



**Wilham Kenya Limited v Mbutu (Civil Appeal E096 of 2022)
[2024] KEHC 1598 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E096 OF 2022
FROO OLEL, J
FEBRUARY 21, 2024**

BETWEEN

WILHAM KENYA LIMITED APPELLANT

AND

STEPHEN KIOKO MBUTU RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Hon S. Khapoya ,
Principal Magistrate Dated 22nd June 2022 In Kithimani PMCC No 229 of 2017)*

JUDGMENT

A. Introduction

1. This appeal arises from the judgement/decree of Hon. S. Khapoya (PM) dated 22nd June 2022 delivered in Kithimani PMCC NO. 229 of 2017, where he found that the Appellant was liable to compensate the respondent to the tune of Kshs.180,250/= as special damages incurred by the respondent to repair his motor vehicle registration Number KAS 139R, Nissan Sunny Saloon. (Hereinafter referred to as the first suit Motor vehicle) Which had been involved in an accident with motor vehicle KAQ 016Z Mitsubishi Pick (hereinafter referred to as the 2nd suit motor vehicle up) at Ikaatini Shopping Center, along Ekalakala -matuu Road, within Machakos County.

B. Pleadings

2. The respondent herein, was the plaintiff in the primary suit and vide his plaint dated 20th September 2017, had sought for Kshs 180,250.00/= being cost of repairing the first suit motor vehicle, which had been involved in a road traffic accident with the second suit motor vehicle, alleged to belong to the Appellant which accident had occurred on 1st August 2016 at Ikaatini Shopping Center, along Ekalakala -matuu Road, within Machakos county.



3. It was alleged that on the said date, the respondent was lawfully driving the first suit motor vehicle on the above-mentioned road, when the 2nd suit motor vehicle was so carelessly and negligently driven by the Appellants driver, their servants, employee and/or agent, that he permitted the suit motor vehicle to violently collide with the 1st suit motor vehicle thereby occasioning the respondent herein to suffer damages for which he claimed compensation.
4. The Appellant herein, filed their statement of defence dated 10th November 2017 denying all the allegations pleaded in the plaint. Further they did plead that they had sold the 2nd suit motor vehicle four year earlier to a party known as John Kamau Nungari and hence had no control over the 2nd suit motor vehicle as at the time of the said accident. They further gave notice to institute third party proceedings to enjoin the proposed 3rd party and in the alternative the appellant averred that if an accident did occur, which was denied, the same was caused and/or substantially contributed too by the respondent's Negligence for which he was wholly to blame. The Appellant prayed that the suit be dismissed.

C. Evidence at Trial.

5. PW1 P.C Stephen Kioko Mbutu adopted his witness statement and produced his list of documents as exhibit 1 to 17. In the said witness statement, he did state that on 1st August 2016, he was driving along Ekalakala -matuu road enroute to Nairobi and as he was negotiating a corner some 2 km before reaching Ikaathini Shopping Center, he noticed the 2nd suit motor vehicle being driven at high speed, along his left lane. He swerved and went further to the left to avoid a head on collision, but the side road had steep earth embankment, consequently, the accident could not be avoided and the oncoming 2nd suit motor vehicle rammed into the 1st suit motor vehicle head on thereby causing damage to it.
6. After the accident both vehicles stopped and they came out to assess the damage occasioned. The 2nd suit motor vehicle was loaded with cement, and its driver one Simon Kilo Mukeke (as he introduced himself) had either lost control of the 2nd suit motor vehicle or was simply asleep. The 1st suit motor vehicle was damages on the bonnet, which was distorted, from bumper, front grill was broken, right hand front head lamp too was broken, front right-hand body frame bent, radiator was damage's, windscreen was cracked and there was also a possibility of a faulty wiring damages as the 1st suit motor vehicle failed to start after the accident
7. The respondent did call the Traffic police based at Matuu police station and one Inspector Ahmed came to the scene after an hour, he inspected the scene, confiscated the insurance stickers of both motor vehicles and directed the parties to make arrangements to take both motor vehicles to Matuu police station. The 1st motor vehicle refused to start, but the 2nd suit motor vehicle could start on ignition. At this point a person known as Mr Wanjohi Maina arrived at the scene of the accident, claiming to be the owner of the 2nd suit motor vehicle and was surprised to see the 2nd suit motor vehicle on the wrong side of the road. He exclaimed loudly, what was wrong with his driver and was ready to take responsibility for the damage caused by the accident on the 1st suit motor vehicle.
8. The parties did proceed to Matuu police station which was about 3km away. At the police station, they agreed that Mr Wanjohi Maina would repair the damages to his motor vehicle and pursuant to the said agreement, the Investigating officer, released to them the said motor vehicles. They proceed to the garage of one Mr.Sammy Kioko within Matuu town and he prepared a schedule of the repair works needed to be undertaken, cost of replacement parts together with his labour. It was also made clear by the said mechanic, that some long-term effects of the accident could only be determined once the engine had been removed. Both parties agreed on the costing and Mr.Wanjohi promised to deliver the spare parts to the garage by himself on the following day.



