Githinji v Njoroge & another (Civil Appeal E132 of 2024)
[2025] KEHC 7072 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E132 OF 2024

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

PAUL NGUGI GITHINJI ..... APPELLANT

AND

FREDRICK NJENGA NJOROGE ..... 1ST RESPONDENT

PETER NJENGA ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. N. Musyoka (CM) delivered on 29th May 2024 in Gatundu CMCC No. E145 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Chief Magistrate in CMCC No. E145 of 2020 in a claim that arose from a motor vehicle accident whereby the court found the appellant fully liable in favour of the respondents and awarded the 1st respondent general damages for pain, suffering and loss of amenities at Kshs. 120,000/-, loss of earning capacity at Kshs. 100,000/- and special damages at Kshs. 5,350/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds summarized as follows:-

    a. The trial magistrate erred in law and in fact in finding that the appellant's vehicle was indeed the one that was involved in the accident contrary to the evidence adduced.

    b. The trial magistrate erred in law and in fact in finding that the respondent was a fare paying passenger in the appellant's motor vehicle.

c. The trial magistrate erred in law and in fact in finding that the appellant is vicariously liable for the actions of the 2nd respondent.

d. The trial magistrate misdirected herself in relying on the inference that "it is common knowledge that many authorized matatu drivers allow their conductors to drive when they are tired or want to run their errands" to find that the 2nd respondent had authority to drive the motor vehicle.

e. The trial magistrate erred in law and in fact in finding that the appellant should pay the damages awarded.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits the 1st respondent in his Amended Plaint dated 8th September 2021, claimed that he was a fare paying passenger aboard matatu registration number KAP 548P which belonged to the appellant. It was further submitted that the police abstract produced by the 1st respondent indicated that motor vehicle registration number KAP 548P was involved in the accident but it did not provide any information as to the ownership of the suit motor vehicle. Furthermore, the appellant submits that the motor vehicle copy of records indicates that motor vehicle registration number KAP 548P is a blue saloon car and not a matatu and neither does it indicate that he is not the registered owner of the motor vehicle.

5. The appellant relies on Section 8 and the case of Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR and submits that the burden of proving that the suit motor vehicle involved in the accident belonged to him lay on the 1st respondent. The appellant avers that in his Statement of Defence dated 26th September 2022, he denied ownership of the said motor vehicle and put the 1st respondent to strict proof of the same.

6. The appellant submits that the 1st respondent failed to prove on a balance of probabilities that the suit vehicle belonged to him by registration or otherwise. The reliance on the police abstract and copy of records is insufficient as those documents contradict the claim that the vehicle involved was a matatu owned by him. The appellant submits that as the 1st respondent failed to prove that the suit vehicle belongs to him, it is only prudent to conclude that the 1st respondent was never a fare paying passenger in his vehicle.

7. The appellant relies on the cases of Rentco East Africa Ltd v Dominic Mutua Ngozi [2021] eKLR; Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another [2014] eKLR; Ali Lali Khalifa & 8 Others v Pollman's Tours and Safaris Ltd, diamond Trust Bank (K) Limited, Salim Khalid Said [2003] eKLR and Ormrod v Crosville Motor Services Ltd [1954] 2 All ER 753 and submits that vicarious liability arises where an employer is held responsible for the actions of their employee if such actions occur in the course of their employment. The appellant submits that he adduced evidence to prove that his driver one Alex Njuguna Muriithi who testified in court on how the appellant's vehicle operated. The driver testified that he would go off on Sundays and leave the matatu at a parking in Thika town. He further testified that on the date of the accident, he was not on duty as it was a Sunday and that he parked the vehicle as usual before proceeding to take his rest day.

8. The appellant argues that the 2nd respondent's actions were unauthorized and occurred outside the scope of his employment as his duties as a conductor did not extend to driving the motor vehicle. The appellant further argues that the 2nd respondent's actions were not for his business, purpose or benefit

as the vehicle is usually parked on Sundays. Thus, the doctrine of vicarious liability cannot be invoked against him for the 2nd respondent's actions.

9. The appellant submits that the trial magistrate's reliance on a generalized inference as the basis for finding that the 2nd respondent had the authority to drive the motor vehicle was a fundamental error in law. The assertion that "it is common knowledge" lacks evidential grounding and cannot form the basis of a legal finding. The appellant argues that courts are required to base their findings on evidence adduced before them and not on assumptions or generalized perceptions unless the same is a matter that the court can take judicial notice of in line with Section 60 of the *Evidence Act*.

