Mt Kenya Java Wines and Spirits Limited v Machora & another (Civil Appeal E091 of 2024) [2025] KEHC 11164 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E091 OF 2024

RM MWONGO, J

JULY 23, 2025

BETWEEN

MT KENYA JAVA WINES AND SPIRITS LIMITED ..... APPELLANT

AND

ANDREW NTABO MACHORA ..... 1ST RESPONDENT

ROBINSON MOKAYA ..... 2ND RESPONDENT

(Appeal arising from the Judgment of Hon. S. Ouko in Runyenjes MCCC No. 45 of 2018 delivered on 11th January 2024)

JUDGMENT

Memorandum of Appeal

1. The appellant filed a Memorandum of Appeal dated 16th October 2024 seeking: That the appeal be allowed and the judgment of the trial court be set aside, and that the costs of the appeal be awarded to the appellant.

2. The appeal is premised on the grounds that the learned magistrate erred in law and fact:

    1. In failing to consider the totality of the evidence on record, witness testimony presented at the hearing and written submissions of the appellant hence finding that the 1st respondent was not liable for the acts of the 2nd respondent, contrary to the evidence on record;

    2. In failing to properly analyze the evidence on record which clearly established that the 1st respondent was substantially to blame;

    3. By only holding the third party as wholly liable for negligence in disregard of the sum of evidence adduced at trial; and

4. In failing to appreciate and apply the principles applicable in a claim for negligence.

Background

3. In the trial Court the appellant filed a plaint dated 08th August 2018 seeking judgment against the 1st respondent for Kshs.3,202,592/= with interest. Its case was that on 09th August 2015, its motor vehicle registration no. KCB 602R was being driven along Embu-Meru Road when the 1st respondent or his authorized driver drove motor vehicle registration no. KBQ 756W in such a negligent and careless manner that he caused it to hit the appellant's motor vehicle and damaged it extensively.

4. Through his statement of defense, the 1st respondent denied the allegations made in the plaint. He further denied that the person allegedly driving his vehicle Reg. No.KBQ 756 W, at the time of the accident, one Mercy Imali was not known to him or authorized to drive the said vehicle. That the said driver was not the defendant's employee, servant or agent.

5. Through an application dated 29th January 2020, the appellant sought leave to enjoin the 2nd respondent as a third party. The application was allowed as prayed and he was duly enjoined as a third party to the proceedings. He was served with the pleadings but he did not enter appearance. Interlocutory judgment was entered against him.

6. PC Samuel Irungu testified as PW1 and produced the police abstract following reporting of the accident at the police station. He stated that the 1st respondent's motor vehicle's driver was one Mercy Imali who was headed towards Meru direction while the appellant's vehicle was being driven by John Nyaga Kiarago headed towards Embu Direction. The collision occurred at Kivwe area when the 1st respondent's vehicle was attempting to overtake another vehicle but ended up colliding with the appellant's vehicle.

7. PW2 was Peterscott Mutua, a Legal Officer at Britam Insurance. He testified that the appellant's motor vehicle had been comprehensively insured at the time of the accident. Following the accident in which the appellant's car suffered extensive damage, the insurer found that it would not be economical to repair the car and it was declared a constructive total loss. The charges were assessed at a total of Kshs.3,202,592/=. He produced documents in support of the assessed amount.

8. PW3 was Fredrick Mutwiri, a motor vehicle assessor who produced the assessment report as evidence.

9. DW1 was the 1st respondent who stated that at the time of the accident, the 2nd respondent had borrowed his car to attend a funeral. They agreed that he would not give the car to anyone else. When he was served with the pliant, he was surprised and he did not know the person who was named as the alleged driver of the vehicle. He reached out to the 2nd respondent who confirmed that throughout the trip, he was the one driving the vehicle and it had been involved in a minor accident along Embu-Meru Road. He denied any liability, vicarious or otherwise and denied knowledge of Mercy Imali who was the alleged driver of the vehicle at the time of the accident.

Written Submissions

10. The appeal was canvassed by way of written submissions.

11. It was the appellant's submission that the 1st respondent should be held vicariously liable for the damage to the appellant's vehicle because he is the undisputed owner of the motor vehicle that caused the accident. Through the pleadings, it was stated that the 1st respondent lent his vehicle to the 2nd respondent but this was not proved through evidence. It relied on the cases of William Kabogo Gitau v George Thuo & 2 Others [2010] KEHC 4124 (KLR) and Kansa v Solanki (1969) EA 318.

12. The 1st respondent submitted that the trial court was correct when it entered judgment against the 2nd respondent as the third party. He also stated that the costs of the suit were rightly awarded to the successful party. He relied on the cases of Equator Distributors v Joel Muriu & 3 others [2018] KECA 53 (KLR), Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another [2007] KEHC 1126 (KLR) and Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 others [2013] KEHC 3235 (KLR).

Issues for Determination

13. The issue for determination is whether the 1st respondent should be held vicariously liable for the damage to the appellant's motor vehicle.

Analysis and Determination

14. In making the decision in this matter, this first appellate court is obliged to re-evaluate the evidence of the trial court and make a finding of its own. This was the position held in the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1 where the court held that:

> " The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

15. The 1st respondent indicated in his statement of defense that at the time of the accident, he had lent his vehicle to the 2nd respondent who borrowed it to travel to a funeral. According to the 1st respondent, the vehicle was only supposed to be driven by the 2nd respondent and nobody else. PW1 produced a police abstract indicating that at the time of the accident, the vehicle was being driven by one Mercy Imali and not the 2nd respondent.