9. The witness further averred that Mr.Wanjohi Maina failed to honour the agreement and he did resort to follow up this matter with the insurers. He got in touch with his insurance company, Gateway Insurance company ltd and they did give him a letter to forward to Xplico Insurance company ltd who had insured the 2nd suit motor vehicle. The letter was Ref 030/070/9/031841/2016/08 and dated 11th August 2016. The 2nd motor vehicle insurer advised him that its owner had to make a formal report at its claims department and they would require about 21 to 30 days to follow up on the matter and get feedback from him. In the meanwhile, they suggested to him that he could go ahead and start repairing the first suit motor vehicle and lodge a claim for reimbursements afterwards.
10. He proceeded to tow the suit motor vehicle to Nairobi, had a motor vehicle damage assessment report done by Autostar Assessors & Valuers LTD and consequently forwarded the repair bill to Xplico Insurance company ltd vide his letter dated 24th August 2016. They did reply vide their letter dated 30th August, 2016 acknowledging his letter and also informed him that their client was yet to comply with the requirements of the insurance cover terms and thus they were unable to be of assistance to him. He did repair his motor vehicle and filed a suit for compensation. In cross examination/ re-examination, PW1 did state that the driver of the suit motor vehicle was Mr.Kiio and he believed that Mr. Wanjohi Maina was the owner of the 2nd suit motor vehicle but later discovered that he was not the registered owner thereof. The official motor vehicle search showed that the Appellant herein was its owner.
11. PW2 James Karuga Kariuki, stated that he was an assessor from Auto Star Assessors & Valuers and he produced the motor vehicle damage assessment report dated 15th August 2016. That they were an authorized agency allowed to engage in assessment business and had been gazette by the relevant authority. He produced the motor vehicle assessment report as Exhibit 14
12. DW 1 Samuel Nyabuto also relied on his witness statement as filed. In the said witness statement, he did state that he was the Appellants transport manager and had served in the said capacity for 20 years. The Appellant was not the owner and/or beneficial owner of the suit motor vehicle as the company had sold the said motor vehicle over four years ago to one John Kamau Nungari and had no control over the said motor vehicle as at the time of the accident. The Appellant was involved in the business of growing and exporting horticultural product's and was not in the business of transporting cement. The driver of the suit motor vehicle as at the time of the accident, too was not its agent, driver and/or employee and they therefore they could not be held to be vicariously liable for the incident. The said witness produced all documents in their bundle of document as exhibits except document 11 and 12 therein which were sale agreement between Pats's Motors and Wanjohi Maina and the appellants Bank statement.
13. Under cross examination, the witness reiterated that, they had sold the 2nd suit motor vehicle and no longer had any measurable interest therein. They had expected that once they had given the purchaser John Nungari possession thereof and transfer papers, he would effect transfer thereof immediately, which unfortunately did not happen. The blank transfer forms filed in their list of documents should be seen within the context of the sale of motor vehicle agreement signed. In re-examination he further stated that MFI D12 showed the money deposited into the Appellant's Cooperative bank Account by the said John Nungari, being the purchase price thereof.
14. DW2 Tom Gisanga Mutari confirmed that the suit motor vehicle was sold to John Nungari, who was his friend and business partner and he was the one who deposited the money into the Appellants bank account and hand over to him the bank deposit receipt. The said John Nungari thereafter took possession of the said motor vehicle, repaired it and sold it off to one Wanjohi Maina who paid part of the purchase price but was yet to finish paying the same as he had a balance of Ksh 160,000/=. The 2nd suit motor vehicle belonged to the said Wanjohi Maina and even its insurance was not in the name the



Appellant company. In cross examination, he did confirm that John Nungari was his business partner and they were involved in passenger transport business. He was the one who deposited money into the Appellants bank account and the deposit receipt showed his name. The logbook of the 2nd suit motor vehicle was in the name of the Appellant, and was being held by Pat's Motors

15. The learned magistrate considered the evidence tendered and in his considered judgment delivered on 22nd June 2022 held that the respondent had proved his case and proceeded to award him Special damages at Kshs.180,250/- plus costs and interest of the suit.
16. The Appellant being dissatisfied by the award did file their memorandum of Appeal dated 7th July 2022 and raised the following grounds of appeal namely: -
 - a. The Honourable Magistrate erred in law by making a finding that the Defendant was vicariously liable in this claim
 - b. The Honourable Magistrate erred in fact and in law by ignoring clear and mandatory provisions of statute and in particular, section 8 of the [Traffic Act](#), Cap 403 of the laws of Kenya on the issue of presumption of ownership.
 - c. The Honourable Magistrate erred in fact and in law by holding that the ingredients of the tort of negligence had been met contrary to the evidence adduced.
 - d. The Honourable magistrate erred in fact and in law by failing to find that there was no evidence of Agency/principal; master/servant or any relationship of whatever nature between the Defendant and the plaintiff; or that the motor vehicle was being driven on the authority of or joint benefit between the plaintiff and the defendant and came to the erroneous conclusion that the Defendant was vicariously liable.
 - e. The Honourable Magistrate erred in fact and in law by failing to properly evaluate the evidence adduced, by taking into account irrelevant considerations and ignoring critical matters hence leading to a miscarriage of justice.
 - f. The Honourable Magistrate erred in fact and in law by failing to properly consider the comparable judicial authorities availed for consideration and thereby purported to overturn court of Appeal decisions.
 - g. The Honourable Magistrate erred in fact and in law by failing to consider, evaluate and give due weight to the Appellants submissions and thereby occasioned a miscarriage of justice.
 - h. The Honourable Magistrate erred in fact and in law by applying wrong principles pertaining to assessment of damages and/or compensation thereby arriving at a manifestly excessive award and hence a miscarriage of justice.

D. Submissions

Appellants Submissions

17. The Appellant filed their submissions on 17.04. 23 and submitted that Section 8 of the [Traffic Act](#), Cap 403 provided that “the person in whose name a vehicle was registered shall unless the contrary is proved be deemed to be the owner of the vehicle.” The import of this proviso was that there could be actual, possessory and beneficial ownership of a motor vehicle which exists independently of registration. Reliance was placed on the case of Superfoam Ltd & another Vrs Gladys Nchororo Mbero (2014) eklr, where it was stated that logbook or search of motor vehicle would show conclusive proof of registered



- ownership, but not conclusive proof actual ownership. This was a clear recognition of the fact that vehicles often changed hands and the registration might not reflect the actual position.
18. Even though the records obtained at the registrar office indicated that the Appellant was the registered owner of the 2nd suit motor vehicle, evidence presented before court confirmed that indeed the appellant had discharged ownership of the subject motor vehicle through a sale agreement produced which showed that they sold the said motor vehicle to one John Nungari Kamau and cash deposit voucher /bank records showing proof of payment too were availed. Reliance was placed in the case of Samauel Mukunya Kamunge Vs John Mwangi Kamuru Civil Application No 34 of 2002 & Jared Magwaro Bundi & Another Vs Primerosa Flowers Limited (2018) eKLR, Osumo Apima Nyaundi Vs Charles Isaboke Onyancha Kibondari & 3 others & Joel Muthuri Vs Julius Gichuru Guatai (1996) eKLR, where the courts accepted that there could be rebuttable presumption of Section 8 of the [Traffic Act](#) and that a logbook was only evidence of title but property in a vehicle is passed to the buyer at the time when the contract is made.
 19. The appellant also faulted the trial court in its evaluation of the evidence by failing to find that the driver of the suit motor vehicle was not an employee and/or agent of the Appellant nor was he acting on their express or implied instructions at the time of the accident. The factual position was that there was no agency relationship at all established between the Appellant and the driver of the 2nd motor vehicle. The respondent had admitted/revealed as much during cross examination and even attempted to amend pleadings to introduce the new party after close of hearing, which application was not allowed on the strength that he intended to bring new evidence after close of trial. The Appellant thus could not be held to be vicariously liable for the accident.
 20. The Appellant thus prayed that this Appeal be allowed with costs.

The Respondent's Submissions.

21. The Respondent filed submissions on 02.01.2023, where he rehashed the facts and pleadings of this case. It was his contention that the Appellant despite pleading that it had sold the 2nd suit motor vehicle never instituted third party proceedings as against the alleged purchaser one John Kamau Nungari. The sale agreement produced as proof of sale was void for lack of mandatory execution by the parties and/or the sale agreement later attached in the Appellants further list of documents was doctored and particulars inserted, which was totally missing in the original sale agreement.
22. The respondent submitted that Section 8 of the [Traffic Act](#), Cap 403, should not be read in isolation but should be read in context with Section 9(1) and (2) of the said Act, which provided that no motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on the road for more than fourteen days after the date of such transfer and if there was a delay caused by the death of the seller, or the owner could not be traced and/or had refused to comply with the provisions of the said sub section, the registrar could cause the vehicle to be registered in the name of the new owner on payment of prescribed fee.
23. The appellant was faulted for failing to comply with the above cited provisions of the [Traffic Act](#), and the evidence of DW2, Tom Gesanda Motari did confirm the same. The respondent reiterated that the Appellant failed to prove that they sold the said suit motor vehicle as they produced unexecuted sale agreement, which also did not have the seal of the Appellant Company. There was therefore no valid contract entered into between the Appellant and any third party capable of showing that ownership of the 2nd suit motor vehicle had passed on and/or changed hands. Reliance was placed in the case of Kisumu CA No 43 Of 2006, Nelson Yabesh Bichanga Vs Mary B Omari & others, Nairobi CA No



92 of Francis Nzioka Ngao Vs Silas Thiani Nkungu & Nairobi CA No 99 of 2007, Shem Obondi Vs Seemfod Holding Limited.

24. The Respondent emphasized that under Section 35 of the *evidence Act*, only the maker of a document could produce the same and since that was not done, the contents of the sale agreement remained unverified, the sale agreement remained unproved and the evidence lead did not support the purported sale. Reliance was placed on the case of Francis Nzioka Ngao Civil Appeal No 92, & Ernest Orwa Mwayi (Objector) Vrs Victoria Enterprises Ltd, Civil Appeal No 14 of 1991 (unreported). The law also required two of the Appellants directors to execute the said agreement, again with respect to the sale agreement under contention herein, it was only executed by one director, who did not have power of Attorney to appear and append his signature for his/her co director.
25. The Appellant had pleaded in its statement of Defence that the suit motor vehicle belonged to John Kamau Nungari, but failed to commence third party proceedings as against the said purchaser of the second suit motor vehicle. Ironically, they also strenuously opposed the respondents attempts to bring on board the said purchaser. Further at paragraph 6 of its statement of defence, the Appellant had stated that he would seek indemnity and/or contribution from the third parties in case judgement was issued as against them, and that was an implied admission by the appellant that they owned the second suit motor vehicle. Parties were bound by their pleadings and the law did not allow them to depart from it to the disadvantage of the other party, especially without amendments.
26. Reliance was placed on Nairobi HCCA No 641 of 2016 Jackson Omoi Ratemo Vs Silas Sirma Yator & Others, Kisii HCCA No 1 of 2012 James Gikonyo Mwangi Vs DA, (Minor suing through his mother and next friend), Siaya HCCA No 8 of 2017, Edward Wasamba Onyango Vs The chairman Board of Governors - Agoro Ayombe Secondary school & Nairobi HCCA No 17 of 2008, Kenya Gatby Trust Vrs Joseph Waithaka Ruo & Another to persuade the court that failure of the Appellant to take out third party proceedings in order to shift the blame, to the said third party clearly jeopardized the Appellants own case and/or line of Defence being fronted in this Appeal.
27. Finally, the respondent also pointed out that the Appellant did not prove that it was only in the business of growing and exporting horticultural produce and therefore none of its vehicles were used to transport cement. The Appellant too had failed to produce their memorandum of association to prove this point.
28. The respondent therefore prayed that the court finds that this Appeal has no merit and proceed to dismiss the same with costs.

E. Analysis and Determination

29. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions filed by both parties herein. This is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor, however the court will analyze the evidence before it and arrive at its own independent conclusion. I am therefore guided by the case of *Selle & Another Vs Associated Motor Boat Company Limited & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion 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,



this 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 demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270.

30. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

31. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

32. It is not in contention that an accident occurred on 1st August, 2016 along EKELAKALA – MATUU ROAD around IKAATANI SHOPPING CENTER, involving Motor vehicle registration No KAS 139R NISSAN SUNNY and Motor vehicle registration Number KAQ 016Z MITSUBISHI PICK. It was proved that the respondent owned the first suit motor vehicle but the ownership of the second suit motor vehicle was disputed and so was its liability .Based on the pleading filed and submissions made, I do find that the issue for determination in this appeal is whether it was proved that the Appellant was the owner of the 2nd suit motor vehicle and/or whether they were vicariously liable for the accident.

I. Whether the trial court erred in finding the Appellant owned the second suit motor vehicle and/or whether they were vicariously liable for the accident.

33. Section 107(1) of the *Evidence Act* 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.”

Section 108 of the *Evidence Act* further provides that;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.

34. The Halsbury's laws of England, 4th Edition, Volume 17 at para 13 and 14 states that;

“ The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he



will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.

{16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.”

35. 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 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.

36. In this case, the appellant did plead at paragraph 5 & 6 of the statement of Defence that it had sold the second suit motor vehicle to one John Kamau Nungari about four (4) years prior to the said accident and that they had no control over the same as at the time when the accident occurred. DW1 Samuel Nyabutu confirmed the same and produced the sale agreement dated 20th March 2023 as Exhibit D1 as proof of this fact. The respondent on the other hand did urge this court to find that the appellants had not proved this fact for the reason that the initial sale agreement and transfer of motor vehicle forms filed in the initial list of documents were unsigned/ not executed and was at variance with the subsequent sale agreement eventually produced. Secondly DW1 and DW2 evidence as adduced in court amounted to hearsay and should be considered with a pinch of salt. The Appellant was also faulted for its failure to institute third party proceedings and as such the trial court was right to find them liable to compensate the respondent.

37. Section 8 of the *Traffic Act*, Cap 403 laws of Kenya provides that;

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

38. Further Section 9(1) of the *Traffic Act*, Cap 403 Laws of Kenya also provides that;

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- (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 transfer date of such transfer unless the new owner is registered as the owner thereof.

39. The above provisos have been litigated upon and the jurisprudence that emerges is that there could be actual, possessory and beneficial ownership of a motor vehicle. The legal position is that Where there is a dispute as to who owns the suit motor vehicle, the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved.



40. In the decision of Samuel Mukunya Kamunge Vs John Mwangi Kamuru Civil Appeal NO 34 OF 2002

“It is true that a certificate of search from the Registrar of motor vehicle would have shown who was the registered owner of the motor vehicle according to the records held at the registrar of motor vehicle, That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the [Traffic Act](#) provides that the contrary can be proved. This is in recognition of the fact that often time’s vehicle changes hands but the records are not Amended. I find that the trial Magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor vehicle.”

41. The court of Appeal also in the case of Jared Magwaro Bundi & Another Vs Primarose Flowers limited (2018) eKLR, held 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 a possessory owner. Such a owner though not registered for the practical purpose maybe more relevant than in whose name the vehicle is registered.”

The position taken by this court in Joel Muga opija (supra) and Muhambi Koja (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case.”