10. The appellant submits that he adduced evidence that his designated driver Alex Njuguna Muriithi who testified that he parked the vehicle as instructed on the material date which testimony rebuts any presumption that the vehicle was being operated under the driver's authority or for his purposes at the time of the incident. The appellant argues that the inference by the trial learned magistrate is a matter of fact that should have been proved or clarified during the hearing. The presumption by the trial court is fatally prejudicial to the appellant.

11. The appellant submits that the conductor was the 1st defendant in the lower court suit and his failure to enter appearance and defend the suit should no be used as a basis to fault him or shift the evidentiary burden.

12. The appellant submits that the determination of liability to pay the awarded damages hinges on whether he can be held responsible for the acts of the 2nd respondent under the principle of vicarious liability. The appellant submits that he has demonstrated that the 2nd respondent, a conductor, was not acting in the course of his employment at the time alleged negligent acts. The appellant submits that he had no knowledge, control, or interest in the vehicle's use by the 2nd respondent in any capacity outside his designated role as a conductor.

The 1st Respondent's Submissions

13. The 1st respondent submits that the issue of ownership of the subject motor vehicle was conclusively established during the trial and the trial court correctly found the appellant to be the owner of the vehicle based on the evidence adduced.

14. The 1st respondent submits that the police abstract produced at trial, which was not objected to or challenged during the hearing, indicated that the 2nd respondent was the driver of the subject vehicle at the time of the accident. The 1st respondent relies on the case of Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another [2010] eKLR and submits that while a police abstract may not, on its own, be conclusive proof of ownership, it does constitute prima facie evidence of ownership when no contrary evidence is provided.

15. The 1st respondent submits that the appellant did not produce a logbook or sale agreement to demonstrate that he was not the owner of the vehicle at the material time. The 1st respondent argues that the burden of proof shifted to the appellant under Section 112 of the *Evidence Act* to prove that he was not the owner of vehicle and he had divested ownership. No such evidence was produced.

16. The 1st respondent submits that the appellant in his own witness statement confirmed that he had employed the 2nd respondent as a conductor. Further he was summoned to Mwea Police Station after the accident where he found that the vehicle had been impounded. The appellant further confirms that upon receiving the call from the police, he contacted his regular driver to inquire about the vehicle. Thus the appellant's conduct holistically points to the fact that he had proprietary interest in and control over the subject vehicle. To support his contentions, the 1st respondent relies on the cases of

Grace Kanini Muthini v Kenya Bus Service Ltd & Another [2016] eKLR and Joel Muga Opija v East African Sea Food Ltd [2013] eKLR.

17. The 1st respondent submits that the appellant has not denied that the 2nd respondent, who was driving the vehicle at the time of the accident, was in his employment. The appellant only disputes that he had authorized the 2nd respondent to drive the vehicle. The respondent argues that the said admissions confirm the employment relationship and when read together with the police abstract and the appellant's conduct, it further supports his case that the appellant owned and controlled the vehicle. To support his contentions, the 1st respondent relies on the cases of Jotham Mugalo v Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001 and Joel Muga Opija v East African Sea Food Limited [2013] eKLR.

18. The 1st respondent refers to the cases of Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another [2014] eKLR; Kenya Bus Services Ltd v Humphrey [2003] KLR 665 and Lazarus Muthama Kamota v Kinatwa Co-operative Savings & Credit Society Limited [2018] eKLR and submits that the appellant was the registered owner of the suit motor vehicle whilst the 2nd respondent was a conductor employed to work in the vehicle.

19. The respondent argues that the 2nd respondent, although employed as a conductor, was in possession of the vehicle keys which strongly suggests that he had been entrusted with the vehicle's operation by the authorized driver or the owner of the said motor vehicle. The respondent further refers to the cases of Messina Associated Carriers v Kleinhaus [2001] 3 All SA 285 (SCA) and Pritoo v West Nile District Administration (1968) EA 428 and submits that vicarious liability is not limited to employment relationships.

20. The respondent further refers to the cases of Joseph Cosmas *Khayigila v Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986*; Bachu Wainaina *CA No. 14 of 1976* Nakuru Automobile House Ltd v Zavdin CA 63 OF 1986 and Ormrod & Another v Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA and submits that implied authority arises when an employee, by virtue of their position or the circumstances surrounding their employment, is given certain powers that are not explicitly stated but can be inferred from their duties. In the instant case, the 2nd respondent although employed as a conductor, had access to the car keys and was in control of the vehicle at the time of the accident which strongly suggests that he was acting within the scope of his employment even if driving was not his primary role.

