



REPUBLIC OF KENYA



**Kamau v Alibaba Motors Limited & 2 others (Civil Appeal E907 of 2023)
[2024] KEHC 16784 (KLR) (Civ) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E907 OF 2023

NIO ADAGI, J

AUGUST 2, 2024

BETWEEN

MWANAISHA WARIGIA KAMAU APPELLANT

AND

ALIBABA MOTORS LIMITED 1ST RESPONDENT

PETER KIRURI 2ND RESPONDENT

HERMAN KIMANI 3RD RESPONDENT

*(An Appeal from the Judgment of Hon. Caroline Ndumia, (SRM)
in Nairobi SCCC No. E756 of 2023 delivered on 31/08/2023)*

JUDGMENT

1. By a Statement of Claim dated 15/2/2023, the Claimant (Appellant herein) claimed that on 13/1/2023 the 1st and 2nd Respondents' motor vehicle registration number KDD 928D was negligently recklessly and/or carelessly managed controlled and/or driven by the 3rd Respondent who was their driver, servant and/or agent that it veered off the road and crushed into the property of the Appellant erected on plot title number Limuru/Birioni/4768.
2. As a result of the said accident, the Appellant's property as well as the Appellants tenants' properties were extensively damaged and the Appellant suffered great loss and damage and holds the 1st and 2nd Respondents vicariously liable for the acts and/or omission of the driver, servant and/or agent. That the Appellant blamed the Respondents for the accident, and relied on the provisions of the highway code and [traffic act](#) (Chapter 403 of the laws of Kenya) to attribute negligence upon Respondents



3. The 1st Respondent did not enter appearance and or put in a response. The 2nd Respondent put in a response in which he denies the Appellant's claim and instituted third party proceedings against Herman Kiman/ the 3rd Respondent. The third party too did not put in a response.
4. The matter proceeded by way of Section 30 of the [Small Claims Court Act](#) No. 2 of 2016 and written submissions. Upon consideration of the evidence on record the trial court entered judgment in favour of the Appellant against the third party for the sum of Kshs.1,000,000/- and costs of the claim. The claim against the 1st and 2nd respondents was dismissed and costs to be borne by the third party.
5. The Appellant being aggrieved by the said judgment filed a Memorandum of appeal dated 27/2/2024 raising 7 grounds of appeal.
6. The law on appeals from decisions and orders of the Small Claims Court is firmly set out.

An appeal from the Small Claims Court is on issues of law only. This is pursuant to Section 38 of the Small Claims Court. The Section provides that:

- 1) A person aggrieved by the decision or an order of the court may appeal against the decision or order to the High Court on matters of law.
- 2) An appeal from any decision or order referred to in Subsection (1) shall be final.

In the case of [Mwangi v Kibiu \(Civil Appeal 16 of 2023\)](#) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment)

7. What constitutes, points of law, has been settled. In the case of Peter Gichuki King'ara Vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014, the Court of Appeal stated as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”

Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis a vis the pleadings in the court below. In the case *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696: -“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court.”

In other words, though not seen as a preliminary point, they must as of necessity arise out of the pleadings. They must hold true, to the law or implication of the law. This includes deciding on basis of no evidence, based on a nullity, failing to exercise discretion which the court clearly has, failing to take up jurisdiction which the court has or taking jurisdiction the court does not have or otherwise reaching a decision which no reasonable person could have reached given the evidence and pleadings.



In *Itakura v Odera* (Civil Appeal E009 of 2022) [2022] KEHC 3120 (KLR) (Commercial and Tax) (30 June 2022) (Judgment) it was held that it is the duty of this court, as the first appellate court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (see *Selle v Associates Motor Boat & Co* [1968] EA 123).

8. The Appellant invites this court to determine two issues arising from the grounds of appeal which are:
 - i. Whether the learned magistrate erred in exercise of power under Section 17 of the SCCA and Rule 30 of the SCC Rules to hear the suit by way of documents on record and submissions.
 - ii. Whether the 2nd Respondent is vicariously liable for the acts of the Third Respondent.

i. Whether the learned magistrate erred in exercise of power under Section 17 of the SCCA and Rule 30 of the SCC Rules to hear the suit by way of documents on record and submissions.

9. The Appellant submits that the learned magistrate erred in dismissing the case against the 2nd Respondent when she wrongly exercised her powers and discretion under Section 17 of the SCCA and Rule 30 of the SCC Rules to proceed Rules to hear the suit by way of documents on record and submissions and without the consent of Parties and when the nature of the case and the principles of natural justice required that the matter go for full trial by way of cross-examination of witnesses' statements.

