

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E255 OF 2022**

**CAR AND GENERAL (TRADING)  
LIMITED.....APPELLANT**

**VERSUS**

**DAMARIS MWENDE MUTUA.....1<sup>ST</sup> RESPONDENT**

**NELSON MAGETO.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. A.N  
Ogonda, Principal Magistrate, in Milimani CMCC No. 1840 of 2017  
delivered on 31/3/2022)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent was the plaintiff in Milimani CMCC No. 1840 of 2017. She had sued the Appellant vide a plaint dated 20<sup>th</sup> March 2017 claiming for general and special damages following a road traffic accident that occurred on 29<sup>th</sup> November 2016 at around 1:30 PM at South B area.

2. The Appellant entered appearance on 9<sup>th</sup> May 2017 and filed its defence on 19<sup>th</sup> May 2017 in which it contended that it was not the owner of the motor cycle at the time of the accident as it had sold it to a third party. The 2<sup>nd</sup> Respondent never entered appearance and interlocutory judgment was entered against him

on 7<sup>th</sup> May, 2018. The matter proceeded to full hearing after which the trial court entered judgement as against the Appellant and the 2<sup>nd</sup> Respondent on the following terms: -

Liability at 100% against the appellant and the 2<sup>nd</sup> respondent jointly and severally;

General Damages .....Kshs. 180,000/=;

Special Damages .....Kshs. 180,000/=

Costs of the suit and interest at court rates.

3. The Appellant was aggrieved by the judgment and lodged the present appeal vide a memorandum of appeal dated 26<sup>th</sup> April 2022 and an amended memorandum of appeal dated 7<sup>th</sup> June 2024. The appellant raised a total of 28 grounds which grounds can be summarized as to raise the following issues; whether the learned magistrate erred in finding the appellant liable for the said accident; whether the trial magistrate erred in finding that the appellant failed to enjoin Khetia Drapers Limited as third party and whether the trial court erred in its judgment on quantum.

4. The appellant proposed that the appeal be allowed, the judgment of the learned magistrate against the appellant be set

aside and the suit against the appellant be dismissed. The appellant also prayed for costs.

5. The appeal was canvassed by way of written submissions of the respective advocates for the Appellant and the 1<sup>st</sup> Respondent.

### **Appellant's submissions**

6. Counsel for the appellant faulted the trial magistrate for holding that the appellant was the owner of the Motor Cycle Registration No. KMDH 813Q. Counsel submitted that although the appellant's name appeared in the search records of the National Transport Authority as the registered owner, the said motor cycle was sold to Khetia Drapers on 12<sup>th</sup> July 2014 and therefore that the Appellant was not in control of the motorcycle on the day of the accident.

7. It was submitted that the Appellant is an importer of motor cycles and that it is a statutory requirement for all dealers to have the motor cycles being registered in their respective names. That it is for that reason that the motor cycle was registered in their name though it was thereafter sold to Khetia Drapers Limited. Reference was made to the case of **Toroitich vs Kibe & another (2024) eKLR** where in similar circumstances as in this case the court held that:

.....I am satisfied that the said motor vehicle was sold to Meena Collections. The third party`s witness evidence established that the third party is in the business of sale of motorcycles and as such it is required to have motor cycles and motor vehicles registered in their name but many at times they might not be the beneficial owners as in this case.

8. The appellant submitted that the motorcycle was insured in the name of Nelson Mageto who was also listed in the police abstract. Reliance was placed in **Muhambi Koja v Said Mbwana Abdi (2015) eKLR** where it was held that:

**In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.**

9. The cases of **Securicor Kenya Limited vs Kyumba Holdings Limited (2015) eKLR** and **Car & General Trading Limited vs Owino & another (2023) eKLR** were cited to buttress the same position.

10. It was submitted that registration of motor vehicle is not conclusive proof of ownership. Reliance in this regard was placed in the cases of **Car & General Trading Limited v Owino & another (Civil Appeal E098 2021 (2023) KEHC 19397 (KLR) (29 June 2023) (Judgment)** and **Car & General (Trading) Limited Abuga & another (Suing as the Legal Representatives of the estate of Sylvia Kemunto Aguga - Decease) & 3 others (Civil Appeal E002 of 2023) (2023) KEHC 25431 (KLR)(16 November 2023) (Judgment)**, where the courts found the respective appellants not liable as they had sold their respective motor cycles at the time of the accident.

