Jimcab Services Limited v Mueke & another (Suing as the Legal Representatives of the Estate of the Late Nicholas Malombe Wayua (Deceased)) & another (Civil Appeal E1423 of 2023) [2025] KEHC 13198 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E1423 OF 2023

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

JIMCAB SERVICES LIMITED .... APPELLANT

AND

KAMENE MUEKE & CELESTINA KAMBUA MALOMBE (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE NICHOLAS MALOMBE WAYUA (DECEASED)) .... 1ST RESPONDENT

FELISTER NJERI KIBERENGE .... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. J.M. Gacheru (RM) on 14.12.2023 in Nairobi CMCC No. E10247 of 2021. The appellant was 1st Defendant in the subordinate court.

2. The court upon hearing the parties entered judgment for the 1st respondent as follows:

    a. Liability 100% against the Appellant and 2nd Respondent

    b. General damages for pain and suffering Ksh. 10,000/=

    c. Loss of expectation of life Ksh. 100,000/=

    d. General damages for loss of dependency Ksh. 1,824,120/=

    e. Special damages Ksh. 30,000/=

3. The Appellant lodged an amended Memorandum of Appeal dated 15.12.2023 raising the following grounds of appeal:

a. The learned magistrate erred in law and in fact by awarding special damages which were not pleaded and proved.

b. The learned magistrate erred in law and in fact by finding the 1st Defendant liable for the accident while disregarding the fact that the 1st defendant was not the owner of the motor vehicle.

c. The learned magistrate erred in law and in fact by disregarding the Sale Agreement dated 22nd September, 2016 whereby the appellant herein sold the vehicle to the 2nd respondent a whole year before the accident took place.

d. The learned magistrate erred in law and in fact by disregarding the fact that the vehicle was transferred to the 2nd Respondent upon payment of full purchase price.

e. The learned magistrate erred in law and in fact by disregarding the motor vehicle Copy of Records clearly showing that the 1st defendant herein is a previous owner of the motor vehicle.

f. The learned magistrate erred in law and in fact by finding the appellant herein liable for the accident without determining true ownership of the motor vehicle at the time of accident.

g. The learned magistrate erred in law and in fact by disregarding the evidence of the Appellant in support of its position that it was not the beneficial and legal owner of the motor vehicle at the time of the accident.

h. The learned magistrate erred in law and in fact by entering a judgment that is unfair, unjust, biased and an absurdity to the extent that liability is based on the doctrine of res ipsa loquitur where no facts are set out to justify its invocation.

4. The issues that arise for determination in this appeal are threefold. The first concerns the question of special damages, namely whether they were specifically pleaded and strictly proved as required by law. The second issue relates to the ownership of the suit motor vehicle, and whether the evidence tendered was sufficient to establish the same. The third issue touches on the applicability of the doctrine of res ipsa loquitur, and whether, in the circumstances of the case, the doctrine could properly be invoked to infer negligence on the part of the respondent.

Pleadings

5. In the Plaint dated 9.08.2021, the 1st Respondent claimed damages for an accident pleaded to have occurred on 18.11.2017, where the deceased was a motor cyclist riding motor cycle registration number KMED 590Z Premier along Nairobi-Mombasa Road at Imara Daima area. The Appellant was said to be the registered owner of motor vehicle registration number KAY 115Z Toyota mini bus matatu. No known dependents were listed except an aunt and uncle. Unfortunately, there is not appeal in respect of loss of dependency as the persons listed are not dependents.

6. The second respondent was pleaded as the registered owner of motor vehicle registration number KAY 115Z Toyota mini bus matatu. Though indicated as two registered owners, the registration of the vehicle had one owner at a time. The ownership cannot thus be a continuum but discrete events. The question of liability, in respect of the actual driving is not in issue.

7. The Appellant filed its defence dated 21.09.2021 to the effect that the suit motor vehicle was sold on 22.09.2016 to the 2nd Respondent. They denied ownership of the vehicle. In their evidence they stated that the current owner was Mountain View Schools.

Evidence

8. PW1 was PC Jackline Naeku of Embakasi police station. She confirmed occurrence of the accident involving motor vehicle registration number KAY 115Z Toyota mini bus matatu and motor cycle registration number KMED 590Z Premier along Nairobi -Mombasa Road at Imara Daima area.

9. PW2 was the first respondent who produced all documents. On cross examination, he stated that she did not know the registered owner of the suit motor vehicle.

