Obaro & 2 others v Onyango & another (Civil Appeal E043 of 2024)
[2025] KEHC 12856 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12856 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E043 OF 2024

DK KEMEI, J

SEPTEMBER 19, 2025

BETWEEN

LUCAS ONYANGO OBARO ..... 1ST PLAINTIFF

CPL JAMES MAINA MUCHEMI ..... 2ND PLAINTIFF

TREAL LIMITED ..... 3RD PLAINTIFF

AND

PETER OCHIENG ONYANGO ..... 1ST DEFENDANT

INSEPCTOR GENERAL OF POLICE ..... 2ND DEFENDANT

(Being an appeal from the Judgment/Decree and Orders of Hon. J.P Mkala-RM & Adjudicator dated 16th August 2024 in Siaya CMCC No. E078 of 2023-Peter Ochieng Onyango vs Lucas Onyango Obaro, CPL James Maina Muchemi, Treal Limited & Inspector General of Police)

JUDGMENT

1. The Appeal arises from the Judgment/Decree and Orders of Hon. J.P Mkala-RM & Adjudicator dated 16th August 2024 in Siaya CMCC No. E078 of 2023 wherein he entered judgement in favour of the 1st Respondent against the 1st, 2nd and 3rd Appellant inter alia; that they should return the suit motor vehicle to the 1st Respondent within 30 days failing which they should pay the sum of Kshs 700, 000/ (being the value of the suit vehicle) less Kshs 200, 000/ making a sum of Kshs 500, 000/; General damages of Kshs 50, 000/ be paid by the 2nd Appellant personally to the 1st Respondent; the case against the 2nd Respondent was dismissed with no order as to costs; the 1st , 2nd and 3rd Appellants to pay the costs of the suit plus interest at court rates.

2. Aggrieved, the 1st, 2nd and 3rd Appellants filed their in their Memorandum of Appeal dated 16th September 2024 wherein they raised the following grounds of appeal:

1. The learned trial Magistrate erred in law and misdirected himself in finding the 1st Respondent (Plaintiff) had purchased motor vehicle registration number KAD 213M (the suit motor vehicle) on the basis of conjecture and speculation.

2. The learned trial Magistrate erred in law and misdirected himself when he framed questions to the 1st and 2nd Appellants' witness, denied the witness an opportunity to explain using leading questions, effectively descending to the arena of dispute and tilting the trial in favour of the Plaintiff to the prejudice of the Appellants.

3. The learned trial Magistrate erred in law by relying on secondary evidence without a basis, despite the Appellants' well-founded objections, which were overruled.

4. The learned trial Magistrate erred in law by relying on controverted and contradictory evidence by the Plaintiff, which raised serious questions on the credibility of his evidence

5. The learned trial Magistrate erred in law by disregarding the evidence led by the 2nd Appellant and framing his questions and making conclusions based on conjecture

6. The learned trial Magistrate erred in law in failing to appreciate the fact that the onus of proof was on the 1st Respondent and therefore shifted the burden by expecting the Appellants to prove their ownership beyond registration documents and the value of the motor vehicle as Defendants

7. The learned trial Magistrate erred in law and fact by finding that the 1st Respondent had proved on a balance of probabilities that he is the owner of motor vehicle registration number KAD 213M without proof of any essentials of contract, proof of payment of any utility, including repair costs, insurance costs, and motor vehicle inspection costs

8. The learned trial Magistrate erred in law in failing to properly consider, evaluate, and analyse the evidence on record.

3. The Appellant prays that the judgment be set aside and substituted with a dismissal of the Plaintiff's suit with costs. The Appellant seeks the costs of this appeal.

4. In the Plaint dated 1st December 2023, the 1st Respondent prayed for judgment against the Defendants jointly and/or severally for:

   a. The Defendants are compelled to return the said motor vehicle in the same condition it was at the time they towed the said motor.

   b. In the alternative, the Defendants are to pay the value of the said motor vehicle;

   c. Loss of user at a rate of Kshs. 50,000.00 per month from 15/10/.2021

   d. Interest on the said damages at such rate and for such a period as the court deems fit;

   e. Costs of the suit;

   f. Any other relief the court deems fit to grant.

5. The 1st Respondent contended that at the material time, the 2nd Appellant was the beneficial owner of motor vehicle KAD 213 M, having purchased the same from Treal Limited sometime in late 2016. According to the 1st Respondent, the 1st Appellant who was the director of Treal Limited duly furnished him with the original copies of the Certificate of Registration duly filed transfer form by the 1st Appellant and stamped by official stamp of Treal Limited, certificate of change of name, certificate

of incorporation and KRA Pin Certificate to enable the Plaintiff to effect transfer of the said motor vehicle. It is pleaded that at the time of purchase, the said motor vehicle was in dire need of repair having been involved in a road traffic accident and was parked at Namo Italiano (K) Limited Garage at Kisumu. He repaired the motor vehicle. According to the 1st Respondent, on 15th October 2021 at around noon, he was summoned by the 2nd Appellant, a police officer attached to Ng'iya police Patrol Base, as a result of a complaint by the 1st Appellant on allegations that he had stolen the motor vehicle. That the 2nd Appellant demanded that the Plaintiff produce a certificate of Registration and a sale agreement pending investigation, lest he be put in custody. He produced the documents, but after a while, the 2nd Appellant informed the 1st Respondent that he had received Kshs. 200,000.00 from the 1st Appellant to his M-Pesa line 0723 656 393. The 1st Respondent was directed by the 2nd Appellant to withdraw Kshs. 10,000.00. The 1st Respondent pleaded that on the same day at around 9.00 am, the 1st and 2nd Appellants, in the presence of other unknown people, towed the motor vehicle from his compound, and when the 1st Respondent objected, he was told by the 2nd Appellant that it was being towed to the police station pending investigations. It was pleaded that he learnt that no complaint was made at Ngiya Police Patrol Base or any other police station but that the 1st and 2nd Appellants colluded and/or conspired to steal the 1st Respondent's motor vehicle KAD 213M from him and deprive him of ownership by the abuse of office by the 2nd Appellant. He pleaded that he was deprived of ownership and the loss of the said motor vehicle.

6. The Appellants filed a joint Statement of Defence dated 7th March 2021. The 1st and 3rd Appellants' case is that they had contracted the 1st Respondent to tow the motor vehicle to Nairobi in Kitengela, and that they did not sell the motor vehicle. It was pleaded that the 1st Respondent had attempted to convert the 3rd Appellant's motor vehicle on the basis of possession, which had become unlawful when he refused to release the motor vehicle. Accordingly, the money demanded of Kshs. 200,000.00 by the 1st Respondent was money expended in the process of moving the motor vehicle from Nam Italiano garage to his home, which the 1st Appellant settled, though exorbitant. On his part, the 2nd Appellant denied that he orchestrated the towing. He did not book the claim since the 1st Appellant had not made an official report to the police, as the 1st Appellant and 1st Respondent had agreed to resolve the dispute outside court. The 2nd Appellant herein denied that the Inspector General of Police committed any wrongdoing against the 1st Respondent. They urged the learned trial Magistrate to dismiss the 1st Respondent's case with costs.

7. Through the Attorney General, the 2nd Respondent filed a Statement of Defence dated 20th March 2024 wherein it was pleaded that on 15th October 2021 a complaint was made by the 1st Appellant against the 1st Respondent at Ng'iya Police Base through his agent concerning a motor vehicle but due lack of ownership documents, the 1st Appellant and the 1st Respondent were advised to report the matter to the Directorate of Criminal Investigations. Instead, the 1st Respondent instituted a suit which is the subject of this appeal by the Appellants. The particulars of intimidation, threats, abuse of office and collusion with the 1st Appellant to deprive the 1st Respondent of the motor vehicle were denied.

8. This being the first appellate court, its duty is well spelt out namely, to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to

9. PW1 Josephat Kamau Principal Officer with Primedots Assessors stated that he undertook a valuation of the motor vehicle KAD 213M under the instructions of the 1st Respondent, the owner of the vehicle. They gave a Pre-Theft valuation report dated 15/4/2024 of the vehicle at Kshs. 700,000.00. They charged Kshs. 5000 for preparing the report as professional fees and Kshs. 5,000 as court attendance fee. According to PW1, the vehicle having reached age of 29 years, it was at the plateau stage where the

value is determined by demand and supply. They took two values of a well-maintained vehicle in the open market and made an average. On being cross-examined, PW1 told court that he signed the report though his name does not appear in the report. He stated that he did not inspect the motor vehicle. He stated that he was provided with a logbook. According to PW1, the 1st Respondent was the beneficial owner. He stated that it was not indicated that there is a police officer who owns it.