Issues for determination

21. The main issues for determination are:-

    a. Whether the 1st respondent proved ownership of the suit motor vehicle.

    b. Whether the appellant is vicariously liable for the actions of the 2nd respondent.

The Law

22. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another v 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."

23. In Gitobu Imanyara & 2 Others v 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.

24. 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 1st respondent proved ownership of the suit motor vehicle

25. The appellant argues that the 1st respondent did not prove ownership of the subject motor vehicle.

26. 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.

27. This degree of proof is well enunciated in the case of Miller v Minister of pensions [1947] cited with approval in D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati [2014] eKLR where the court stated:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepodence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

28. The record shows that the 1st respondent produced a police abstract and a copy of records to establish the ownership of motor vehicle registration number KAP 548P. On perusal of the police abstract, it is noted that the appellant is not the registered owner of motor vehicle registration number KAP 548P. The police abstract shows that the 2nd respondent is the driver of the said motor vehicle. A copy of records in respect of the said vehicle was produced by the 1st respondent. Surprisingly, it did not indicate who the owner of motor vehicle KAP 548P was. In fact, the 1st respondent discovered the appellant when his authorized process server served the 2nd respondent who then informed him that the owner

of the subject vehicle was the appellant. Upon being informed, the 1st respondent proceeded to amend his plaint to include the appellant as a party to the suit.

29. It is evident that the evidence produced by the 1st respondent supported ownership of the vehicle by the appellant in respect of vehicle registration number KAP 548P.

30. 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.

31. Proof of ownership was discussed in the case of Thuranira Kaururi v 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."

32. The issue of various ownerships was discussed in the case of Charles Nyambuto Mageto v 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."

33. In the instant case, the 1st respondent produced documents which did not prove ownership of the subject motor vehicle. He relied on hearsay evidence by the 2nd respondent upon service to asume that the appellant was the owner of the vehicle. In this regard, it is my considered view that the 1st respondent did not discharge the burden of proof as to ownership of the said vehicle. Furthermore, the appellant in his defence denied being the beneficial owner of motor vehicle registration number KAP 548P. It was then incumbent upon the 1st respondent to provide proof that the appellant was indeed the owner of the subject motor vehicle. That notwithstanding, it was not upon the appellant to prove that the motor vehicle belonged to him as was alleged by the 1st respondent. The burden of proof rests with the 1st respondent as long as ownership is denied. Furthermore, the appellant could not challenge the contents of the police abstract as alleged by the 1st respondent, for his name was not included therein to the effect that he was the owner of the subject motor vehicle. It is therefore my considered view that the 1st respondent did not prove the ownership of motor vehicle registration number KAP 548P before the court below.

Whether the appellant can be held vicariously liable for the actions of the 2nd defendant.

34. The 1st 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 2nd respondent as the driver of the motor vehicle at the time of the accident. The doctrine of vicarious liability was discussed in the case of Morgans v

Launchbury & Others [1972] 2 ALL ER 607 which was cited with authority in the court of Appeal decision in Paul Muthui Mwavu v 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 cat is committed contrary to his general instruction the matter is liable.

35. Thus, the 1st respondent ought to have proved that the suit motor vehicle belonged to the appellant and that the driver of the said motor vehicle was either his employee/servant/agent and that he drove the motor vehicle in question for his benefit in the ordinary course of his duties. In the instant case, the 1st respondent failed to prove that the appellant was the registered owner of the suit motor vehicle. In that regard, the issue of vicarious liability cannot apply herein. It is therefore my considered view that the 1st respondent having failed to prove ownership of the vehicle, he could not prove vicarious liability.

36. In the circumstances, the 1st respondent upon failing to prove ownership of the motor vehicle, his claim hereby fails. Accordingly, the judgment of the lower court for finding the appellant as the owner of the vehicle without proof. The said judgment is hereby set aside and substituted with an order of dismissal for lack of merit with costs to the appellant payable by the 1st respondent.

Conclusion

37. It is therefore, my considered view that the appeal has merit and it is hereby allowed.

38. The appellant shall have the costs of the appeal to be met by the 1st respondent.

39. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE