Ndetto & another v Nzivo & another (Suing as the Legal Representatives of the Estate of James Maweu Nzivo) (Civil Appeal E003 of 2024) [2025] KEHC 8466 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E003 OF 2024

RC RUTTO, J

JUNE 12, 2025

BETWEEN

ANTONY MUTISO NDETTO ..... 1ST APPELLANT

GOLDEN MARKETING COMPANY LIMITED ..... 2ND APPELLANT

AND

ALICE MWIKALI NZIVO ..... 1ST RESPONDENT

MARY NAMUKOYE SIKUKU ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES MAWEU NZIVO

(Being an Appeal from the Judgment and Decree of the Hon. Victoria Achieng Ochanda (SRM) delivered on 6th December 2023 in Machakos Civil Case No. 263 of 2021 at the Chief Magistrate's Courts, Machakos)

JUDGMENT

1. The appellants are appealing against the judgment delivered on 6th December 2023, in favour of the respondents finding that the appellants were vicariously liable for the actions of the deceased.
2. The appellants' Memorandum of Appeal dated 11th January 2024 sets out seven (7) grounds of appeal to wit:
    1. That the Learned magistrate wholly and completely misapprehended the law on vicarious and tortious liability.
    2. That the Learned Magistrate misdirected herself when she addressed herself wholly to the issue of legal/beneficial ownership of Motorcycle registration number KMEU 056K in determining

whether the appellants were vicariously liable for the tort of negligence committed by the deceased. There was no attempt at addressing the issue of delegation of tasks or duties.

3. That the learned Magistrate erred in law and fact in finding that the respondent had proved negligence on the part of the appellants when in fact the particulars of negligence pleaded in the plaint were not proved.

4. That the Learned Magistrate applied an erroneous standard of proof by requiring the appellants to prove that the deceased did not have authority to ride Motorcycle registration number KMEU 056K.

5. That the Learned Magistrate's apportionment of liability was erroneous and/or was based on the wrong principle. The lower Court misdirected itself by finding that the tortious actions of an employee leading to the employee's own death or injury could be attributed to the employer in a claim for negligence.

6. That the learned magistrate erred in law and fact by disregarding the evidence of the appellants.

7. That the Learned magistrate erred in law and fact in awarding excessive and exorbitant damages to the respondents contrary to the evidence tendered and the law.

3. The appellants pray for this appeal to be allowed with costs; that the judgment be set aside and, for any other or further order this courts deems fit to grant.

4. The genesis of this matter is a civil suit filed by the respondents herein, against the appellants, at the Chief Magistrate's Court in Machakos. In their amended plaint dated 6th June 2022, the respondents claimed special damages of Kshs.41,300/=, damages under both the *Law Reform Act* and *Fatal Accidents Act* on behalf of James Mweu Nzivo (the deceased) due to a fatal accident that occurred on 16th August 2020 along Machakos-Kangundo road.

5. In their claim, the respondents averred that the deceased was a lawful pillion passenger in motorcycle KMEU 056K which was ridden by the appellants' agent or servant negligently of which negligence was the sole cause of the fatal accident. The respondents claimed that the rider was the agent or servant of the appellants, riding with the authority of the appellants and within the scope of his duties.

6. The appellants herein, in their amended defence dated 21st October 2022 denied that they caused the accident in the manner claimed by the respondent. It was their defence that they had not authorized anyone to ride the motorcycle and the same was illegally and unlawfully taken in their absence and without their knowledge.

7. In a judgment dated 6th December 2023, the trial magistrate found that the motorcycle was owned by the 2nd appellant herein and under the control and authority of the 1st appellant herein who was the beneficial owner. It was also held that the deceased was an employee of the Kamuthanga farm under the command of the 1st appellant.

8. The trial court held that being a casual employee, the deceased had access to and authority, express or implied, to the use of the motorcycle, evidenced by the fact that the deceased took the motorcycle and there was no report of him taking it without authority.

9. The trial court further held that the deceased being under the command of the 1st appellant by virtue of being a casual employee, the 1st appellant was vicariously liable for the deceased's actions. That the deceased had the authority to control the motorcycle and if he gave it to the rider, he was only giving it with the authority of the appellants. The trial court also found that because the deceased was not

the rider, he could not have contributed to the accident and therefore held that the appellants herein were 100% liable.

10. Consequently, the trial court awarded Kshs.100,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs.3,005,448/= under loss of dependency, Kshs.41,300/= as special damages and costs the total award being Kshs.3,246,748/=. The trial court also awarded costs and interest at court rates from the date of judgment until payment in full.

11. This decision has precipitated the appeal before me. The appeal was canvassed by way of written submissions. The appellants filed their written submissions dated 26th November 2024.

Appellants' submissions

12. In support of grounds one and two of their Memorandum of Appeal, it is the appellants' case that at the time of the accident, there was no employer/employee relationship between them and Peter Mutuku Kimilu. It is their case that Peter Mutuku Kimilu was a gratuitous agent of the deceased who gratuitously undertook to ride the motor cycle for him on the material date. They contend that as a gratuitous agent, Peter Mutuku Kimilu had a general duty not to conduct himself in a manner that causes injury to others. They faulted the trial magistrate for placing liability on the appellants for the tortious action of a gratuitous agent that was not in the employment of the appellant.

13. It was urged that the rationale of the principle of vicarious liability is to place liability on the party that should in law bear it on the basis of the delegation of tasks or duty. It is contended, therefore, that the existence of an employer/employee relationship between the rider of the motorcycle; Peter Mutuku Kimilu needed to be established by the trial magistrate in order to place liability on the appellant and that this was not done.

14. In support of grounds three, four and five of their Memorandum of Appeal, it is submitted that the respondents alleged that the deceased had suffered loss and damage falling within the scope of a duty of care owed to the respondent by the appellants. They refer the court to the decision in Christine Kalama v Jane Wanja Njeru & Another [2021] eKLR on how the scope of duty of care is determined.

15. They submit the motorcycle was ridden by Peter Mutuku Kimilu. They urge that the rider is bound by The *Traffic Act* Cap 403 of the laws of Kenya which imposes a duty of care on a rider and/or driver to take necessary precautions to avoid accidents.

16. The appellants submit that in the present circumstances of the accident, no evidence was adduced by the respondents to prove that the negligence of Peter Mutuku Kimilu arising from his careless, dangerous and/or reckless riding could be attributed to the appellants.

17. It is the appellants' case that they displaced the effect of the res ipsa loquitur doctrine when they testified that the rider of the motorcycle, Mr. Mutuku was neither their employee nor agent to show that there was no negligence by them or the person over whom they were responsible. They cite the decision in Christine Kalama v Jane Wanja Njeru & Another [2021] eKLR to buttress this assertion.

18. The appellants urged that the respondent failed to prove that the appellants owed the deceased a duty of care which was breached resulting in loss and damage to the respondents. Further, that when the trial court was asked to determine what caused the accident and in so doing who breached a duty of care to the respondents, the magistrate misdirected herself when she addressed herself wholly to the issue of legal/beneficial ownership of the motor cycle in determining liability for the tort of negligence committed against the deceased. They rely on the decisions in Equator Distributors Vs Joel Muriu & 3 Others [2018] and John Nderi Wamugi vs. Ruhesh Okumu Otiangala & Others [2015] eKLR to reinforce this assertion.

Respondents' submissions

19. The respondents filed written submissions dated 16th December 2024. They submit that vicarious liability imposes liability on employers for the wrongful acts of their employees. Thus, such an employer will be held liable for torts while an employee is conducting their duties. They rely on the decisions in Yewens v Noakes (1880) 6 QBD 530 and Joel v Morison [1834] EWHC KB J39 which interrogate the principles required for this tort to hold.

20. They submitted that in the instant case, the employee was acting in the course of his duties but in total disregard to his employer's express instructions, gave a lift to the deceased. They urged that this is not a ground to exonerate the employee unless it can be shown that the deceased was made aware of and freely consented to the risk. They rely on the decisions in Launchbury v Morgans [1973] AC 127, Bachu v Wainana (CA no. 14 0f 1976) Nakuru Automobile House Ltd v Zavdin *CA 63 of 1986*, and Central Motors (Glasgow) Ltd V Cessnock Garage & Motor Co. (1925) SC 79 802).

21. It was the respondent's submission that the appellants were vicariously liable for the accident. It is urged that there are no reports that the motorcycle was stolen by the deceased.

22. The respondent's urge that it is trite law that he who alleges must prove as provided in the *Evidence Act* sections 107-109 and 112. They submit that the no evidence was tendered to show that the deceased was not authorized to ride the motorcycle.

23. The respondents rely on the decisions in Basley v Curry (1999) 174 DLR, Hewitt v Bonvin and another (1940) 1 KB 188 and Selle and another v Associated Motor Boat Co. Ltd (1968) EA 123 to show the circumstances under which an owner can be held liable for an agent's negligence.