10. Peter Ochieng Onyango (PW2) was the 1st Respondent herein who adopted his witness statement dated 1/12/2023 as his evidence in chief. He produced all the documents as exhibits, save for the transfer of ownership which the trial Court allowed for its production vide a ruling. He stated that Cpl James Maina Muchemi asked him to send Kshs. 2,000 to facilitate him in looking after the truck. He stated that he had not authorized the release of the motor vehicle to Lucas whom he had not talked to for almost four years. On being cross-examined, he stated that he brought a copy of the logbook because the original documents were with Mr. Muchemi. He stated that the registration indicated that the car belonged to Transcorp Limited. He stated that it was Lucas Onyango who gave him the transfer after he filed and stamped it with the stamp of Treal Limited, though he did not sign. He stated that he had not transferred the motor vehicle to himself since he had not gotten the money to transfer it. He stated that he had repaired the motor vehicle since it had been involved in an accident. That he bought the motor vehicle at Kshs. 500,000.00 though a receipt was not given. He stated that he did not have a sale agreement between him and Lucas, though he bought the motor vehicle through installments. That Lucas gave him an acknowledgment of payment. He stated that Lucas prepared the sale agreement. He stated that Muchemi took his documents by force, but that he did not report. He stated that he received Kshs. 200,000.00, though he did not want it. That Muchemi forced him to send Kshs. 10,000.00. That he withdrew the money from M-Pesa. He told the court that he had never used the car since he had repaired it. On being cross-examined, PW2 told the court that he sued the 2nd Respondent herein because of what the 2nd Appellant did. He reported to IPOA. On re-examination, PW2 stated that Cpl Maina Muchemi handcuffed him until he gave money. That he did not report since he didn't know the procedure and was not given an OB.

11. In the defence case, DW1, the 2nd Appellant adopted his witness statement dated 27/3/24 as his evidence in chief. On being cross-examined, he stated that PW2 did not produce any document at the police station. He stated that he did not received any money from PW2, but that he received Kshs. 2,030.for pishori rice, which he used to sell within Siaya as his side hustle job, though he did not have any evidence to show that the money was for rice or that he operated a business of selling rice. He stated that he did not record the report as he received the complaint over the phone. He told the court that it was not minuted and it was not known to his superior. He denied having breached Clause 5 of the Police Standing Orders. He stated that there was no official complaint made at the station. On re-examination, he stated that he did not report the complaint since the complainant was not around and that he was to personally bring documents. That he did not report the information to his superior since there was no formal complaint and that the parties had already agreed.

12. Eddy Odhiambo Ouma (DW2), testified that he is Teal Limited Director and that the company was the owner of the motor vehicle in issue. He stated that he was testifying on behalf of Lucas Onyango Obaro, who had been hospitalized at St. Paul's Hospital, Kitengela. He adopted Lucas's statement dated 7th March 2024 as the 3rd Defendant's evidence in chief. He produced a copy of the logbook and invoice from Namo Italiano as exhibits. On being cross-examined, he stated that he knew the Plaintiff through talking but had not met him in person. He denied the Plaintiff had been employed or earned a salary from the company. He stated that the motor vehicle was involved in an accident around 2012 and was released to the Plaintiff in 2017. He stated that the motor vehicle had been in a garage for six years. He stated that the invoice was not stamped or as paid as there was no receipt showing payment. He stated that it itemized the list of items that Namo Italiano had replaced, but did not indicate the items

replaced. He stated that there were other items that had not been fixed to make the vehicle roadworthy, e.g., the entire dashboard, which has not been fixed to date. He stated that he did not have any pictures to show that some parts had not been fixed. He stated that it did not show that the Plaintiff did any repairs to the vehicle. That it was his testimony that the Plaintiff had been contracted to ferry the motor vehicle from Kisumu to Kitengela, though the agreement was oral. He stated that the pictures were taken outside the police station. He stated that the complaint was made to Ng'iya police, though the transaction never reached the OB Section. He stated that the officer had their complaint. It was further his testimony that the Plaintiff and Mr.Obaro negotiated and that the Plaintiff demanded Kshs. 300,000.00 but negotiated further and settled at Kshs. 200,000.00. He stated that the demand letter was not served to them. In re-examination, he stated that the Plaintiff was performing a service. He stated that the Plaintiff resisted delivering the motor vehicle which had never been fixed.