10. DW1 was Daniel Njogu who testified being an Operations Director of the Appellant. He stated that they sold the suit motor vehicle on 22.09.2016. They were paid a sum of 1,400,000/=. He produced RTGS for the amount and acknowledgment receipt. He stated that the vehicle was transferred to the 2nd Respondent. On cross examination, he stated that the copy of the records indicated that they were the previous owners.

Submissions

11. The Appellant filed submissions dated 5.06.2024. It was submitted that the Appellant was not liable for the accident. Reliance was placed on section 107-109 of the *Evidence Act*. It was their case that the 1st Respondent is bound by their pleadings. Consequently, it was their case that no evidence was produced showing that the Appellant was the registered owner as at the time of the accident. Reliance was placed on section 8 of the *Traffic Act* as well as the cases of David Ogol Alwar v Mary Atieno Adwera & another [2021] KEHC 7727 (KLR), where R.E. Aburili stated as follows:

    30. Proof of ownership of a motor vehicle is not just by way of a registration of such ownership in the logbook. Other forms of ownership of motor vehicles are recognized in law. Section 8 of the *Traffic Act* (Chapter 405 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. That section which is couched in terms of a rebuttable presumption does not restrict a party from proving ownership of the motor vehicle by means other than by the copy of records or log book. The provision leaves room for proof of ownership by other evidence as was stated by Emukule J.in Charles Nyambuto Mageto v Peter Njuguna Njathi NKU HCCA No. 4 of 2009 [2013] eKLR thus:

        > "From the interpretation of Section 8 of the *Traffic Act* as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuranira and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police Abstract as to the ownership, then, the evidence in totality may lead the court to conclude on the balance of probability that ownership."

12. They also relied on the case of AIG Insurance Company Limited v Benard Kiprotich Kirui [2022] KEHC 888 (KLR), where LAGAT-KORIR, held as follows:

    31. From the foregoing, the presumption of ownership arising out of the production of a title document is the best evidence prima facie to demonstrate one's ownership rights. However,

this presumption is not absolute and may be rebutted based on the facts of a case and the evidence produced.

13. The appellant's case was two pronged, first that the 1st Respondents did not prove that the Appellant owned the suit motor vehicle. Secondly, that the Appellant went ahead and disproved ownership by showing documents showing sale and transfer to the 2nd Respondent. They relied on the case of Kosgei v Mutisya [2024] KEHC 156 (KLR), where Wananda J.R. Anuro J held as follows:

> For the burden of proof on an issue to shift to a Defendant, the Plaintiff must have first laid down a strong foundation for establishing the correctness of the facts that he alleges as answering that issue. In this case, in view of all the contradictions and doubts apparent in the Respondent's allegations that the Appellant was the owner of the subject motor vehicle, my view is that no sufficient foundation had been laid by the Respondent (as the Plaintiff) to justify shifting the burden of proof to the Defendant (Appellant in this case).

14. There were no submissions on special damages.

15. The 1st Respondent on the other hand filed submissions dated 13.06.2024. It was submitted that Appellant called on one witness who confirmed that indeed the Appellant is listed as an owner in the copy of records. They wondered why the appellant was still registered owner if they sold the suit motor vehicle. Reliance was placed on the case of Mary Ambeva Kadiri suing as the administrators of estate of Mary Ambeva Kadiri suing as the administrators of estate of Saleh Juma Kadiri (Deceased) v Country Motor Limited [2017] KEHC 7023 (KLR), where the court held as doth:

> 11. As the Court of Appeal explained, once the plaintiff established a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on the it part. From the foregoing, it is my view that the appellant could rely on the doctrine of res ipsa loquitur if she could establish a prima facie case showing that the accident took place at the respondent's involving the respondent's motor vehicles and that the case was not rebutted.

16. They also submitted on quantum which has no basis as there is no appeal in respect thereto. They sought that the court sets aside the award in the lower court and awards a larger figure. There was no basis laid in terms of an appeal or cross appeal.

Analysis

17. This being a first appeal, the Court should with judicious alertness 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.

18. This being a first appeal, the duty of the Court is to re-evaluate the evidence on record to consider the arguments advanced by the parties, to apply the law thereto, and ultimately to arrive at its own independent determination of the issues in controversy. In the oft-cited case of Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123, the Court of Appeal for East Africa succinctly set out this principle, holding that an appellate court is not bound by the findings of fact by the trial court and is under a duty to reconsider and re-evaluate the evidence afresh, while at the same

time bearing in mind the advantage enjoyed by the trial court in observing the demeanour of witnesses. The court therein 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."

19. The burden of proof is on a party wishing that the court gives them judgment. The same is set out in extensio under sections 107 -109 of the *Evidence Act*, Cap 80 Laws of Kenya as follows:

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.

(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."

20. Though there is an appeal on special damages, it is incompatible with the claim by the appellant. In any case the said damages were properly pleaded and proved. Special damages must be both pleaded and proved before they can be awarded by the court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> > "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

21. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages

in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it."

22. There is no basis to attack the award of special damages. That limb of the appeal is dismissed in limine.

23. Though indicated as two registered owners, the registration of the vehicle has had one owner at a time. The ownership cannot thus be a continuum but discrete events. The question of liability, in respect of the actual driving is not in issue. In a proper context, the appeal is based on the understanding of the copy of records.

24. The 1st Respondent had to prove the circumstances under which the accident occurred leading to blame the Appellant. The 1st Respondent was also to prove the ownership of the accident motor vehicle on prima facie basis. The test of this burden was addressed in the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where 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".

25. The search is a self-explanatory document. It is only accepting what is on the search on a prima facie basis that we can address the rest of the questions arising from evidence. Parties cannot use parole evidence to explain what the record means. They can however adduce evidence showing that the proviso to Section 8 of the *Traffic act* applies. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

26. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005, the court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

27. What did the search show? The search showed that there were two previous owners as at 24.06.2020, these were:

    a. Felister Njeri Kiberenge

b. Jimcab Services Limited

28. The current owner was given as Mountain View School Ltd. The current owner was as at 24.06.2020. What the search shows is that there was a transfer first from the appellant and secondly, from the 2nd Respondent to Mountain View School Ltd. What the search does not tell us, is when the transfer occurred. This then leaves the plaintiff with a burden of proof as to who between the Appellant and 2nd Respondent was registered as at the time of occurrence of the accident on 18.11.2017.

29. The defendant showed that a sum of Ksh. 1,400,000/= was paid on account of sale of the suit motor vehicle to Andrew Kamau. The balance was paid on 13.10.2016. A transfer was signed and from the record, duly registered.

30. The court was plainly wrong that once the doctrine of res ipsa loquitor was pleaded, the burden of proof shifted. The burden of proof does not shift until sufficient facts have been tendered to show negligence. In this case, the doctrine of res ipsa loquitor applied only to the circumstances surrounding the accident. It is limited to finding of liability of each of the two vehicles. It answers as to which vehicle was speeding, driving in a zig zag manner. In that regard, I cannot delve into the issue as whether motor cycle registration number KMED 590Z Premier along Nairobi -Mombasa Road or motor vehicle registration number KAY 115Z Toyota mini bus matatu was to blame. However, the doctrine of res ipsa Loquitor is irrelevant when answering which defendant owned motor vehicle registration number KAY 115Z Toyota mini bus matatu, or in a more practical way, who is to pick the tab?

31. The doctrine does not touch on ownership. The Appellant, though not having a burden showed that it sold motor vehicle registration number KAY 115Z Toyota mini bus at least one year before the accident occurred. The 2nd Respondent did not rebut the presumption. As a fact, the police abstract showed that the owner was Aero Africa Ltd. The reason for suing the Appellant were beyond comprehension. The Appellant clearly demonstrated that they were former owners.

32. Proof on a balance of probabilities would involve proof that the allegations as pleaded in the 1st Respondent's case were more likely than 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 –vs- 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."

33. 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….."

34. 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 –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> > "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 lose because the requisite standard will not have been attained."

35. In the present case, the Appellant has demonstrated that the 1st Respondent failed to dislodge liability as against the Appellant. The evidence on record clearly established the sale and transfer of the motor vehicle. It was therefore a fundamental misdirection, borne of a sheer lack of appreciation of the issues in controversy, for the lower court to disregard the defence evidence. In so doing, the court blundered in a grave and catastrophic manner, ultimately occasioning a manifest injustice upon the Appellant.

36. The net effect is that the appeal is allowed. The next question will be costs. 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.

37. 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.

38. The consequence of the foregoing is that judgment and decree against the Appellant is set aside. In lieu thereof, I dismiss the 1st respondent's case against the Appellant with costs of Ksh 85,000/=.

Determination

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

    a. Appeal on liability is allowed. Judgment and decree against the Appellant is set aside. In lieu thereof, I dismiss the 1st Respondent's case against the Appellant with costs of Ksh 85,000/=.

    b. The Appellant shall have costs in the court below.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

E. W. Nderitu Advocates for the Appellant

Obwoge Onyango & Co. Advocates for the Respondent

Court Assistant – Michael