24. The respondents submit that since the issue of quantum was not submitted by the appellants, they shall not be submitting on the same as it is undisputed.

25. The respondents further rely on the decisions in Malindi HCCA 51 of 2019 Ewo Beatrice William Muthoka and another (both suing as legal representatives of the Estate of the late William Muthoka Yumla (deceased) v Agility Logistics Limited [2020] eKLR, Machakos HCCA 45 of 20 Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] eKLR, Thika HCCA 37 of 23 Ribiru v Ndung'u (suing on behalf of the estate of the late Joram Ndung'u Mwaniki) & 2 others (Civil Appeal 37 of 2023) (2024) KEHC 339 KLR (25 January 2024).

Analysis and determination.

26. This being a first appeal, this court is enjoined to re-evaluate and re-analyze the evidence tendered in the lower court so as to arrive at its own conclusions. I must, however, bear in mind, that I have neither seen nor heard the witnesses and should make due allowance in this respect.

27. Guided by the foregoing, after perusal of the record of appeal and written submissions from the rival parties, the sole issue that emerges for determination is whether the trial court erred in finding that appellants were vicariously liable for the actions of the deceased.

28. The appellants fault the trial court for wholly and completely misapprehending the law on vicarious liability and tortious liability of a gratuitous agent while the respondents agree with the trial court's finding that the appellants were vicariously liable for the actions of the deceased.

29. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that: "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his

apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

30. Further, the Court of Appeal in Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014] [2014] KECA 297 (KLR) is instructive on vicarious liability. It stated as follows at paragraph *9*:

> "...The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed."

Further at paragraphs *10* and *11*:

> "...However, the liability placed upon the employer/master due to the master/servant relationship is not absolute. In Pritoo –vs- West Nile District Administration, (1968) EA 428, it was held,
>
> > '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 whose negligence the owner is responsible.' Emphasis added.
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> 11. The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision in Joseph Cosmas *Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986* as follows:-
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> > 'In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that 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 was 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 performance of the task or duty thereby delegated to him by the owner.'
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> See also Morgans –vs- Launchbury & Others (supra). Waki, J.A in P.A Okelo & Another t/a Kaburu Okello & Partners –vs- Stella Karimi Kobi & 2 Others- Civil Appeal No. 183 of 2003, expressed himself as follows regarding the assignment of vicarious liability:
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> > 'In assigning vicarious liability, the learned Judge appreciated, correctly, that it arises when the tortious act is done in the scope or during the course of his employment.'
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> In the matter of Minister of Police –vs- Rabie, 1986 (1) SA 117 (A), the Appellate Division held that the determination of whether an employee acted within the scope of employment incorporates both a subjective and an objective enquiry. At paragraph 134 the Court held as follows:
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> > 'It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment,

> may fall outside the course and scope of his employment and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. It may be useful to add that a master is liable even for acts which he has not authorized provided that they are so connected with an act which he has authorized that they may be regarded as modes – although improper modes – of doing them.'"

31. Guided by the foregoing, it is clear that vicarious liability imposes liability on employers for the wrongful acts of their employees where an employer will be held liable for torts committed while an employee is conducting duties in the course and scope of employment.

32. Thus, in order to determine whether the appellants were vicariously liable for the deceased's actions it is necessary to establish if the deceased was acting within the course and scope of employment at the time the delict was committed.

33. The appellants, in their statement of defence in the trial court, averred that the deceased was working as a gardener in the 1st appellant's compound. This was denied in the respondents' reply to amended defence dated 27th October 2022. The respondents' statements dated 6th May 2022 states that the deceased was working as a casual labourer at Kamuthanga Farm earning Kshs.18,000/= a month. The record also reveals that the 1st appellant refers to the deceased as a gateman. The appellant's witness Joseph Kiio in his witness statement states that the deceased was a gardener. In their submissions in the trial court, one of the respondents (Mary Namikoye Sikuku, the wife of the deceased) stated that deceased worked as a gardener in Kamuthanga Farm and was earning Kshs. 18,000/= a month and produced a contract letter to that effect. This was reiterated by Alice Mwikali Nzivo her co-plaintiff at the trial court.