13. Upon the close of the defence case, and before the delivery of the judgment, the learned trial Magistrate directed parties to provide the documents of when Mr. Eddy Odhiambo Ouma became a Director within 14 days. Further, it was ordered that the Registrar of Companies supply certified copies of the registration documents and other documents contained in the file for Treal Limited, CPR/2010/32984.

14. Based on the issues for determination, framed in his judgment, the learned trial Magistrate found Eddy Odhiambo Ouma (DW2) who was the Managing Partner at OG Law LLP and Director of the 3rd Appellant was not conflicted since he had never represented the 1st and 3rd Defendants (1st and 3rd Appellants herein) but Ms. Agina Advocate had always appeared for the 1st, 2nd and 3rd Defendants, thus DW2 had the capacity to testify. As to who owned motor vehicle KAD 213M, the learned trial Magistrate found the 1st Respondent had proved on a balance of probabilities that he had purchased the motor vehicle from the 1st and 3rd Defendants. According to the learned trial Magistrate, the 1st Appellant gave the 1st Respondent some documents which can only be for purposes of transferring the motor vehicle to the 1st Respondent, and it was alarming why they waited for four years to come and claim the motor vehicle from the 1st Respondent without having reported the alleged theft to the police. As to whether the 2nd Appellant breached his duty, it was held that the 4th Defendant (2nd Respondent) could not be held vicariously liable for the breaches committed by the 2nd Appellant outside his official mandate. According to the learned trial Magistrate, the 2nd Appellant knew what he was supposed to do, but went ahead to follow his own procedures. On the claim for loss of user, the learned trial Magistrate observed that the 1st Respondent had admitted on evidence that the motor vehicle, having been involved in an accident, he was in the process of repairing it and it was not working, thus the claim was untenable and was dismissed. On the value of the motor vehicle, the learned trial Magistrate found the assessment value of Kshs. 700,000.00 for the motor vehicle was fair since the Defendants failed to provide an alternative valuation report despite being in possession of the motor vehicle

15. In the end, the learned trial Magistrate found the 1st, 2nd, and 3rd Appellants jointly and severally liable in the following terms:

    a. The 1st and 3rd Appellants shall, within 30 days from the date of this judgment, return the motor vehicle registration number KAD 213M to the Plaintiff; failure to which they shall pay the sum of Kshs. 700,000.00, which is the value of the motor vehicle, less Kshs. 200,000.00, making it Kshs. 500,000.00;

    b. The claim for loss of user be and is hereby dismissed.

    c. The 2nd Defendant is hereby found to have breached his duty, thereby occasioning loss to the Plaintiff

d. The 2nd Defendant shall pay as general damages of Kshs. 50,000.00 personally to the Plaintiff.

e. The case against the 4th Defendant (2nd Respondent) be and is hereby dismissed with no orders as to costs.

f. The 1st, 2nd, and 3rd Defendants shall pay the costs to the Plaintiff.

g. There shall be interest at the court's rates from the date of the judgment until payment in full

h. Stay of execution for 30 days.

16. I have considered the appeal in light of the evidence on record and written submissions filed on behalf of the parties herein.

17. This being a first appeal, the role of this Court is to re-evaluate and subject the evidence to a fresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial Court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (Selle v. Associated Motor Boat Co. [1968] EA 123).

18. Odunga J. (as he then was) in China Wu Yi Company Limited v Ronald Manthi David [2021] KEHC 1626 (KLR) stated that this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

19. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the duty of the first appellate court was also held thus;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze 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"

20. In Ephantus Mwangi and Another v Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

21. The dispute between the parties herein revolves around ownership of motor vehicle registration number KAD 213M. Primarily, the grounds of appeal enumerated in the Memorandum of Appeal are seeking a determination on the question of motor vehicle ownership. The issues that are for determination are:

    1. Whether the 1st Respondent proved on a balance of probabilities that he is the owner of motor vehicle registration number KAD 213M;

    2. Whether the trial Court erred in relying on secondary evidence by the 1st Respondent without a basis.

3. What reliefs was the 1st Respondent entitled to?

22. The legal burden of proof was on the 1st Respondent to prove his claim on a balance of probabilities. It was therefore incumbent upon the 1st Respondent to prove his assertions as pleaded in the Plaint.

