Radha Motors Limited v CW (Minor Suing Thro' Father and Next Friend JGM) & another (Civil Appeal E1449 of 2023) [2025] KEHC 11463 (KLR) (Civ) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11463 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1449 OF 2023

DKN MAGARE, J

JULY 28, 2025

BETWEEN

RADHA MOTORS LIMITED ..... APPELLANT

AND

CW (MINOR SUING THRO' FATHER AND NEXT FRIEND JGM) ..... 1ST RESPONDENT

JORAM KAMIA GATHANWA ..... 2ND RESPONDENT

(Appeal arises from the Judgment and decree of subordinate court delivered by Hon. C.K Cheptoo (PM) on 5.12.2023 in Milimani CMCC No. 7784 of 2017)

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. C.K Cheptoo (PM) on 5.12.2023 in Milimani CMCC No. 7784 of 2017.
2. The Appellant lodged the Memorandum of Appeal dated 19.12.2023 raising the following grounds of appeal:
    a. The learned magistrate erred in law and fact in failing to find that the Appellant had no control of motor vehicle registration No. KBZ xxxH on the date of the accident.
    b. The learned magistrate erred in law and fact in failing to find that the Appellant was not liable for the accident.
    c. The learned magistrate erred in law and fact in failing to find that the Appellant could not be held vicariously liable for the 2nd Respondent's acts and omission.

d. The learned magistrate erred in law and fact in failing to find that mere registration of the motor vehicle was not prima facie evidence of ownership.

3. In short, the Appellant contends that the learned magistrate erred both in law and in fact by failing to appreciate several key issues surrounding the accident involving motor vehicle registration number KBZ xxxH. First, the magistrate failed to recognize that the Appellant did not have control of the said vehicle at the time of the accident. Secondly, the magistrate erroneously found the Appellant liable for the accident, despite evidence to the contrary. Further, the Appellant argued that the magistrate wrongly held them vicariously liable for the actions and omissions of the 2nd Respondent, who was the actual operator of the vehicle. Finally, the Appellant posited that the magistrate misdirected herself in treating the mere registration of the vehicle in the Appellant's name as sufficient proof of ownership and liability.

Pleadings

4. In the plaint dated 18.10.2017, the 1st Respondent claimed damages for an accident pleaded to have occurred on 1.5.2017 when the 1st Respondent was a passenger in motor vehicle registration No. KCD xxxB along Ruaka-Windsor Road when the Appellant's motor vehicle registration No. KBZ xxxH was so negligently driven that it collided with motor vehicle registration No. KCD xxxB.

5. The Appellant filed its defence dated 15.6.2020 denying ownership of the accident motor vehicle and the particulars of negligence as pleaded by the 1st Respondent. Quantum is not part of this appeal and as such it is not necessary to go to details of injuries.

6. The 2nd Respondent failed to enter appearance or file defence and default judgment was entered against him.

Evidence

7. PW1 was Joseph Gachau Mungai, the father to the 1st Respondent. He testified that he was father of the minor. He produced the documents per his list of documents. On cross examination, it was his case that the Appellant was the owner of the accident motor vehicle.

8. DW1 was Mohammed Rameez. He stated that he was the driver of the Appellant. It was his case that motor vehicle registration No. KBZ xxxH was sold. It was his case on cross examination that the motor vehicle was sold to Julius Kamoya. They however had not joined the said buyer as third party.

Submissions

9. The Appellant filed submissions dated 9.12.2024. It was submitted that the Appellant was not liable for the accident as it was not the registered owner and would not be held vicariously liable for acts of the 2nd Respondent. Reliance was placed on *Osomo Apima Nyaundi c Charles Isaboke Onyancha Kibondori & 3 others* (1996) eKLR.

10. It was also submitted that the Appellant proved that it had sold the motor vehicle to a third party and there is no way it would be held to be liable for an accident. They cited *Eastern Produce (K) Ltd v Christopher Atiado Osiro* (2006) eKLR.

11. The 1st Respondent in submissions dated 31.12.2024, argued that the burden of proof lay with the Appellant to demonstrate that at the time of the accident, the motor vehicle had been sold to a third party. In support of this position, the Respondent relied on Section 116 of the *Evidence Act*, which provides that when a person is shown to be in possession of something, it is presumed that they are the

owner unless proven otherwise. Accordingly, the Respondent maintained that the Appellant failed to discharge this burden and remained liable for the accident.

12. They also submitted that the Appellant ought to have joined a third party from whom they claimed. Reliance was placed on *SBI International (K) Limited v Fredrick Matheka Kasilu* (2021) eKLR.

Analysis

13. This being a first appeal, the Court should re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of *Selle & Another v Associated Motor Board Company Ltd* [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

14. On liability, Section 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> 107.
>
> (1) 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.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

15. The 1st Respondent had to prove the circumstances under which the accident occurred leading to blame on the Appellant. The 1st Respondent was also to prove the ownership of the accident motor vehicle. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition 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 however the evidential burden that is case 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."

16. Once the motor vehicle search records was adduced, the burden shifted to the Appellant to demonstrate why its name appeared on the motor vehicle register when it alleged that it was not the owner. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. Therefore, the burden is not on the Plaintiff, or the Defendant. It is on the party who alleges. This was the reasoning of the Court in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR where it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

17. Proof on a balance of probabilities would involve proof that the allegations as pleaded in the 1st Respondent's case were more likely not to be what took place. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

18. Once the court considers that on the evidence, the occurrence of the event was more likely than not, it would find for the party who had the burden to prove the event. Per Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 thus;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

19. Where the fact was not proved, it would be against the person who bore the burden of proof. If the 1st Respondent proved that the Appellant was the owner of the motor vehicle and the Appellant failed to prove whoever it alleged to have subsequently become the owner thereof, then the 1st Respondent would consequently be said to have proved her case. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "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 a tribunal

can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden on a balance or preponderance 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...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

20. Liability attaches to the fault. There can be no liability without fault. Liability includes vicarious liability. In the case of *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* {1988} RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."
>
> What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

21. In the case of *Kiema Muthuku v Kenya Cargo Handling Services Ltd* (1991) 2 KAR 258, the court of appeal posited as doth:

> There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

22. The Appellant stated that they sold the motor vehicle in 2014. The accident occurred in 2017. However, the police abstract indicates that the 2nd respondent was the policy holder. There is no reason for the 2nd Respondent to be a policy holder other than being an owner. The said motor vehicle was sold to the 2nd Respondent on hire purchase orders; the vehicle was not being driven for the benefit of the Appellant. It is absurd for the court to require Third Party Proceedings against a party already party to the case. Order 1 Rule 15 of the *Civil Procedure Rules* provided as follows:

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant

but as between the plaintiff and defendant and the third party or between any or either of them.

23. The court was thus plainly wrong when it said that the third party was not joined. Further, even if the vehicle was sold to a third party, the question before the court was not indemnity or contribution. It was that it was not the owner. In the case o*f John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others* [2015] eKLR, the Court of Appeal held as follows:

> *Black's Law Dictionary*, 9th edition at page 998 defines vicarious liability in the following words:
>
> > "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."
>
> 15. In *HCM Anyanzwa & 2 Others v Luigi De Casper & Another* [1981] KLR 10, this Court held that "vicarious liability depends not on ownership but on the delegation of tasks or duty." We believe the learned judge misdirected himself when he addressed himself to the issue of legal ownership of the motor vehicle in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent, who was an employee of the third respondent. It is the third respondent who had supervisory power over his driver and not the appellant. The appellant cannot therefore be held to be vicariously liable.
>
> 16. The reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle in a case of this nature, to the total exclusion of employer/employee relationship, would amount to grave injustice to the appellant.

24. The respondent failed to establish a causal link between the appellant's negligence and the injury to the 1st respondent. There was no relationship between the 1st respondent and the 2nd respondent. The mere fact that the vehicle was registered in the name of the Appellant does not mean that they are liable. The driver of the vehicle was not shown to be using the vehicle on behalf of the Appellant. In the case of *Securicor Kenya Ltd v Kyumba Holdings Ltd* [2005] eKLR, the court of Appeal [Tunoi, O'Kubasu & Deverell, JJA] held as follows:

> It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial Judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle is the appellant.
>
> That section reads as follows:-
>
> > The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."
>
> We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in *Osapil v Kaddy* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.

25. The question of the certificate of search vis-à-vis, Section 8 of the *Traffic Act* was addressed succinctly in the case of *Samuel Mukunya Kamunge v John Mwangi Kamuru* [2005] eKLR, where H. M. Okwengu as then she was stated as follows:

> It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the *Traffic Act* provides that the contrary can be proved. This is in recognition of the fact that often times vehicles change hands but the records are not amended.
>
> I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH xxxA, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH xxxA was owned by the Respondent.

26. In the circumstances, I find the appeal is merited and is consequently allowed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

27. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

28. The Supreme Court 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.

29. The circumstances of this case are that the Appellant is to blame for failing to register both itself and the hirer to protect their role as financiers or sellers of the vehicle on hire purchase. The 1st Respondent was also a victim of the circumstances. Each party shall bear its costs.

Determination

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

    a. Appeal is merited and is accordingly allowed. Judgment against the Appellant is set aside. In lieu thereof I substitute with an order dismissing the suit against the Appellant.

    b. The Appellant shall bear his costs in this court and the court below.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Michael