



**Alginza Automobiles Limited v Mulei & 2 others (Civil Appeal
E077 of 2021) [2024] KEHC 17158 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E077 OF 2021**

TM MATHEKA, J

MAY 2, 2024

BETWEEN

ALGINZA AUTOMOBILES LIMITED PLAINTIFF

AND

SOLOMON YUMBYA MULEI 1ST DEFENDANT

**CATHERINE MWIKALI MUISYO & ANOTHER & ANOTHER &
ANOTHER & ANOTHER & ANOTHER & ANOTHER &
ANOTHER 2ND DEFENDANT**

*(Appeal from the Judgment of Hon. J.N Mwaniki in the Chief Magistrate's
Court at Makueni, Civil Case No.55 of 2020, delivered on 29th August 2021)*

JUDGMENT

1. On 06/10/2017 the plaintiff, Solomon Yumbya Mulei was a cyclist along Kithuki Matheani Road (earth road) while the Robert Nganga Muisyo was driving motor vehicle registration KBX 085W – which was registered in the name of Al Ginza Automobiles Limited 1st defendant and Catherine Mwikali Muisyo the 2nd defendant was the beneficial owner.
2. An accident happened – where the motor vehicle collided with the cyclist as a result of which the plaintiff sustained severe head injury, blunt injury of the right lower limb. The plaintiff blamed the defendants for the negligence that led to the accident. He filed suit, *Makueni MCCC 55/2020* against the defendants seeking general damages for pain, suffering and loss of amenities, and special damages of Kshs.8950.
3. The 1st defendant filed defence, denied all the allegations of negligence and put the plaintiff to strict proof of all the allegations and without prejudice contended that there was no viable cause of action



against it , and that the motor vehicle was sold to the 2nd defendant on 7/6/2014, long before the accident, hence it was not liable for its use.

4. *Vide* the judgment dated 29/9/2020, the learned trial court accepted the plaintiff's testimony on how the road accident happened as not having been contradicted and found the defendants 100% jointly and severally liable for the accident. He made the following awards:

General damages – 480,000/=

Special damages - 8,950/= 488,950/=

2. Aggrieved, the 1st defendant filed this appeal on the following grounds:

2. That the learned trial magistrate erred in law and in fact in holding the appellant liable for the accident which took place on 7th June 2014 involving motor vehicle registration Number KBX 085W.
3. That the learned trial magistrate erred in law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at the wrong decision.
4. That the learned trial magistrate erred in law and fact by failing to weigh all the evidence placed before him before assessing damages and or relying on insufficient evidence.
5. That the learned trial magistrate erred in law and in fact in failing to be guided by recent court awards thus arriving at an excessively high award.

3. The appellant sought Orders:

1. That judgment and decree therefore of chief magistrate Hon. Mwaniki be set aside and or varied in such terms as this Honourable court may deem necessary.
2. That this Honourable court be pleased to make an order on the costs of this appeal.
3. Such further or consequential orders as this Honourable court deems just.

4. The other defenadants never participated in the trial in the lower court and interlocutory judgments had been entered against them. The appellant joined them in the appeal

5. Parties agreed to proceed with the appeal by way of written submissions.

6. For the appellant it is submitted that the appeal is brought under section 65(1)(b) of the *Civil Procedure Act* Order 43 Rule 1 of the *Civil Procedure Rules*. Having considered the record and the submissions, it appears to me that the key issue in this appeal is whether the ownership of the m/v was established to warrant the finding on liability

7. It is not in dispute that at the time of the road traffic accident the motor vehicle was registered in the name of the appellant. It is common ground that it was beneficially owned by the 1st interested party and was driven by the 2nd interested party. That is how these three defendants found themselves in the same suit Would that position render the appellant vicariously liable for the negligence of the 2nd interested party (the driver)?

8. It is the appellant argument that it indeed proved that the motor vehicle had been sold to the first interested party who was the beneficial owner at the and fo that reason the appellant could not be held vicariously liable for the actions of the beneficial owner's agents actions..



9. The appellant relies on *Jane Wairimu Turanta v Githae John Vickery and Equity Bank Ltd & Munene Dan* ML HCCC 483/12 (2012) eKLR. That the appellant having sold the motor vehicle to the 1st interested party and having handed over possession – could not have been liable for what it did after the sale.
10. The appellant also relies on *John Nderi Wamugi v Rubesh Okumu Otiangala & 2 Others* (2015) eKLR :

“Passage of property is a contracted principle and its relevance with respect to the *Sale of Goods Act* is to determine the point at which a seller cease to be the owner of property and the buyer assumes ownership of the said property”.