16. In his defense, the 1st respondent stated that Mercy Imali is was a stranger to him. After being enjoined in the proceedings as a third party, the 2nd respondent did not enter appearance neither did he file a defense. The trial court found the 2nd respondent liable for the damage to the appellant's motor vehicle. It found that the case against the 1st respondent was not proved on a balance of probabilities.

17. Whether or not a party should be held vicariously liable depends on the existing relationship. The principle of vicarious liabilityholds one person responsible for the tortious actions of another person based on their relationship. That relationship is defined in the 9th Edition Black's Law Dictionary as follows:

> " Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."

18. In light of the foregoing, the following issues arise:

    1. What is the legal relationship between the 1st and 2nd respondent? and

    2. For what purpose was the 1st respondent's car being used?

19. In the present case, the 1st respondent is the undisputed owner of the motor vehicle registration No KBQ 756W; He had lent it to his friend, the 2nd respondent for his own personal use. In his statement, the 1st respondent stated that when he lent the vehicle to the 2nd respondent, the agreement was that he (the 2nd respondent) would not give the vehicle to anyone else to drive it besides himself. When

the 2nd respondent borrowed the 1st respondent's car, he intended to use it for his own enterprise and was not furthering the 1st respondent's purpose. Even though the trial court satisfied itself that the 2nd respondent had been served, he did not enter appearance neither did he testify. As a result, there is no evidence to prove that he was using the car as an agent of the 1st respondent, the owner.

20. In the case of Ormrod v Crosville Motor Services Ltd [1954] 2 All ER 753the owner of a car asked a friend to drive it from Birkenhead to Monte Carlo. The plan was for the owner and friend to go on a holiday together in Switzerland. However, before meeting with the owner in Monte Carlo, the friend intended to see a friend in Normandy. During this trip to Normandy, while en route to Dover to take a ferry to France, the friend carelessly collided with a bus, inflicting damage to both vehicles and injuries to the car's passengers. The court was faced with the question of whether the owner of the car was vicariously liable for the negligence of his friend, who was driving the car at his request, even though the driver was also using the car for his own personal purposes. Here, the owner of the car was held vicariously liable because the driver was partly serving the owner's interests. The court stated that the owner can only avoid culpability if they lend or hire their car to someone who uses it for reasons unrelated to their own interests. It was held:

> " The law puts a special responsibility on the owner of a vehicle who allows it to on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver."

21. In this case, the 1st and 2nd respondents are friends. These are facts that were deposed to in the statement of defense. The purpose of the 2nd respondent's use of the 1st respondent's car was uncontroverted through the available evidence. Through the plaint, the appellant pleaded vicarious liability and the onus was on it to prove that the 1st respondent was to be held vicariously liable.

22. From the available evidence, it appears that there is strictly, no proper agency relationship between the respondents given that the 2nd respondent was using the 1st respondent's car for his own purposes. It would have been an agency relationship if the 1st respondent had sent the 2nd respondent to attend the funeral on his behalf. This was not established through evidence and the 1st respondent's evidence is uncontroverted. Agency is defined under the 9th Edition Black's Law Dictionary as:

> " A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions."

23. At the time of the accident, it was found that the vehicle was being driven by one Mercy Imali who was neither a party to the proceedings or a witness. This driver was not known to the 1st respondent as the owner of the vehicle, but, seemingly, she is known to the 2nd respondent. I accept as truthful, on a balance of probabilities, the 1st respondent's testimony as to his lack of knowledge of the driver, Imali.

24. Therefore, the 1st respondent cannot be held vicariously liable for the damage to the appellant's car since the 2nd respondent and his accomplice were not his agents in law. In the case Khayigila v Gigi & Co Ltd & another [1987] KECA 53 (KLR), the Court of Appeal, in determining an appeal on the sole issue of vicarious liability, opined thus:

> " For the vehicle owner to be responsible for the negligence of the agent, that agent must have been detailed to do a task beneficial to or on behalf of the owner. The recent decision of this court in Nakuru Automobile House Ltd v Nasiruddin Ziaudin Civil Appeal No 63 of

1986 based its decision on Morgan v Launchbury and Others [1972] 2 All ER 606 and held that the owner of the car was not vicariously liable for the negligence of the driver of the car who had borrowed it to enjoy the rally. The driver was not at the time of the accident driving the vehicle as a servant or an agent of the owner. In the present appeal, the second respondent was not driving the vehicle as a servant or agent of the first respondent. The second respondent was not driving for the benefit of the first 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. I would also dismiss this appeal." [Emphasis added] (see also the case of Ndungu v Ndungu [2025] KEHC 2025 (KLR))

25. In conclusion, I find that the 1st Respondent is not vicariously liable for the 2nd Respondent's act and as such, the trial Magistrate did not err in her finding that the 2nd respondent was not liable to pay the damages prayed by the appellant.

Disposition

26. In the result, the appeal lacks merit and it is hereby dismissed with costs to the 1st respondent.

27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF JULY, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Muya holding brief for Ms. Masudi for Appellant

Onsembe holding brief for Ongegu for 1st Respondent

No Representation for 2nd Respondent

Francis Munyao - Court Assistant