



Car & General (Trading) Limited v Musambai & 2 others (Civil Appeal E125 of 2023) [2025] KEHC 10928 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E125 OF 2023**

REA OUGO, J

JULY 24, 2025

BETWEEN

CAR & GENERAL (TRADING) LIMITED APPELLANT

AND

DAVID MANDILA MUSAMBAI 1ST RESPONDENT

BENJAMIN KHISA 2ND RESPONDENT

GILLSANDOLS MAKOKHA WAKULA AKA CHRISTOPHER

WAFULA 3RD RESPONDENT

*(Being an Appeal from the judgement of Hon. P.Y. Kulecho (PM)
delivered on 29th September, 2023 in Webuye Civil suit No. 15 OF 2019)*

JUDGMENT

Background

1. This appeal is in regard to the judgment of the subordinate court where David Mandila Musambai, the 1st Respondent herein was the Plaintiff, while Car & General (Trading) Limited, Benjamin Khisa, Gillsandols Makokha Wakula alias Christopher Wafula, the 1st Appellant and 2nd and 3rd Respondents herein were the Defendants.
2. The 1st Respondent's case before the subordinate court was that the Appellant was the registered owner, the 2nd Respondent the beneficial owner or person in possession, and the 3rd Respondent the rider of Motorcycle KMDB 096X TVS Star. He claimed that on 18th May 2016, while pulling a cart at Webuye Market, the 3rd Respondent, acting with the authority of the Appellant and 2nd Respondent, negligently and recklessly rode the motorcycle, causing it to hit him from behind and inflict grievous injuries.



3. The 1st Respondent alleged negligence on the part of the Appellant and the 2nd and 3rd Respondents, invoking the doctrine of *res ipsa loquitur*, the Highway Code, and the [Traffic Act](#), and relied on findings in Webuye PMCC TR. No. 80 of 2018, where the 3rd Respondent was found guilty. He claimed to have sustained soft tissue injuries, a compound fracture of the left tibia and fibula, and psychological trauma. He sought general and special damages, including Kshs. 15,120/= in special damages, future medical expenses, costs, and interest.
4. The Appellant, in a defence dated 21st August 2019, denied ownership of Motorcycle KMDB 096X, knowledge of the 2nd and 3rd Respondents, and the occurrence of the alleged accident. It stated its role was limited to assembling and selling motorcycles, and the registration was not indicative of ownership or control. The Appellant sought dismissal of the claim with costs.
5. The 2nd and 3rd Respondents did not enter appearance nor file defence, and an interlocutory judgment against them both was entered.
6. The trial magistrate entered judgment in favour of the 1st Respondent against the Appellant and the 2nd and 3rd Respondents jointly and severally, apportioning liability at 50%. The court awarded general damages of Kshs. 1,000,000/= and special damages of Kshs. 15,120/=, totalling Kshs. 1,015,120/=, which, after deducting 50% for contributory negligence, resulted in a net award of Kshs. 507,560/=.

The Appeal

7. The Appellant being dissatisfied with the trial magistrate's finding on liability preferred a memorandum of appeal dated 18/10/2023 raises the following grounds:
 - a. The learned Magistrate erred in law and in fact by failing to consider the issue of vicarious liability against the Appellant and the 2nd Respondent.
 - b. The learned Magistrate erred in law and in fact in making a finding on liability against the Appellant without any evidence proving vicarious liability against it.
 - c. The learned Magistrate erred in law and in fact in making a finding on liability against the Appellant despite there being no evidence or nexus to prove that there was an agent, servant and/or any employment relationship existing between the Appellant and the 3rd Respondent herein at the time of the alleged accident.
 - d. The learned Magistrate further erred in law and in fact in making a finding on liability against the Appellant despite there being no evidence adduced to show that the 3rd Respondent was acting on behalf of the Appellant and/or using the motorcycle registration. number KMDB 096X on the instructions of the Appellant at the material time of the accident.
 - e. The learned magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant that it had sold the motorcycle registration KMDB 096X on 05/07/2013 a date prior to the date of the alleged accident.
 - f. The learned Magistrate erred in law and in fact in making a finding on liability against the Appellant despite there being no evidence or nexus to prove that there was an agent, servant and/or any employment relationship existing between the Appellant and the rider of the motorcycle herein at the time of the alleged accident.
 - g. The learned Magistrate further erred in law and in fact in making a finding on liability against the Appellant despite there being no evidence showing that the rider of the motorcycle was in the course of lawful employment with the Appellant at the time of the accident.



- h. The learned Magistrate erred in law and in fact by making a finding on vicarious liability on the part of the Appellant as regards the rider in the suit, when there was actually no evidence tendered by the 1st Respondent whilst the Appellant presented the court with sufficient evidence that the rider was completely unknown to the Appellant.
- i. The learned Magistrate erred in law and in fact in entering 50% liability against the 1st Defendant when no evidence was tabled to show that the Appellant was in control, had authority or derived any benefits from the use of the motorcycle registration number KMDB 096X which allegedly caused the accident.
- j. The learned Magistrate erred in law and in fact in finding the Appellant liable for the accident; whereas the police abstract indicated that Benjamin Khisa was the beneficial owner of the suit motorcycle registration number KMDB 096X.
- k. The learned Magistrate erred in law and in fact in failing to appreciate and consider the evidence of the Appellant with regards to the sale of the motorcycle registration number KMDB 096X to Lady Ken which sale occurred prior to the date of the said accident.
- l. The learned Magistrate erred in law and in fact by failing to appreciate that there exists various forms of ownership i.e. beneficial, possessory and legal owner who are not necessarily the registered owners: The learned Magistrate erred in law and in fact by failing to appreciate the pleading as filed indicating Benjamin Khisa as the beneficial owner having insurable interest and the evidence of the 1st Respondent absolving the Appellant of any liability whatsoever with regards to the filed police abstract, which the 1 Respondent sought to rely on during the trial.
- m. The learned Magistrate erred in law and in fact by entering judgment against the Appellant which sum is astronomically high and will cause the Appellant financial strain in its business to the detriment of its employees.
- n. The learned Magistrate erred in law and in fact by failing to appreciate that the Appellant had discharged the case against it, proving its burden to the standard required by law.
- o. The learned Magistrate erred in law and in fact by failing to consider the evidence tendered by the Appellant to prove that it was neither the owner nor did it derive any benefit from the use of the suit motorcycle registration number KMDB 096X having sold the motorcycle prior to the date of the accident.
- p. The learned Magistrate erred in law and in fact by failing to consider the position of law under the *Evidence Act* with regards to ownership.
- q. The learned Magistrate erred in law and in fact by applying improper standard of proof whereas the Appellant had presented the trial court with sufficient proof to meet the legally required threshold on balance of probability.
- r. The learned Magistrate erred in law and in fact by failing to consider the testimony of the Appellant's witness which proved the Appellant's non- involvement with the subject matter of the suit and relationship with the rider of the said motorcycle.
- s. The learned Magistrate erred in law and in fact by finding that the Appellant was of the owner of the motorcycle registration number KMDB 096X despite evidence to the contrary.



- t. The learned Magistrate erred in law and in fact by failing to appreciate the principles of stare decisis to the holdings in the Court of Appeal Authorities on the issues before the court holding contrary to the holding of the learned Magistrate.
 - u. The learned Magistrate erred in law and in fact by disregarding the documentary evidence adduced by the Appellant, which evidence was not countered or otherwise disproved by more compelling evidence by the 1st Respondent.
 - v. The learned Magistrate erred in law and in fact by holding the Appellant was liable for the accident and further by misdirecting herself on the legal principles in awarding damages therein that were excessive in the circumstances.
 - w. The learned Magistrate erred in law and in fact by failing to acknowledge that the suit motorcycle was not in possession or actual ownership of the Appellant at the time of the alleged accident and consequently holding it liable for the negligence as alleged by the 1st Respondent.
 - x. The learned Magistrate erred in law and in fact by failing to take into account the findings of the police investigation following the accident, which wholly extricated the Appellant from the subject matter of this suit and for which subsequently an abstract was issued which did not bear the name of the Appellant as the owner of the said motorcycle registration number KMDB 096X involved in the accident.
 - y. The learned Magistrate erred in law and in fact by failing to appreciate that the motorcycle was not in the possession and/or control of the Appellant and therefore it was the responsibility of the beneficial and actual owner to have the same registered in their name, which failure greatly prejudiced the Appellant and that the said motorcycle was illegally on the road.
 - z. The learned Magistrate erred in law and in fact by failing to appreciate that the Appellant was in business of selling motorcycles and the registration in its name was solely for the purposes of enabling it carry out its business effectively and to meet statutory requirements.
 - aa. The Learned Magistrate erred in law and in fact by failing to appreciate the statutory requirements set down by NTSA for dealers to have motor vehicles and motorcycles to be registered in their names for purposes of sale.
 - ab. The learned Magistrate erred in law and in fact by failing to take into account the Appellant's pleadings that the only documents that are accepted are only the old log book that are surrendered by the purchaser physically and then the purchaser is issued with a new one by N.T.S.A hence the guiding principles and requirement are those of the N.T.S.A as far as registration and transfer of motor vehicles is concerned.
 - ac. The learned Magistrate totally misdirected herself in delivering the judgement in favor of the 1st Respondent and against the Appellant by failing to consider and appreciate the evidence on record tendered by the 1st Respondent and on behalf of the Appellant.
8. The Appellant sought to have the appeal allowed, the judgment against them set aside and substituted with the dismissal of the case against them and lastly for cost of the appeal and the primary suit.

Submissions

- 9. The appeal was canvassed by way of written submissions.
- 10. The Appellant filed submissions dated 06/11/2024, addressing three issues. First, it was argued that the Appellant was engaged in the business of importing and selling motorcycles and three-wheelers,



which required registration of importers and dealers as owners of the imports, in accordance with the declaration of customs entries and regulations of the National Transport and Safety Authority (NTSA). It was further stated that they sold the motorcycle on 05/07/2013 to Lady Ken prior to the said accident. Reliance was placed on the cases of Gichira Peter v. Lucy Wambura Ngaku & Another (2021) eKLR and Toroitich v. Kibe & Another (Civil Appeal E124 of 2023) {2024}KEHC 251 KLR. It was contended that the trial court erred in concluding that the NTSA notice of the above statutory requirement lacked evidential value.

11. It was further submitted that the police abstract dated 21/05/2017 indicated that the 2nd Respondent was the owner of the motorcycle while the 3rd Respondent was its rider, which meant that the Appellants herein had divested ownership to the persons indicated in the said police abstract. They cited inter alia the cases of Muhambi Koja v. Said Mbwana Abdi (2015) eKLR and Securicor Kenya Limited v. Kyumba Holdings Limited (2005) eKLR, *Car & General Trading Limited v Owino & Another (Civil Appeal E098 of 2021)* KEHC 19397 (KLR) and *Car & General Trading Limited V. Abuga & Another (Suing as the Legal Representative of the Estate of Sylvia Kemunto Abuga-Dcd) & 3 Others (Civil Appeal E002 o 2023)* [2023] KEHC 25431 (KLR). It was submitted that they had discharged the burden of proof to the end that they were not liable for the suit motor cycle and that their registration did not connote ownership. They cited the cases of Jared Magwaro Bundi & Another v. Promarosa Flowers Limited (2018) eKLR and Nancy Ayemba Ngaira v. Abdi Ali, Civil Appeal 107 of 2008 (2010) eKLR.
12. It was further submitted that the 1st Respondent did not link them to any acts of negligence and that the trial court was wrong to draw such inferences. It was argued that, at the time of the accident, i.e., 18/05/2016, they had sold the motorcycle in July 2013 and were therefore strangers to its activities. Reliance was placed on the case of John Nderi Wamugi v. Rubesh Okumu Otiangala & 2 Others, Kisumu CA 24 OF 2015, and Joseph Mbayi v. Frida Onyango (2019) eKLR. It was contended that vicarious liability does not depend on ownership but on the delegation of duties and tasks, and that the registration of the Appellant in the logbook was not sufficient proof of vicarious liability.
13. Lastly, it was submitted that the trial court did not properly apply the principles of the law of evidence on the burden of proof and thus reached an erroneous decision. On the issue of costs, the court was urged to grant the same on favour of the Appellant.
14. The 1st Respondent filed submissions dated 06/12/2024, where he submitted that he proved his case before the trial court on a balance of probabilities as is required under the law, and the Appellant, being the registered owner of the suit motorcycle, was liable for the negligent actions of the rider. He quoted the provisions of Sections 8 and 9(1) of the *Traffic Act*, where he argued that although the Appellant averred that they had sold the motorcycle, there was no evidence that a transfer of ownership had been logged. Reliance was also placed in the case of Muhambi Koja v. Said Mbwana Abdi (2015) eKLR and Nelson Bichanga v. Mary Omari KSM Civil Appeal No. 43 of 2006 (UR).

Analysis and Determination.

15. This being a first appellate court, I am guided by the principles 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.”



16. I have carefully considered the thirty (30) grounds of appeal in the memorandum of appeal, the written submissions in support and against the Appeal and the evidence adduced before the court. The single issue for determination is whether the Appellant can be held vicariously or otherwise liable for the injury and damages occasioned to the 1st Respondent as a result of the accident
17. 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 the evidential burden that is placed 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. It is not in dispute that the Appellant is the registered owner of the suit motorcycle, as is evidenced in the copy of records produced by the 1st Respondent. The burden of proof, therefore, shifted to the Appellants to prove otherwise.
18. The Appellants in their defence contend that such registration does not, of itself, confer liability upon them in relation to the subject accident, as they had already disposed of the motorcycle by way of sale. On that basis, they argue that the doctrine of vicarious liability is inapplicable in the circumstances of this case. The Appellants in support of their argument produced a cash sale invoice claiming that they sold the suit motorcycle to one Lady Ken way back on 05/07/2013, and as such, they ceased control and/or authority over the said motorcycle. The document notes the engine number and chassis number of the suit motorcycle, along with those of the other four motorcycles that were sold on the same date. They argued that their registration was in compliance with the requirements of NTSA as they were in the business of importing and selling motorcycles.
19. Under the Provisions of section 8 of the Traffic Act Cap 403 of the Laws of Kenya, the owner of a vehicle as: “The person in whose name a vehicle is registered shall, unless the contrary is proved is deemed to be the owner of the vehicle.”
20. In the case of Bernard Muia Kilovo Vs Kenya Fresh Produce Exporters (2020) eKLR, the Court of Appeal stated that: “The Court of Appeal in these binding decisions is clearly stating: -
 - i. The presumption that the person registered as the owner of the motor vehicle in the logbook is the actual owner is rebuttable.
 - ii. Where there exists other compelling evidence to prove otherwise, then the court can make a finding of ownership that is different from that contained in the logbook.
 - iii. Each case must however, be considered in its own peculiar facts”
21. The 1st Respondent, however, disputes the authenticity and legal effect of the said invoice, arguing that no evidence was adduced to demonstrate that a transfer of ownership was lodged in accordance with Sections 8 and 9(1) of the Traffic Act. Further, no supporting documentation was produced to show that Lady Ken took possession of or exercised control over the motorcycle. The 1st Respondent maintains that the Appellants, being the registered owners at the time of the accident, are presumed to have retained control and authority over the motorcycle, thereby attracting liability under the doctrine of vicarious liability.
22. It is this court’s considered view that the presumption of ownership arising from registration established in Sections 8 and 9(1) of the Traffic Act is rebuttable, and that ownership should be determined not solely on the basis of registration but also by reference to the factual background, including possession and control. In this regard, the Appellants’ production of a cash sale invoice bearing the specific engine and chassis numbers of the suit motorcycle, coupled with their explanation



- that they were acting as dealers in the ordinary course of business, provides prima facie evidence of a transaction in which the motorcycle passed to a third party.
23. Their position is further reinforced by the contents of the police abstract, which identifies the 2nd Respondent as the beneficial owner of the motorcycle at the time of the accident, while the 3rd Respondent is in possessory ownership. This, they argue, demonstrates that even the investigating authorities recognised a change in ownership. The police abstract is silent as to who maintained a running insurance cover for the subject motorcycle, which information would have been crucial to the 1st Respondent's case. Moreover, the Appellants assert that the continued registration of the motorcycle in their name was purely for compliance with NTSA regulations, pending the formal completion of transfer procedures.
 24. Indeed, it has been argued that concepts have emerged to describe different types of ownership: actual ownership, beneficial ownership, and possessory ownership. A person who enjoys any of these other categories of ownership may, for practical purposes, be more relevant than the individual whose name appears on the registration certificate; and in this case, at the trial level, it was pleaded that there was such an alternative form of ownership.
 25. On vicarious liability, the law is well settled. Vicarious liability is a legal doctrine that assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. While the Appellant denied ownership of the suit motorcycle, he also denied any relationship with the 2nd and 3rd Respondents. On his part, the 1st respondent contended that the 3rd Respondent was under the authority of the Appellant. I agree with the Appellant that, save for the assertion that they were the registered owners of the suit motorcycle, no further evidence was tendered by the 1st Respondent to the effect that any particular legal relationship existed between the Appellant and the 2nd and 3rd Respondents.
 26. In this case, prima facie, the Appellant was the registered owner of the accident motorcycle. Nonetheless, it was proved that the said motorcycle had been sold at the material time of the accident and its possession and use had been delivered to a third party, and eventually to the 2nd and 3rd Respondents. Accordingly, I am persuaded that the Appellants had relinquished both control and beneficial interest in the motorcycle, and should not be held vicariously liable for the actions of a third party merely by virtue of registration.
 27. In the circumstances, I set aside the trial court's judgment on liability and I discharge the Appellant.
 28. I substitute the judgment with a finding that the 2nd and 3rd respondents are 100% liable for negligence on the basis of the interlocutory judgment entered against them.
 29. The quantum of damages remains as assessed by the trial court.
 30. Judgment be and is hereby entered in favour of the 1st respondent against the 2nd and 3rd respondent in the sum of KSh . 1,015,120/= plus costs and interest at court rates from the date of the trial court's judgment until payment in full.
 31. The case against the appellant is dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF JULY 2025.

R.E.OUGO

JUDGE

In the presence of:



Miss Muthee h/b Mr. Karibu -For the Appellant

1st Respondent - Absent

Wilkister - C/A

