notified of the suit against him using his telephone number 0721149854, he agreed to accept the summons to enter appearance on 2/10/2019 as John Githengi Murunga. Furthermore, in his testimony during the trial and in his admitted witness statement dated 13/12/2023, he admitted to being the 1st defendant in this suit. He further confessed that he hired motor vehicle registration number KAR 710S during cross examination.
13. The respondent relies on the cases of Joel Muga Opinja vs East Africa Seafood Limited [2013] eKLR and *Ainu Shamsi Hauliers Limited vs Anastacia Ndinda Mwanzia (Suing as the administrators of the Estate of Harrison Mwendwa Kavili) (Civil Appeal 13 of 2018)* [2018] KEHC 3246 (KLR) and submits that the appellant never challenged the production of the police abstract dated 27/6/2019 and therefore the contents of the said abstract cannot be denied.
14. The respondent submits that the appellant disputed that he was neither the driver nor the one in actual possession of the suit motor vehicle when the accident occurred. However he testified that he had hired motor vehicle registration number KAR 710S from the 2nd defendant on 4/4/2019 to transport avocados to the airport located in Nairobi.
15. The respondent refers to the case of Nancy Ayemba Ngaira vs Abdi Ali Civil Appeal 107 of 2008 [2010] eKLR and submits that the copy of records produced indicated that the 2nd defendant was the registered owner of motor vehicle registration number KAR 710S. Furthermore, the appellant never produced any written agreement to prove that he had hired the suit motor vehicle as alleged. The



- respondent refers to the case of Jotham Mugalo vs Telkom (K) Limited Kisumu HCCC No. 166 of 2001 (2005) eKLR and submits that the appellant ought to have produced evidence that he was not the beneficial owner of the suit motor vehicle when the accident occurred.
16. The respondent submits that the appellant in his defence dated 10/2/2020 did not expressly deny that he was at the material time of the accident, the beneficial owner of motor vehicle registration number KAR 710S pursuant to Order 2 Rule 11 of the Civil Procedure Rules. To support her contentions, the respondent relies on the cases of Samuel Mukunya Kamunge vs John Mwangi Kamuru Nyeri HCCA No. 34 of 2002 [2005] eKLR and [*JRS Group Limited vs Kennedy Odbimabo Andwak \(Civil Appeal 180 of 2010\)*](#) [2016] KEHC 1552 (KLR) (30 November 2016).
 17. The respondent refers to the cases of P.A. Okello & M.M. Nsereko t/a Kaburu Okello & Partners vs Stella Karimi Kobia & 2 Others (2012) eKLR and Anyanzwa & 2 Others vs Lugi de Casper & Another (1981) KLR 10 and submits that vicarious liability depends not on the ownership but on the delegation of the task or duty. The appellant in his testimony before the trial court admitted that he had hired motor vehicle registration number KAR 710S from the 2nd defendant on 4/4/2019 to transport avocados. The appellant further testified that he learnt of the accident two days later when he followed up on the cargo yet he never called any witness such as the person who informed him of the accident to corroborate that assertion. Furthermore, without the appellant producing a hire agreement, it is his word against the respondent's. The respondent argues that the uncontested police abstract dated 27/6/2019 indicated that John Githengi Murunga was the owner of motor vehicle registration number KAR 710S at the material time. The appellant never produced a copy of his identity card as evidence to prove otherwise. The appellant acknowledged the details indicated of his mobile number 0721149854 of the police abstract and the particulars of the insurance of the suit motor vehicle have been provided on the said police abstract.
 18. The respondent relies on Section 109 of the [*Evidence Act*](#) and the case of General Motors East Africa Limited vs Eunice Alila Ndeswa & Sofia Musimbi Indasi (Civil Appeal 527 of 2013) [2015] KEHC 4854 (KLR) and submits that the appellant did not provide any evidence to disprove that the driver of the suit motor vehicle was their agent, driver and or servant and that despite the accident occurring at 5/4/2019 at 1600 hours, the said persons were not within the scope of employment or authority of the appellant. Thus, the respondent submits that the appellant and the 2nd defendant should be held vicariously liable for the actions of their driver and/or servant.
 19. The appellant filed Further Submissions dated 7th February 2025 and states that the issue of the holder of the insurance policy was never raised in the trial court. Further, there is no evidence that he was the insured and/or policy holder of the said insurance policy. The appellant argues that it was the duty of the respondent to produce documentary evidence from the insurance company to proof that despite the suit motor vehicle being registered under the name of the 2nd defendant, it was the appellant who had taken out the insurance cover.

Issues for determination

20. The main issues for determination are:-
 - a. Whether the appellant was wrongly enjoined in the suit.
 - b. Whether the magistrate erred in finding that appellant was the beneficial owner of motor vehicle registration number KAR 710S.
 - c. Whether the appellant was rightly held as vicariously liable for the actions of the driver/agent and the 2nd defendant.



The Law

21. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

22. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

23. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appellant was wrongly enjoined in the suit.

24. The appellant argues that he was wrongly sued as his name is Joseph Githengi Muruga yet the respondent instituted a suit against one John Githengi Murunga.

25. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

26. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-

As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.



27. The record shows that the appellant entered appearance and filed a Statement of Defence on 12th February 2020 after being served with the summons to enter appearance dated 27th August 2019. In his Statement of Defence, the appellant admitted to the contents of paragraph 2 in the plaint which provide for the description of the parties. The applicant did not provide any documentary evidence including and not limited to his national identity card to show that he was not John Githengi Murunga who was a different person from the appellant herein Joseph Githenji Murunga. As such, , the appellant failed to prove his assertions that he was the wrong party in the suit.

Whether the appellant was the beneficial owner of motor vehicle registration number KAR 710S.

28. On the issue of ownership of the motor vehicle registration number KAR 710S, the respondent produced a police abstract dated 27th June 2019 showing that an accident occurred on 5th April 2019 at 1600 hours at Jomoko area between the respondent and her daughter one Mercy Joy Mutanu as pedestrians and motor vehicle registration number KAR 710S. The owner of the motor vehicle was indicated in the police abstract as John Githengi Murunga of telephone number 0721149854. The respondent produced a copy of records showing that motor vehicle registration number KAR 710S was owned by one Samuel Gacau Riunge, the 2nd defendant as at 3rd July 2019 which date was about one (1) month after the accident. This was the 2nd defendant in the case before the Magistrate. In his evidence, the appellant said he had hired the vehicle to take his avocados to the airport.
29. Section 8 of the *Traffic Act* provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.
30. Proof of ownership was discussed in the case of Thuranira Kaururi vs Agnes Mucheche (1997) eKLR where the Court of Appeal stated:-

The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.

31. The issue of various ownerships was discussed in the case of Charles Nyambuto Mageto vs Peter Njuguna Njathi [2013] eKLR where it was held as follows:-

From the interpretation of Section 8 of the *Traffic Act* as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The court recognizes that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract report, even as held in Thuranira and Mageto case that the police abstract is not, on its own, proof of ownership of a motor vehicle. If however, there is no evidence to corroborate the contents of the police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership.

32. The appellant denied ownership of the suit motor vehicle and testified that he had hired the said motor vehicle from the 2nd defendant to transport his avocados to Jommo Kenyatta International Airport on 4th April 2019 at a consideration of Kshs. 9,000/-.



33. In the instant case, the police abstract indicates that the owner of motor vehicle registration number KAR 710S is John Githengi Murunga of telephone number 0721149854. The appellant did not contest the contents of the police abstract or object to its production. Additionally, the appellant's evidence was that he hired the motor vehicle on the material day to transport avocados to the airport. Thus from the testimony of the appellant, he was in actual possession of the motor vehicle on the material day and he had hired the vehicle from the 2nd defendant for his own use which made him the beneficial owner at the material time. Notably, the 2nd defendant did not enter appearance nor did he file a Statement of Defence and interlocutory judgment was entered against him on 10th February 2022. On admission by the appellant in his evidence, he said that the suit motor vehicle was in his actual possession on the material day. It is evident that the appellant failed to rebut the evidence of the respondent that he was the beneficial owner of the said motor vehicle and was in actual possession at the time of the accident.

Whether the appellant can be held vicariously liable for the actions of the driver/agent and the 2nd defendant.

34. The respondent in the instant case has pleaded the doctrine of vicarious liability and argued that the appellant is vicariously liable for the actions of the driver of the motor vehicle. The doctrine of vicarious liability was discussed in the case of *Morgans vs Launchbury & Others* [1972] 2 ALL ER 607 which was cited with authority in the court of Appeal decision in *Paul Muthui Mwavu vs Whitestone (K) Ltd* [2015] KECA 745 (KLR) as follows:-

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 the existence of the agency relationship it is 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 the performance of the task of duty thereby delegated to him by the owner or so long as the driver's act is committed by him in the course of his duty even if he is acting deliberately, wantonly, negligently, or criminally or even if he is acting for his own benefit or even if the act is committed contrary to his general instruction the matter is liable.

35. Thus, the respondent ought to have proved that the suit motor vehicle belonged to both or either the appellant and the 2nd defendant and that the driver of the said motor vehicle was either their employee/servant/agent and drove the motor vehicle in question for their benefit, in the ordinary course of his duties. In the instant case, the respondent proved that the 2nd defendant was the registered owner of the suit motor vehicle whereas the appellant was its beneficial owner at the material time. The appellant further testified that the suit motor vehicle was being driven on the authority of the 2nd defendant and himself following the hire agreement he had with the 2nd defendant.
36. It is my finding that the respondent proved that the appellant was the beneficial owner of the vehicle and was vicariously liable for the acts of the driver. This being the position, the magistrate in my view, did not err in finding the appellant liable for the accident.

Conclusion

37. In view of the foregoing, I find that the appeal lacks merit and it is hereby dismissed with costs to the respondent.
38. It is hereby so ordered.



**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF
APRIL 2025.**

F. MUCHEMI

JUDGE