11. Counsel submitted that the learned magistrate erred by failing to appreciate the evidence adduced by the appellant on liability. That the trial magistrate had instead shifted the burden of proof on the appellant by relying on the copy of records to find the Appellant the owner of the motor cycle without considering the evidence of the Appellant that they had sold the motor cycle at the time of the accident and as such they did not have possessory, beneficial or insurable interest in the motor cycle, see **Nancy Ayemba Ngaira v Abdi Ali, Civil Appeal 107 Of 2008 20100 eKLR.**

12. It was submitted that a presentation of a search certificate is not sufficient proof of ownership of a motor vehicle. Reliance in this respect was placed in the cases of **Samuel Mukunya**

**Kamunge v John Mwangi Kamuru, Civil Appeal No.34 Of 2002** and **General Motors East Africa Limited v Eunice Alila Ndeswa & another** (2015) eKLR where it was held that where a police abstract is produced and no evidence is adduced to rebut it, the police abstract could be relied upon to proof ownership.

13. Counsel submitted that the 1<sup>st</sup> Respondent had not demonstrated that there was any agency/servant or any other existing employment relationship between the appellant and the 2<sup>nd</sup> respondent and as such vicarious liability could not arise. Reliance was in this respect placed in the cases of **Abson Motors Limited v Tabitha Syombua Mutua & another (2019) eKLR** and **Securicor Kenya Limited vs Kyumba Holdings Limited** (supra). In the latter case it was held that:

**The Appellant was still the owner by way of logbook in its name such ownership was not however sufficient to create vicarious liability for the negligence of everyone who happened to drive it.**

14. It was submitted that as per Order 1 Rule 15 of the Civil Procedure Rules, 2010, taking out third party notice is premised on the doctrine of contributory negligence where the defendant seeks contribution, indemnity or some sought of remedy from the party they feel they have a claim against. Counsel submitted that this was not the case in the present case as the Appellant did not

blame Khetia Drapers for the accident. The Appellant in this respect relied on the case of **John Kibicho Thirima vs. Emmanuel Parsmei Mkoitiko (2017) eKLR** where it was held that:

**131. Further, I find the defendant`s submissions that the plaintiff should have joined owners of all the motor vehicles involved in the material accident an act of chasing the wind. The plaintiff never claimed that the other vehicles contributed to the occurrence of the material accident. He was clear in his testimony and pleadings. It is the defendant who pleaded that other motor vehicles were responsible for the accident hence the burden of proof lay on the defendant to enjoin those owners and prove how they contributed to the accident.**

15. For the foregoing reasons, the Appellant urged the court to allow the appeal with costs.

### **1<sup>st</sup> Respondent`s submissions**

16. Counsel for the 1<sup>st</sup> respondent submitted that according to section 8 of the Traffic Act, a person registered as the owner of a motor vehicle is presumed as the owner unless the contrary is proven. That to prove ownership of a motor vehicle/cycle one

must produce a log book, or certificate of search from the National Transport and Safety Authority showing the registered owner. Counsel submitted that the 1<sup>st</sup> Respondent produced documents from the registrar of motor vehicles showing that the Appellant was the registered owner of the subject motorcycle. Reliance was placed in **Thuranira Karauri vs. Agness Ncheche (1997) eKLR** and **Joel Muga Opija vs. Eat Africa Sea Food Ltd (2013) eKLR**. In the latter case it was held that the best way to prove ownership would be to produce a document from the Registrar of Motor Vehicles showing the registered owner.

17. Counsel submitted that the 1<sup>st</sup> respondent had effectively demonstrated the owner of the said motorcycle and that the burden shifted to the appellant to disapprove whether it was the owner or not. That according to section 9 of the Traffic Act, the responsibility of ensuring that the appropriate transfer was registered lay with the transferor. Consequently, in the absence of a transfer document between the appellant and Khetia Drapers, the Appellant was the presumed owner of the motorcycle. It was thus submitted that the 1<sup>st</sup> Respondent had proved on a balance of probability that the Appellant was at the time of the accident the registered owner of the accident motorcycle.

18. On vicarious liability, counsel submitted that since the appellant could not disapprove that it was the owner of the motorcycle, then it was vicariously liable. Counsel referred to the

cases of **Kenya Bus Service Ltd vs. Dina Kawira Humphrey (2003) eKLR** where the Court of Appeal cited the case of **Karisa v Solanki 1965 EA 318** that:

**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).**

19. The same was repeated in **Dritoo vs West Nile District Administration 1968 EA 428**. Counsel submitted that the trial court correctly apportioned liability between the respondents.

20. It was submitted that it was incumbent upon the appellant to enjoin the third parties in the suit as liability could not be determined against persons who were not before the court. Reliance was placed in **Murungi Kirigia vs Catherine Kagira (2011) eKLR** where the court stated that:

**We cannot make precipitating orders against those who are not parties before us for the simple reason that they may be condemned unheard and also that such parties would not be said to be in contempt of the court if they fail to**

**obey such a court order as it was, in the first place not made in a case in which they were a party.**

21. It was submitted that third party liability is only in respect of contribution towards the defendant`s liability or to indemnify the defendant for the amount that the court finds due from the defendant to the plaintiff, as held in **John Wambua vs. Mathew Makau Mwololo & another (2020) eKLR**. That in the present case, the Appellant ought to have enjoined Khetia Drapers as a third party so as to be able to seek indemnity from it.

22. As regards quantum, counsel submitted that the award of Kshs. 180,000/= is modest in light of the injuries suffered. Reliance was placed in **Stanley Maore vs Geoffrey Menda (2004) eKLR** and **Cecilia Mwangi & another vs Ruth Mwangi (1997) eKLR** for the principle that comparable injuries should be compensated by comparable awards and with moderation.

### **Analysis and determination**

23. The duty of a first appellate Court was set out in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, as follows:

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely,**

**to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

24. It is therefore my duty to analyse and re-evaluate afresh the evidence adduced before the trial court and reach my own independent decision.

25. I have considered the grounds of appeal, the judgment of the trial court and the submissions by the respective counsels for the parties. The issue for determination are:

- (1) Whether the trial court erred in holding that the Appellant was the owner of the motor cycle registration No. KMDH 813Q at the time of the accident.
- (2) Whether the Appellant was vicariously liable for the accident.
- (3) Whether the trial court erred in finding that the Appellant ought to have enjoined Khetia Drapers Limited as third party.
- (4) Whether the damages awarded by the trial court were excessive.

26. The appellant submitted that it is an importer of motorcycles. That it imported the said motor cycle and sold it to a company known as Khetia Drapers, though the registration of the motor cycle still remained in its name. Therefore, that it was a stranger to the claim.

27. The 1<sup>st</sup> respondent on the other hand submitted that the appellant remains the registered owner of the motor cycle as shown in the motor cycle copy of records as it did not produce any document to show that it transferred the motor cycle to a third party.

28. The trial magistrate found that the Appellant was the registered owner of the motor cycle as it did not produce any evidence to show that it had transferred the motor cycle to Khetia Drapers Limited. The court made reliance on the provisions of Section 8 of the Traffic Act to hold that the Appellant was the owner of the motor cycle.

29. Section 8 of the Traffic Act provides as follows: -

**“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”**

30. There is a long line of court decisions recognizing that the presumption of ownership of a vehicle under Section 8 of the Traffic Act is rebuttable. In the case **Nancy Ayemba Ngana vs. Abdi Ali (2010) eKLR** it was held that:-

**“There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.**

**And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial**

**level, it had been pleaded that there was such alternative kind of ownership.**

**Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question...”**

31. Further, in the case of **P.N.M & another (the legal personal Representative of Estate of L.M.M) vs Telkom Kenya Limited & 2 others (2015) eKLR**, it was in the same vein held:-

**“of the accident motor vehicle and whose agent was the 3rd defendant in view of the two positions- 1st defendant being registered owner whereas the 2nd defendant being the beneficial owner thereof. This court finds that albeit the search certificate/copy of records produced by the plaintiff showed that the 1st defendant Telkom Kenya Ltd was the registered owner of the accident motor vehicle at the material time, it is clear from the evidence gathered by the police investigating the accident, and the driver’s own statement and the vehicle’s insurance policy cover with Kenindia Assurance**

**Co. Ltd, that the owner thereof was the 2nd defendant who was the beneficial owner as the vehicle was then being used for his benefit not the 1st defendant's benefit. The latter had sold the accident motor vehicle and its possession and use thereof passed to the 2nd defendant. Section 8 of the Traffic Act Cap 403 of the Laws of Kenya provides that: - "The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."**

32. The Respondent faulted the Appellant for not complying with the provisions of section 9 (2) of the Traffic Act which provides as follows:

### **9. Change of ownership**

**(1) No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner thereof.**

**(2) Upon the transfer of ownership of a motor vehicle or trailer, the registered owner thereof shall, within**

**seven days from the date of the transfer, inform the Registrar in the prescribed form of the sale or disposition, name, postal and email addresses and telephone number of the new owner, the mileage recorded on the mileage recorder (if any), of the motor vehicle, and such other particulars as may be prescribed, and shall deliver the registration book in respect of such vehicle to the Registrar together with the transfer fee, whereupon the vehicle shall be registered in the name of the new owner:**

33. It was submitted that failure to comply with the provisions of the section meant that the Appellant remained as the registered owner of the motor vehicle as shown in the copy of records. In the case of **Muhambi Koja Said v Mbwana Abdi [2015] eKLR**, the Court of Appeal when considering the implication of Section 9 of the Traffic Act stated the following-

**“Two provisions are presented under this provision. There are two steps to be satisfied within fourteen days before the vehicle can be registered in the name of the new owner. As this process is in motion the new owner, though not registered can use the vehicle on the road for a period of fourteen (14) days. If the vehicle was to be involved in an accident in this intervening**