34. After re-analysing and re-evaluating this evidence, it is without doubt that the deceased was an employee of the 1st appellant. It is my considered view that the deceased was employed as a gardener as per the contract adduced by his spouse. In that capacity, he could have doubled up as a gate man. It is unclear how he would be deemed a casual casual labourer bearing in mind the record indicating that he had a monthly salary of Kshs.18,000/=. Either way, he was within the employment of the 1st appellant at the material time.

35. The respondents, in their claim before the trial court and in this appeal, were categorical that accident occurred while the deceased was within the scope of his duties. However, there is no evidence on record to show the link between the deceased's employment and riding the motorcycle. I am of the considered view that the respondents ought to have tendered sufficient evidence in the trial court to buttress their claim that riding the motorcycle was within the deceased's scope of employment or that at least he was from time to time expected to use the motor cycle. To their detriment, they did not.

36. Even if I were to accept that the deceased was entitled to use the motor cycle on the fateful day, it is unclear how the rider and not the deceased ended up riding the motor cycle. From the record, the rider testified that he went to the market with the deceased, and the deceased bought slippers. There is no evidence on record to show that the deceased was riding the motorcycle for the interests and purposes of his employer on the fateful day. To the contrary, it appears his actions were solely for his

own interests and purposes. Moreover, no link has been adduced between the rider and the appellants in an employment or agency relationship.

37. The trial court held that the deceased had access to and authority to the use of the motorcycle because there was no report of him having taken it without authority. I respectfully disagree with the trial court on this. Just because the appellants owned the motorcycle and the deceased had access to it is insufficient to not only conclude that the respondent was authorized to ride the motorcycle but also to saddle the appellants with vicarious liability.

38. I reiterate that there is no evidence to show that the deceased took the motorcycle in performance of the task or duty assigned or delegated to him by his employer, the 1st appellant. Nothing in the record indicates that he had authority, either express or implied, to ride the motorcycle. As such, I am of the view that the deceased was acting outside his casual labour, gardening or gatekeeping scope and on frolics of his own extraneous to his scope of employment as accentuated by the delegation of the riding of the motor cycle to the rider on the fateful day. This rendered the rider a gratuitous agent, the circumstances of the arrangement between the rider and the deceased having not been elaborated to the extent useful for the court to make any further inquiry and determination.

39. Therefore, being unauthorized to ride the motorcycle, he had no authority to grant or delegate to the rider, Peter Mutuku Kimilu. The Court of Appeal in Anyanzwa v Gasperis [1981] eKLR held : "In this case the driver was not the owner's servant. To be the agent of the owners, the driver would have to be shown to have been driving at the request, express or implied, of the owners, and in pursuance of a task or duty delegated to the driver by the owners. As was said by du Parcq, LJ in Hewitt v Bonvin and Another [1940] 1KB 188, at pp 194-195:

> 'The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.'

The circumstances under which an owner can be held liable for an agent's negligence were examined by this Court's predecessor in Selle and another v Associated Motor Boat Co Ltd [1968] EA 123 in which it was held (per Sir Clement de Lestang, VP, at p 128):

> 'Where, however, a person delegates a task or duty to another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be' and the case of Hewitt v Bonvin (supra) was cited as authority for this proposition. The latter case of Morgans v Launchbury and Others [1972] 2 All ER 606 is to the same effect. The House of Lords in that case held that to fix liability on the owner of a car for the negligence of the driver, not being a servant, it must be shown that the driver, at the material time, 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 performance of a task or duty delegated to him by the owner. The fact that the driver is using the car with the owner's permission is not sufficient to establish vicarious liability. An owner who hires out his car to a person to be used for purposes in which the owner has no interest or concern escapes liability."

40. I arrive at the inescapable conclusion, therefore, that the trial court erred in finding the appellants vicariously liable for the deceased's action that led to his death. The 1st appellant was not vicariously

liable for the deceased's negligence. As a consequence, the trial court erred in apportioning liability against the appellants at 100%. As noted by the appellants, the rider, just like any road user had a duty of care to have regard and not act negligently in the course of riding. On the other hand, the deceased having subjected himself to be a pillion of the rider, bore the attendant risk of being such a pillion. I do not think that in the absence of an action against the rider, the court should interrogate the extent of liability. In the premises, the deceased unfortunately has to take accountability solely if not substantially for the misfortune.

41. The upshot is that the appeal dated 11th January 2024 is allowed, the judgment delivered on 6th December 2023 is hereby set aside and each party to bear its cost.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF JUNE, 2025.

RHODA RUTTO

JUDGE

In the presence of;

..... Appellant

..... Respondent

Sam Court Assistant