23. Section 107(1) of the *Evidence Act*, Cap 80 provides that:

> "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.

24. However, the burden may shift to the Defendant to disprove the alleged claim. This is the evidential burden of proof, which is well captured under Sections 109 and 112 of the *Evidence Act*. See Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.

25. The two concepts are well illustrated by the Court of Appeal in the case of Mbuthia Macharia v Annah Mutua & Another [2017] eKLR, that:

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced." See Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR,

26. The standard of proof is well captured in the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court 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 the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."

27. Kimaru J. (as he then was) in William Kabogo Gitau v George Thuo & 2 others [2010]1 KLR 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 than 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."

28. Section 8 of the *Traffic Act* raises a presumption of law that is rebuttable in that the name of the person appearing in the records form of the registrar of motor vehicles and/or the logbook is the owner. Section 8 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.

29. In Osapil v Kaddy [2000] 1 EALA 187, the Court of Appeal of Uganda held 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 under was presumed to be the owner thereof unless proved otherwise. See Securicor Kenya Ltd v Kyumba Holdings Ltd. [2005] eKLR; Joel Muga Opinja v East Africa Sea Food Ltd [2013] eKLR.

30. On the question of ownership of a motor vehicle, the Court of Appeal in Benard Muia Kilovoo v Kenya Fresh Produce Exporters [2020] eKLR summarized factors to be considered as follows: -

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."

31. The 1st Respondent, suing as the Plaintiff before the trial Court, therefore had the legal burden of rebutting the presumption. Section 107(supra) is to the effect that he who alleges must prove. It is not in dispute that Transcorp Realty Investment Limited was the registered owner of the motor vehicle, vide the Registration Book for motor vehicle dated 2nd March 2011, but later the company was changed to Treal Limited, the 3rd Appellant herein, on 15th September 2011.

32. At paragraph 7 of the Plaint, the 1st Respondent pleaded that he purchased the suit motor vehicle from the 3rd Appellant sometime late in the year 2016. Subsequently, the 1st Appellant furnished him with original copies of the Certificate of Registration, duly filled transfer form by the 1st Appellant and stamped by the official stamp of Treal Limited, Certificate of Change of Name, Certificate of incorporation, and KRA Pin Certificate to enable him to effect transfer of the suit motor vehicle. In support of his case, the 1st Respondent produced the documents as exhibits. In a nutshell, the 1st Respondent asserted that he purchased the motor vehicle from the 1st and 3rd Appellants.

33. The Appellants denied the 1st Respondent's assertions of ownership. According to the Appellants, they had contracted the 1st Respondent to tow the motor vehicle to Nairobi in Kitengela, and so they did not sell the motor vehicle to the 1st Respondent. Their case is that the 1st Respondent attempted to convert the 3rd Appellant's motor vehicle based on possession. DW2 testified that the Plaintiff had been contracted to ferry the motor vehicle from Kisumu to Kitengela, though the agreement was oral. In the statement dated 7th March 2024 adopted by DW2, the 1st Appellant stated that the suit motor vehicle was being repaired at Namo Italiano garage at a cost of Kshs. 490,000.00 when he agreed with the 1st Respondent to retrieve the suit motor vehicle from the garage to Kitengela, where the 3rd Appellant was situated. The 1st Appellant has stated that the 1st Respondent collected the motor vehicle with his written authority when it was already repaired and in good condition. The Appellants' case is that they never sold the motor vehicle to the 1st Respondent, but only agreed with the 1st Respondent to move the motor vehicle from the garage to the 3rd Appellant's place in Kitengela.

34. In the judgment, while finding the 1st Respondent's claim of ownership was proved on a balance of probabilities, the learned trial Magistrate observed that the 1st Appellant gave the 1st Respondent some documents which could only be for the purpose of transferring the motor vehicle to the 1st Respondent and not transporting it to Kitengela. According to the learned trial Magistrate, it was alarming why the Appellants waited for four years to come and claim the motor vehicle from the 1st Respondent without having reported the alleged theft to the police.