**period the registration book will be in the name of the seller yet the motor vehicle will have been transferred and ownership vested in the new owner only pending registration. That new owner will be liable if evidence of transfer is led. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms. The police abstract report which is usually completed after investigations are conducted by the police and which is admissible in evidence by virtue of Section 38 of the Evidence Act is one such proof.”**

34. The Court went on to state that -

**“The proviso to Section 9(2) is the second scenario. Unlike the first scenario which is restricted to fourteen days within which the motor vehicle must be registered, the second scenario is where the previous owner has transferred the vehicle to a new owner but has either refused to comply with the requirements necessary to register it, or has died or left Kenya or cannot be traced. Only after the Registrar is satisfied as to any or more of these conditions and upon payment of fees will the new owner be**

**registered. In the meantime before the Registrar is satisfied, although not named in the log book, the new owner, will be for all intents and purposes be deemed to be the owner, and in case of an accident, will be held liable.”**

35. In the present case, the appellant adduced evidence that it is an importer of motor cycles. The police abstract listed the owner of the motor cycle as Nelson Mageto, the 2<sup>nd</sup> Respondent. The police officer who testified in the case stated that the insurance cover of the motor cycle was issued in the name of the said 2<sup>nd</sup> Respondent. The appellant argued that it had discharged its burden of proof in showing that it had sold the motor cycle to Khetia Drapers. The 1<sup>st</sup> Respondent on the other hand argued that the burden of proof had shifted to the Appellant to rebut the evidence that it was not the owner of the motor cycle which burden the Appellant did not discharge.

36. A police abstract can prove ownership of a motor vehicle where the evidence contained therein is not rebutted. In the case of **Jared Magwaro Bundi & Another v Primarosa Flowers Limited [2018] eKLR** the Court of Appeal held that:-

**“In a nutshell, police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log)**

**book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of ownership to the person named in that other form of evidence.”**

37. The Court continued to state that:

**“ .. It was therefore held in Muhambi Koja (supra) that Section 8 of the Traffic Act recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered”.**

38. Though in this case there was no evidence of transfer of the motor cycle to Khetia Drapers, the fact that the police abstract listed the 2<sup>nd</sup> Respondent as the owner of the motor cycle and the insurance cover was in his name, led credence to the evidence of the Appellant that it had sold the motor cycle. It is the 2<sup>nd</sup>

Respondent who could refute the prima facie evidence that he was the possessory owner of the motor cycle but he did not make an appearance in court. There was no evidence of employer/employee relationship between the Appellant and the 2<sup>nd</sup> Respondent. I find that the Appellant had discharged its burden of proof in demonstrating that it had sold the motor cycle to Khetia Drapers. The trial magistrate in making a finding for the 1<sup>st</sup> Respondent relied on the evidence of mere registration and lack of transfer document but failed to consider the evidence of the Appellant rebutting the evidence on ownership as evidenced by the police abstract and the evidence of the police officer that the insurance cover was in the name of the 2<sup>nd</sup> Respondent. The magistrate in this respect clearly misdirected himself in the interpretation of the provisions of Section 9 of the Traffic Act and as a result arrived at a wrong finding on the ownership of the motor cycle. I find that the Appellant had proved on a balance of probabilities that it had sold the motor cycle to another party as of the time of the accident.

39. In view of the finding that the Appellant had sold the motor cycle at the time of the accident, the issues of vicarious liability and contributory negligence on the part of the Appellant do not arise. So is the issue of issuance of a third-party notice. Having already sold the motor cycle at the time of the accident, the Appellant could not be held vicariously liable for the accident nor being liable in contributory negligence. They were not seeking for any contribution or indemnity from Khetia Drapers so as to be

expected to issue third party notice to them, see **John Kibicho Thirima vs. Emmanuel Parsmei Mkoitiko (2017)** (supra).

40. The upshot is therefore that the appellant was not liable for the accident. The trial court wrongly found the Appellant liable for the accident when the Appellant had discharged its burden of proof by demonstrating on a balance of probabilities that it had divested itself of the ownership of the motor cycle at the time of the accident. I therefore find the appeal herein to be well merited.

41. I accordingly allow the appeal and set aside the judgment of the trial court as against the Appellant. I award the costs of the appeal to the Appellant to be borne by the 1<sup>st</sup> Respondent.

It is so ordered.

**Delivered, dated and signed at GARSEN this 19<sup>th</sup> day of September 2025.**

**J.N. NJAGI**

**JUDGE**

**In the presence of:**

**Mr. Ndungu h/b for Mr. Gathiru for Appellant**

**Miss Nyaguthiii for Respondent**

Court Assistant: