Mwagamoyo v Khamala & another (Civil Appeal E035 of 2024)
[2025] KEHC 8591 (KLR) (Civ) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8591 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E035 OF 2024

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

NIMROD TAABU MWAGAMOYO ..... APPELLANT

AND

NANCY NEKESA KHAMALA ..... 1ST RESPONDENT

ERICK KIAI ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Omurwa Arnold Nyandusi, Adjudicator, dated 20.12.2023 arising from *Nairobi Small Claims Suit No. E5174 of 2023*.
2. The Memorandum of Appeal raises the following grounds:
    a. The trial court erred in awarding the Respondent Ksh. 118,710/= in special damages that was not proved.
    b. The trial court erred in law and fact in that the Appellant was liable jointly with the 2nd Respondent without evidence.
    c. The trial court erred in law and fact in failing to consider the pleadings and submissions of the Appellant.
3. The Statement of Claim dated 6.10.2023 sought compensation for loss and damage for motor vehicle registration number KDC 726T that occurred on 23.3.2022, valued at Ksh. 197,850.
4. The 1st Respondent claimed that the appellant was the beneficial owner of the said motor vehicle, while the 2nd Respondent was the driver thereof.

5. The said motor vehicle was driven along Langata Road at Uhuru Garden area. This resulted in the accident for which the 1st respondent claimed that Appellant's motor vehicle registration number KCS 216M rammed into the rear of the 1st Respondent's motor vehicle registration number KDC 726T.

6. The Appellant filed a Response dated 10.11.2023 denying the allegations in the claim. He sought indemnity as against the 2nd Respondent on the ground that if any accident occurred due to negligence, the same ought to be attributed to the 2nd Respondent. He therefore denied that the 2nd Respondent was his agent.

7. The Appellant also averred in his defence that the Appellant's motor vehicle registration number KCS 216M developed mechanical issues and the Appellant contacted his garage, Rheingold Motors Karen, who sent the 2nd Respondent as mechanic to collect the motor vehicle from the Appellant, and the accident occurred when the 2nd Respondent as agent of the said garage was driving the motor vehicle.

8. The 2nd Respondent filed a response dated 4.11.2024 denying liability and stating that it was the 1st Respondent who was dangerously overtaking hence the accident.

9. There is no doubt that the Appellant authorized the 2nd Respondent to drive the Appellant's motor vehicle registration number KCS 216M to the garage for repairs. The only question raised is liability.

10. This appeal turns on matters of law. The legal issue is whether the Appellant was in the circumstances, vicariously liable for the acts of the 2nd Respondent. A matter of law can be pure matter of law or mixed matters of law but a matter of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR:

> " 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)."

11. Then what constitutes a matter of law? In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others,* (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in *Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484."

12. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered, must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a matter of law. In *Peter Gichuki King'ara Vs Iebc & 2 Others,* Nyeri

Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) on 13.02.2014, held as follows: -

> "It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

13. A matter of law is similar to a preliminary point of law but has a broader meaning. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR:

> I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

14. The appeal thus is on the point of vicarious liability. The Appellant filed submissions dated 13.3.2025 and submitted heavily that the learned adjudicator erred in his finding on liability. The submitted basis was that the relationship between the Appellant and the 2nd Respondent was not that of employer and employee. They relied on *Cooperative Bank Ltd v Thomas Ngui & Another* (2020) eKLR.

15. On the other hand, the 1st Respondent in the submissions dated 4.4.2025 submitted that the Appellant was vicariously liable as the 1st Respondent drove the car with the authority or permission of the Appellant.

16. The appeal based on the findings of the Small Claims Court on liability is not supported either. The learned adjudicator applied his discretion in finding 60:40 in favour of the 1st Respondent. As was held by the Court of Appeal in *Ephantus Mwangi & Another v Duncan Mwangi,* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. There is no question of law in evaluating evidence. The court that heard the witnesses is king as regards evidence. This court did not enjoy the opportunity of seeing the witnesses and the view of the lower court as to where credibility lies. In this regard in *Peters v Sunday Post Limited* [1958] EA 424 the court stated as follows:

Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution.

18. What then, in law, is vicarious liability? It has to be established that the motor vehicle that caused the accident was driven by a person for whose negligence the owner is responsible. As regards the issue of vicarious liability, it was held in *Kansa v Solanki* [1969] EA 318 as doth:

> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See *Bernard V Sully* [1931] 47 TLK 557.) This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

19. In this case, the 2nd Respondent went to the Appellant's home to collect and drive the motor vehicle to the garage. The 2nd Respondent was driving the motor vehicle for the benefit of the Appellant as it was taken to the garage for repairs. The issue would have been different and the garage and its agents would have been liable if the Appellant dropped his motor vehicle and they, upon their own decision drove it during the time it caused the accident. In *Ngugi v Gitau & 2 others* (Civil Appeal 81 of 2018) [2024] KEHC 9977 (KLR) (30 July 2024) (Judgment), the court stated as follow:

> The appellant left his car at the premise of the 1st respondent where the 2nd respondent tasked with washing it drove the said car on his own frolic and caused it to ram into another motor vehicle. In the present appeal the 2nd respondent was not driving the vehicle as a servant or agent of the 1st respondent. The 2nd respondent was not driving for the benefit of the 1st 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. In the upshot vicarious liability against the 1st respondent must fail as there is no nexus to apportion liability. The 2nd respondent is solely to blame for the accident that occurred during his own frolic.

20. First there must exist a relationship between the two persons which made it proper for the law to make the one pay for the fault of the other. Second there was the connection between that relationship and the tortfeasor's wrongdoing, where the tort had to be committed in the course or within the scope of the tortfeasor's employment which has now been broadened. In the case of P.J *Dave Flowers Ltd v David Simiyu Wamalwa* (2018) eKLR it was held that:

> "The employer is made vicarious liable for the tort of his employees not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it was a case in which the employer having put matters into motion should be liable if the motion that he had originated lead to damages to another. It also held that the burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rested on the claimant throughout the trial on balance of probabilities."

21. It is thus clear that the 2nd Respondent was acting on the instructions of the Appellant who permitted him to drive the motor vehicle to the garage and while he was driving, the accident occurred. The

lower court correctly found the Appellant vicariously liable. In the case of *Edward Mungai Waweru v Samson Ochieng Kagunda & another* (2017) eKLR, it was held that:

> " The law would permit the recovery of damages by a person for torts committed by another where the relationship between them and the interest of the one in the conduct of the other was such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or where in the eye of the law the one was in the position of the owner's servant."

22. Therefore, I find no merit in the appeal. On costs, the award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others,* SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

23. Since costs follow the event, the 1st Respondent is entitled to costs of the appeal. A sum of Ksh. 55,000/= will be right and just.

Determination

24. In the upshot, I make the following orders:

    a. The appeal is not merited and is dismissed in limine.

    b. The 1st Respondent shall have costs of this appeal of Ksh 55,000/=.

    c. 30 days stay of execution.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ngugi for the Appellant

Karanja for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Jedidah