35. It is not in dispute that the motor vehicle had been involved in an accident and needed repairs. DW2 produced an invoice from Namo Italiano stating that the motor vehicle had been involved in an accident around 2012, whereby it stayed in a garage until 2017 when it was released to the 1st Respondent. It was DW2's testimony that the invoice had not been stamped as paid and that no receipt was available to show payments. DW2 stated that items were just listed therein and not indicated as having been replaced.

36. Gikonyo J. in E.P. Communications Ltd v East Africa Courier Services Ltd [2019] eKLR stated that the purpose of an invoice is to be issued by a seller to request for payment for a purchase. It is therefore clear that invoices are mere documents in terms of proof of payment unless endorsed with a stamp as paid, as held by the Court of Appeal in Great Lakes Transport Company (u) Ltd v Kenya Revenue Authority [2009] eKLR, where it was stated as follows:

> " We...take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which the invoice was prepared were paid for. In such a case, the endorsement should be visible on the invoice, and then the invoice plus the endorsement on it can be treated as a receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word "paid" on the invoice, and that would turn the status of the invoice into a receipt.'

37. It was admitted by DW2 that there were no pictures to show that some parts had been fixed, despite the 1st Appellant stating in his witness statement that an amount of Kshs. 490,000.00 had been expended on repairs. The court notes that the 1st Respondent exhibited several documents in support of his case, which on a balance of probabilities lead to a plausible conclusion that he acquired a beneficial interest in the motor vehicle. The transfer of ownership form bears the 1st Respondent's name as the new owner of the suit motor vehicle. The transferor is indicated to be the 3rd Appellant as per the endorsed stamp. The letter dated 23rd January 2017, under the 3rd Appellant's letterhead and written by the 1st Appellant, instructs the recipient, Namo Italiano (K) Limited, the garage, to release the motor vehicle to the 1st Respondent. In response, the garage wrote back to the 1st Respondent vide the letter dated 28th January 201, confirming that the motor vehicle was released to the 1st Respondent. The 1st Respondent exhibited pictures to show the damaged to the motor vehicle at the time of its purchase and the repaired motor vehicle.

38. Based on the evidence adduced before the trial Court, the 1st Respondent proved he had a beneficial interest in the suit motor vehicle. The Appellants failed to dislodge that evidence. In Nancy Ayemba Ngana v Abdi Ali [2010] eKLR, the court 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 an 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..." See P.N.M. & another (the legal personal representative of the Estate of L.M.M.) v Telcom Kenya Limited & 2 Others [2015] eKLR; Muhambi Koja v Said Mbwana Abdi [2015] eKLR.

39. In Muhambi Koja v Said Mbwana Abdi [2015] eKLR, the Court of Appeal held as follows:

> " 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." (Emphasis added)

40. The Appellants fault the learned trial Magistrate in finding that the 1st Respondent proved ownership without proof of any essentials of contract, proof of payment of any utility, including repair costs, insurance costs, and motor vehicle inspection costs.

41. I refer to Law of Contract by Edwin G.H. Treit London, Sweet & Maxwell, 2009, where the learned author observed as follows:

> " That under the law of contract, it is generally acceptable that the terms of any agreement will not be reduced into writing save where the contract expressly provides for such contracts to be in written form. The law applicable to all contracts, whether oral or written, to be ascertained from the agreement must fulfil the following conditions: a) The intention of the parties; b) sufficient offer and acceptance; c) capacity; d) lawful subject matter; e) mutuality of obligation; f) consideration."

42. The Court of Appeal in Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

> " It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

43. The Court of Appeal in William Muthee Muthami versus Bank of Baroda (2014) eKLR, stated that for a contract to be valid under the law of contract, it must be proved that there was an offer, acceptance, and consideration.

> "In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

44. On being cross-examined, PW2 testified that the original logbook and sale agreement had been taken by Muchemi (2nd Appellant). He stated that he purchased the motor vehicle at Kshs. 509,000.00, but was not given the receipt. According to PW2, it was 1st Appellant who prepared the sale agreement. The evidence of preparation of the sale agreement has not been rebutted by the Appellant. The court notes that PW2 exhibited some photographs showing the damage to the suit motor vehicle before and after the repairs. PW2 produced a letter dated 23rd January 2017 instructing the garage to release the suit motor vehicle to PW2, and the release was confirmed vide a letter dated 28th January 2023 from the garage. In the undated letter, it was indicated that the motor vehicle was to be collected by PW2 or Bernard Omondi Muganda upon payment of the outstanding amount of Kshs. 20,000.00.