10. Section 17 of the SCCA provides for the Procedure of Small Claims Court. It states:

“Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice”.

11. Section 30 of the SCCA provides for proceedings by production of documents only without proceeding with the hearing. It states as follows:

“Subject to the agreement of all parties to the proceedings, the court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.”

12. I have read through the Record of Appeal and at page 105, on 09/08/2023 before Hon. C. W. Ndumia, SRM both the Appellant's counsel and counsel for the 2nd Respondent were present and they agreed to proceed by way of Section 30 of the SCCA. Which I believe the Adjudicator allowed and directed Parties' counsel to file submissions by 21/8/2023 and gave a judgment date for 29/8/2023. The 1st and 3rd Respondents were absent.

13. From the foregoing, I find the Appellant's issue herein to be without any basis and the same is dismissed.

- i. Whether the 2nd Respondent is vicariously liable for the acts of the Third Respondent.



The doctrine of vicarious liability was well explained in the case of Securicor Kenya Ltd –vs- Kyumba Holdings Ltd [2005] eKLR, Joseph Wabukho Mbayi vs. Frida Lwile Onyango [2019] eKLR which cited Vincent Okello vs Attorney General [1995] III KALR 129 that:

“Vicarious liability imposes liability on employers for the wrongful acts of their employees as such an employer will be held liable for torts committed while an employee is conducting their duties. In order for the Respondent to rely on the principle of Vicarious Liability, it was contended that he has to prove that the driver to Motor Vehicle registration number GKB 376J at the time of the accident was in the employment of the Appellant which the Respondent has failed to prove....”.

14. A re-evaluation of the evidence on the occurrence of the accident is that the Appellant in her statement stated that she is the proprietor of LR No. Limuru/Birironi/4769 located at Manguo Limuru. That on the material day at about 1730 hrs she received a frantic call from her tenants informing her that a motor vehicle had veered off the road and into the rental units and had caused extensive damage to the said units. That she went to the said properties and found that the motor vehicle had destroyed two rental units and comprised the structural integrity of the building. She stated that when the police arrived at the scene, they blamed the driver of the motor vehicle and issued her with an OB Number 32/13/01/2023 together with a police abstract.
15. The 2nd Respondent put in a witness statement of Beth Wanjiku in which she stated that on the material day she was distributing beer in Limuru area a place called Ngarariga and she requested Herman Imani (3rd Respondent) to assist her in offloading the crates. That as she was talking to one of the customers the said Herman requested for the car keys of the motor vehicle to pick his sweater and she gave him the keys. However, that he took longer than expected and she decided to go look for the vehicle and shockingly the vehicle was not where she had parked it. That she tried to call the said Herman but the phone was received by an unknown person who informed her that the driver of the motor vehicle KDD 928D was involved in a road traffic accident and that the driver had disappeared from the scene. That she requested to know where the accident occurred and she was informed that it was at Maguo and when she went to the scene, she found the motor vehicle KDD 928D had rammed into iron sheet constructed houses and Herman was not at the scene.
16. This witness’s evidence was corroborated by that of the 2nd Respondent who added that the 3rd Respondent was not his employee or driver at the time of the accident and that he had not permitted the said Herman to drive his motor vehicle KDD 928D and he thus solely blamed the 3rd Respondent for the accident.
17. There was no evidence tendered by the Appellant to show that the 3rd Respondent/Third Party was an employee, agent and or authorized driver of the 2nd respondent.
18. In the case of Jane Wairimu Turanta vs. Githae John Vickery & 2 others [2013] eKLR, cited the celebrated case of Morgan vs. Launchbury (1972)2 All ER 606, where the doctrine of vicarious liability was expounded, and stated that:-

“ .to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner...”



19. The case of HCM Anyanzwa & 2 others -vs-Lugi De Casper & Anor (1981) KLR stated that
“vicarious liability depends not on ownership but on the delegation of tasks or duty.”
20. Therefore, considering the above this court finds that the third party solely caused the accident. Liability is therefore entered at 100% against the third party. The 2nd respondent is not held vicariously liable for the acts of the said third party therefore the claim against the 2nd respondent is dismissed.
21. In my view, the trial court was correct in the manner it addressed the issue of vicarious liability thereby finding the 3rd Respondent solely liable and the judgment is therefore upheld.
22. For all the foregoing reasons, it is my finding that this appeal is not merited. It is consequently dismissed with no order as to costs.
23. It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF AUGUST
2024**

NOEL I. ADAGI

JUDGE