42. Finally, the same finding was also arrived at by the court of Appeal in the case of Osumo Apima Nyaundi Vs Charles Isaboke Onyanchara Kibondori & 3 others where they stated that;

“the ownership of a vehicle passes on the sale and the delivery and the registration book of the vehicle is only evidence of title. This court has held that section 9(1) and 14 of the [Traffic Act](#) provide penal sanctions but do not decide the issue of ownership of a vehicle..... ownership of a vehicle (which is a chattel) is upon sale governed by the [sale of Goods Act](#).”

43. Even though the respondent did go at length to vilify the sale agreement dated 20th March 2013, produced as Exhibit D1 the same did provide conclusive proof that indeed the Appellant had disposed off the said motor vehicle to one John Kamau Nungari and the purchase price agreed thereon being Kshs 70,000/= was deposited into their account by DW2 Tom Gesanda Motari, who also testified and confirmed this fact. This evidence on a balance of probability discharged the Appellants obligation of having to show that indeed they had sold the 2nd suit motor vehicle as pleaded in their statement of defence.

44. The respondent submissions that the said agreement was suspect and/or was a forgery, it was initially filed unsigned and/or was only signed by one director are all new arguments raised in the submissions and not during cross examination of the Appellant witnesses. That being so the same cannot be considered as part of the evidence adduced in court, the trial magistrate did not make any findings on the same and are matters therefore which this court cannot make a determination on. The poignant fact remains that the Appellants Exhibit D1 was validly produced and is the basis upon which the court makes a determination as to whether it is valid or not.



45. The court also takes judicial notice of the fact that immediately after the accident, one Mr Wanjohi Maina came to the scene of the accident and claimed ownership of the 2nd suit motor vehicle. He even admitted liability and offered to repair the 1st suit motor vehicle before renegating on his promise. The appellant followed up with through with his (Mr. Wanjohi Maina's) insurance company, Xplico Insurance Company Ltd, which had insured the 2nd suit motor vehicle and vide the respondents own Exhibit P9 (letter dated 30th August 2016 sent to the respondent and copied to Mr Johnson Wanjohi) and P10 the follow up email, the said insurer did confirm that the insured was Johnson Wanjohi, who then could be safely assumed to be the beneficial owner thereof.
46. The trial magistrate did fall in error by failing to critically analyze the Appellants case and document produced and therefore proceeded to wrongly determine the case based extraneous matters and on Article 159(d) of *the constitution* of Kenya 2010, when the same was not applicable, under the circumstance. The Appellants fully discharged the burden placed on them and indeed, it was proved that as a matter of fact the 2nd suit motor vehicle had been sold, but not yet registered in favour of the beneficial owner.
47. Finally, with regard to vicarious liability, the court of Appeal in the case of General Motors East Africa limited Vs Eunice Alila Ndeswa & another (2015) eklr, while citing with approval the case of Morgan Vs Launchbury (1972) 2 ALL ER 606 did state that;
- “For vicarious liability against the appellant to be established, the respondents were under a legal burden to prove, as was illustrated in the case of Morgan Vs Launchbury(supra) that;
- “In order to fix liability on the owner of a car for negligence of a driver, it is necessary to show either that the driver was the owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish agency relationship, it is necessary to show that the driver was using the car at the owners request express or implied or in its instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner.”
48. I do find that the respondent also did not prove or establish that at the time of the accident, the driver of the 2nd suit motor vehicle was the appellants servant or was at the material time acting on their behalf as their agent and/or employee in performance of a task or duty delegated to him by the appellant. The appellant therefore also could not be held to be vicariously liable for this accident.

F. Disposition

49. The upshot and from analysis of the pleading and the law I do find that this appeal is merited. The Judgement of Hon B. Khapoya (P.M) delivered on 26th June 2022 in Kithimani PMCC No 229 of 2017 is set aside and substituted with an order dismissing the said suit.
50. Further based on the fact that the Appellant did not undertake third party proceedings and also opposed the respondent's attempts to enjoin the third party, I do find that it would be inequitable to grant them costs. Each party shall bear their own costs of the primary suit and this Appeal.
51. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2024.

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 21ST DAY OF FEBRUARY, 2024.



FRANCIS RAYOLA OLEL

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

Mr. Juma for Appellant

Ms Muumbo for Respondent

Sam Court Assistant