45. This Court agrees with the finding by the learned trial Magistrate which is correct namely that it was not true that Kshs. 200,000.00 paid to PW3 was claimed as in respect of storage, as the Appellants could not tell how much PW3 was charging, if any, per day for the storage charge, or even tell how much was agreed as the towing fees from Kisumu to Siaya. On the same note, it did not make sense that the 1st Appellant gave PW2 ownership documents to transport the suit motor vehicle and not to transfer the motor vehicle to PW2. The conduct of the parties herein clearly establishes a relationship of buyer and seller. PW2 purchased the motor vehicle from the 1st and 3rd Appellants and acquired beneficial ownership over the same. I find the 1st Respondent acquired beneficial ownership that dislodged the 3rd Appellant's registered ownership.

46. The Appellants fault the learned trial Magistrate for relying on secondary evidence without a basis, as is required under Section 68 of the *Evidence Act*. Section 64 of the *Evidence Act* provides that the contents of documents may be proved either by primary or by secondary evidence. Reference is made to Section 67 of the Evidence that requires that "Documents must be proved by primary evidence except in the cases hereinafter mentioned." This is referred to as the best evidence rule.

47. In Lwangu v Ndote (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling) Dr. IUR Nyagaka J. held that:

> "Section 68 of the *Evidence Act* is to the effect that secondary evidence may be given of the existence, condition or contents of a document in situations where the original document is in possession of the adverse party or a person out of the reach of the court or any person legally bound to produce it but fails to produce, where the contents are admitted in writing by the adverse party, where the original is lost or destroyed or cannot be produced within reasonable time, the original is not easily movable, the original is a public document, the original is a certified copy and where the original consists of numerous accounts of other documents if the conditions set out herein have been met.

48. Section 67 of the *Evidence Act* is couched in such a manner as to make it mandatory for documentary evidence to be produced in its primary form unless the secondary evidence thereof falls among the exceptions provided in the Act. See Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2021] eKLR.

49. In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR, Mativo J. (as he then was) had this to say:

> " My interpretation of the above provisions of the *Evidence Act* is that secondary evidence, as a general rule, is admissible only in the absence of primary evidence and when a proper explanation of its absence is given. Such secondary evidence cannot be admitted without the non-production of the original being first accounted for in a permissible manner and only after satisfying the conditions provided for under Section 68 of the Act.
>
> In other words, there must be proper justification to allow a party to adduce secondary evidence. In the present case, I am not satisfied that non-production of the original was satisfactorily accounted for."

50. Kamau J. in Atlantic Limited v Echken Agencies Limited (Civil Appeal E107 of 2021) [2023] KEHC 19409 (KLR) (26 June 2023) (Judgment) stated that ordinarily, the Appellant would have been required to have issued a notice to produce copies of the documents as they were secondary evidence and not primary evidence and to also have laid a proper basis for the production of copies of documents. In this case, the 1st Respondent did not file a Notice to produce as required under Section 69 of the *Evidence Act*.

51. Section 69 of the *Evidence Act* reads;

> [S.69]. Notice to produce a document
>
> Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:
>
> Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—
>
> i. when the document to be proved is itself a notice;
>
> ii. when, from the nature of the case, the adverse party must know that he will be required to produce it;
>
> iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
>
> iv. when the adverse party or his agent has the original in court;
>
> v. when the adverse party or his agent has admitted the loss of the document;
>
> vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
>
> vii. in any other case in which the court thinks fit to dispense with the requirement.

52. The Appellants' Counsel, Ms. Agina, objected to the production of the transfer of ownership, certificate of change of name, picture of the motor vehicle at the time of purchase, and certificate of incorporation. Mr. Mugo, for the 1st Respondent, submitted that the 1st Respondent had indicated how he came to have the documents. He stated that the 1st Respondent had been given the documents by the 1st Appellant.

53. In a ruling delivered on 8th May 2024, the learned trial Magistrate held that if the Appellants' counsel had issues with the production of any document, she should have raised the same at the pre-trial stage and not late in the day at the hearing. The learned trial Magistrate observed that at the pre-trial stage on 20th March 2024 and 3rd April 2024, the Appellants' counsel, who was present in court, intimated to the court that she had been served with the 1st Respondent's pleadings and the matter was certified ready for hearing. Further, the learned trial Magistrate found the Appellants failed to demonstrate the prejudice they would have suffered if the documents were allowed for production.