“On the other hand, vicarious liability is a doctrine in the law of torts that assigns liability for an injury to a person who did not personally cause the injury but who has a particular legal relationship to the person who acted negligently. Such liability is not pegged on ownership, but on the legal relationship, for example between an employer and an employee”.
11. It also relies on *HCM Anyanzwa & 2 Others v Luigi De Casper & Anor* [1981] KLR 10 where Court of Appeal held that: Vicarious liability depends not on ownership but on the delegation of tasks or duty”.
12. It is argued that the trial court misdirected itself on the issue of legal ownership and vicarious liability.
13. For the respondent, it is submitted that the appellant was registered owner of the motor vehicle, the 1st interested party the beneficial owner and the 2nd interested party the driver. That the interested parties were served with summons but never entered appearance and interlocutory judgment was entered against them.
14. It was submitted that the appellants’ witnesses produced in court only a delivery note but no sale agreement was produced to certify the alleged sale between the 1st appellant and one Catherine Mwikali Muisyo. The witness confirmed that the full purchase price had not been paid and the appellant was still in possession of the log book – that the trial court held the appellant and the interested parties jointly liable for the general damages.
15. Relying on section 8 of the *Traffic Act* – the respondents submitted that it creates the rebuttable presumption that the person registered as the owner of the motor vehicle is the owner unless the contrary is proved; that the respondent produced copy of records showing the appellant as the owner and the owner was required to rebut that evidence – that the appellant failed to do so. Reliance was led on *Francis Nzioka Thiani Nkunga* [1998] eKLR where the Court of Appeal found that appellant needed to prove the claim. In this case no evidence was provided to support the claim that the appellant was in the business of selling motor vehicles.
16. It was submitted that the award on general damages was not controverted in the appeal.
17. On ownership of the motor vehicle the respondent relied on the police abstract issued on 9/11/2014 indicated that at the time of the road traffic accident the owner of the motor vehicle is Catherine Mwikali Muisyo and the driver Robert Nganga Muisyo– the injured person Solomon Yumbya Mulei. He also produced the records of the m/v showing that it was registered in the name of the appellant. The motor vehicle was insured by Monarch Insurance Company Ltd . All the parties served with the demand letter and statutory notice accordingly.



18. In the judgment the learned trial magistrate stated :

“On liability, the first defendant said having sold the vehicle to the second defendant it could not shoulder any liability. That even the plaintiff in his plaint acknowledged that the second defendant was the beneficial owner.

In submission, the plaintiff said relying on the case of *Juma Itafel Properties v Hamidu Macco* (2020) eKLR that ... “the suit vehicle had not been transferred the alleged purchaser, and if the appellant elected to indulge the respondents and gamble with fate, then it only has itself to blame ...”

In this case other than the issue of transfer, even the issue of sale was casually handled by the first defendant. He only produced a delivery note. I believe this document is preceded by a sale agreement which shows the terms and conditions for sale. No such document was produced.

The alleged sale of the subject vehicle was not proved by the first defendant as alleged.

If I had made a finding there was such sale, then I would exonerate the first defendant from liability because having sold the vehicle, it had no control on how the vehicle was being used and/or how it was being driven.”

19. The record shows that the plaintiff / respondent who pleaded inter alia that –

The 1st defendant is a limited liability company duly incorporated under the laws of Kenya and its address for purposes of this suit shall be care of P.O Box 16869-80100 Mombasa. (Service of summons shall be effected through the plaintiff’s advocate’s offices).

The 2nd defendant and the 3rd defendant are adults of sound mind and their address of service for purposes of this suit care of P.O Box 17077 – 00200 Nairobi. (Service of Summons shall be effected through the plaintiff’s advocate’s offices).

At all material times relevant to this suit, the 1st defendant was the registered owner of motor vehicle registration number KBX 085w Nissan S. Wagon whilst the 2nd defendant was the beneficial owner and the 3rd defendant was the driver thereof.

20. The plaintiff was clear that the 1st defendant/appellant was the registered owner – but the beneficial owner the person in possession was the 2nd defendant. Having set out the pleadings in this manner the plaintiff proceeded to seek judgment against the defendants jointly and severally: -

21. From the police abstract it is evident even at the time the road traffic accident happened the motor vehicle was “owned” by the 2nd defendant. That is what was reported to the police by the driver of the motor vehicle. So on the face of it and for all interest and purposes this motor vehicle belonged to the 2nd defendant/interested party.

22. The appellant demonstrated that the m/v was delivered to the 1st interested party but the terms of that delivery are unknown. First the appellant did produce any evidence to show that indeed it was in the business of selling motor vehicle. No sale agreement was produced in court to demonstrate that indeed a sale had taken place and that ownership had passed to the interested party. The provisions of s.8 of the *Traffic Act* Cap 403 speak to this thus:

Owner of vehicle



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

23. The appellant did not provide the requisite evidence to rebut this presumption. While it is correct that vicarious liability follows delegation, the evidence before the court is that both the 1st interested party and the 2nd interested party had the permission of the appellant to use the m/vehicle at the material time. The plaintiff placed before the court the evidence to show that the three were liable for the actions of the m/vehicle. The appellant is the one who came up to deny liability but in my view did not get to dislodge the plaintiff respondent's case.
24. In the circumstances I found no ground upon which to dislodge the finding of the subordinate court that the defendants, that is, the appellant and the interested parties, are jointly and severally liable for damages awarded to the plaintiff/respondent.
25. The appeal fails with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 2/05/2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-05-05 10:04:01