54. It is clear from the proceedings that PW2 stated that it was Lucas Onyango who gave him the transfer form after he filled and stamped it with the stamp of Treal Limited. On being cross-examined, he stated that he brought a copy of the logbook because the original documents are with Mr. Muchemi, the 2nd Appellant herein. According to PW2, the 2nd Appellant took the documents by force through a threat by handcuffing him. It will be noted that in the 1st Appellant's witness statement, PW2's assertions have not been rebutted save to say that they had only hired the 1st Respondent to transport the suit motor vehicle to Kitengela. In his testimony, DW1 merely stated that PW2 never produced any documents when he came to the police station as evidence of ownership. The court finds PW2 did provide a basis for the production of the copies, and therefore, reliance on the copies produced by PW2 was not an error. The Appellants never adduced any evidence of the prejudice they would suffer in the event the copies were produced. Hence,, the learned trial Magistrate correctly found the objection lacking in merit. I find the ground of appeal in that regard as unmeritorious.

55. Regarding the reliefs given by the learned trial Magistrate, it is noted that general damages of Kshs. 50,000.00 seems to have been given on the basis that the 2nd Appellant followed his procedures outside his mandate instead of the procedures or steps sanctioned by the 2nd Respondent under the Police Standing Orders and the *National Police Service Act*. The learned trial Magistrate found the 2nd Appellant culpable personally and not the 2nd Respondent. According to the learned trial Magistrate, calling for evidence of ownership when no complaint had been made reeks of abuse of power by the 2nd Appellant. It is my finding that the first port of call for complaints against such an officer should be handled by the Independent Policing Oversight Authority. The Authority has the mandate to investigate police misconduct, review, monitor, and oversight police operations,inspection of police premises, review internal policing disciplinary process, and report.

56. Under section 6(a) of the *Independent Policing Oversight Authority Act*, one of the functions of IPOA is to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, and to make recommendations to the relevant authorities for appropriate relief. Section 7 provides that the Authority has the powers to investigate the Service on its own motion or on receipt of complaints from members of the public.

57. In Halsbury's Laws of England in Volume 29 (2014)) 317 distinguishes special and general damages, and states that general damages are:

> "...those which will be presumed to be the natural and probable consequence of the wrong complained of, with the result that the plaintiff is required to assert that such damage has been suffered."

58. It will be noted that the figure of Kshs. 50,000.00 was not submitted by PW2. The claim for breach by the 2nd Appellant was not a relief sought in the Plaint by PW2, though pleaded as a particular of negligence. In the judgment, the learned trial Magistrate, apart from finding the 2nd Appellant breached the Police Standing Orders, did not place reliance on comparable court decisions to award the amount.

See Southern Engineering Co. Ltd v. Musungi Mutia [1985] KLR 730. It will be noted that the decision of Mohamed Feisal& 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & Another (Interested Party) [2018] eKLR was lodged as a constitutional Petition and not as a civil claim and the cause of action is distinguishable from this instant case.

It is clear that the learned trial magistrate went into error when he made the award of general damages of Kshs 50,000/ against the 2nd Appellant in a bid to punish him for violating the rights of the 1st Respondent yet the Respondent did not seek for such damages in his plaint. It was open for the 1st Respondent to pursue the 2nd Appellant regarding his conduct with his employer where he could lodge a complaint or even file a constitutional petition regarding violation of his rights. Hence, the trial court's award must be set aside. To the extent that the learned trial Magistrate awarded the 1st Respondent the general damages, I find that there was no basis for such an award. Hence, it is my finding that reliefs 4 and 5 stand dismissed while the rest of the reliefs awarded by the learned trial Magistrate are upheld.

59. In view of the foregoing observations, it is my finding that the Appellants' appeal partially succeeds to the extent that reliefs 4 and 5 by the trial court stand dismissed. However, the judgement of the trial court dated 16th August 2024 regarding the rest of the reliefs is hereby upheld. The Respondent is awarded half costs of the appeal to be borne by the Appellants jointly.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. K. KEMEI

JUDGE

In the presence of:

M/s Agina.....for Appellants

M/s Wanyama for Mugo.....for 1st Respondent

N/A.....for the 2nd Respondent

Okumu..... Court Assistant