



**Muguku v Auto Industries Limited & another (Civil Appeal
E848 of 2021) [2023] KEHC 19061 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 19061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E848 OF 2021
DO CHEPKWONY, J
FEBRUARY 16, 2023**

BETWEEN

SAMUEL MUGUKU APPELLANT

AND

AUTO INDUSTRIES LIMITED 1ST RESPONDENT

MARK HOLDINGS LIMITED 2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Milimani
Chief Magistrate's Court at Nairobi (Honourable Kagoni E. M. PM)
made on 8th December, 2021, in Milimani CMCC No.3144 of 201)*

JUDGMENT

1. Before this court for determination is an Appeal filed vide a Memorandum of Appeal dated December 22, 2021 against the Judgment and Decree of Hon Kagoni EM, (PM) in Milimani CMCC No 3144 of 2016 delivered on December 8, 2021.
2. Vide an Amended Complaint dated March 4, 2020, the Appellant sued the Respondents for general damages, special damages of Kshs.282, 789, interest and costs of the suit for an alleged accident that occurred on January 31, 2016 along Jogoo Road near Burma market in Nairobi involving a Motor Vehicle Registration No KMDL 196C allegedly owned by the Respondents.
3. The Respondents opposed the suit vide their undated defence wherein they denied the allegations and claim by the Appellant.
4. The matter proceeded for full trial wherein the Appellant called two witnesses whereas each Respondent called one witness. After listening to the evidence that was adduced by both parties, the trial Magistrate considered the same and dismissed the Appellant's case with costs to the Respondents



on ground that the rider of the suit motor vehicle who was blamed by the Appellant was not a party to the suit and hence the Respondents could not be held vicariously liable.

5. The Plaintiff was dissatisfied with the trial court's decision hence the instant Appeal vide a Memorandum of Appeal dated December 22, 2021 on grounds that the learned trial Magistrate erred in law and in fact in;
 - a. dismissing the suit against the second defendant with costs in a summary manner, when ignored the evidence and the pleadings by the 1st defendant who had claimed to have sold the motor cycle to the 2nd defendant; thus necessitating the joinder of the 2nd defendant; the 2nd defendant was therefore and obviously a necessary party to the suit.
 - b. dismissing the suit with costs, when he failed to appreciate that the plaintiff had actually pleaded vicarious liability on part of the defendants vide their rider in his amended plaint; which averment was not denied by the defendants and hence the issue was not contested by the defendants and hence was not an issue for trial per se.
 - c. dismissing the suit with costs, when ignored the evidence by the plaintiff that the rider of the motor cycle the subject matter of the suit was to blame for the accident; which evidence was not challenged by the Defendants.
 - d. dismissing the suit with costs, when ignored the principle of law In *Karisa v Solanki* [1969] EA 318 it was said .that where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see *Bernard v. Sully* (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver; this presumption was not rebutted.
 - e. dismissing the suit with costs, when he failed to find and hold that in absence of the evidence to the contrary from the defendants, the plaintiff had proved on a balance of probability that the accident was caused by the rider of the motor cycle, who was riding the same as an agent/ or under control of the defendants, who owned the motor cycle. The defendants were hence vicariously liable for the accident.
 - f. dismissing the suit with costs, when he decided and held that failure to enjoin the rider of the motor cycle the subject matter of the suit rendered the suit fatal and hence the issue of liability did not arise. In so doing, the Learned Magistrate ignored a long string of decisions of this court and court of appeal to the effect that non joinder of the driver/rider does not render a suit fatal. These decisions include: *Selle & Anor v Associated Motor Boat Company Ltd & Others* 119681 EA 123 et al.
 - g. The Learned Magistrate erred in dismissing the suit with costs, when he failed to state the award of damages he would have awarded to the plaintiff, had he been successful.
 - h. Dismissing the suit with costs on technicalities, when he ignored his duty to decide cases on substantial justice basis as opposed to procedural technicalities under Article 159(2)(d) of *the Constitution*.

The Appellant prays for orders that:

- a. This appeal be allowed.



- b. The Judgment of the Milimani Chief Magistrate court delivered on 8th December, 2021 be set aside and be substituted with a Judgment allowing with costs, the Plaintiff's suit.
 - c. This court be pleased to make any other or further orders as it shall deem fit to make within its powers.
 - d. The costs of the appeal be awarded to the Appellant
6. On February 28, 2022, the court directed that the Appeal be canvassed by way of written submissions whereby the Appellant filed submissions dated May 12, 2022 while the 1st Respondent filed theirs dated May 30, 2022. I have read the said written submissions for consideration in my determination of this appeal. I find the issues for determination being:-
- a. Whether the 1st and 2nd Respondents are both the registered and beneficial owners of the suit motor vehicle and if they can be held vicariously liable for the accident.
 - b. If one above is in the affirmative, what is the quantum.

Determination

7. This being a first appeal, this court is duty bound to re-evaluate and analyze the evidence and facts adduced before the trial court and come to its own independent findings and conclusions, while alive to the fact that it did not see or hear the witnesses testify, as was set out in the case of *Selle v Associated Motor Boat Co & Others* [1968] EA 123 where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, 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 (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)”.

8. Based on the principle set out in the “Selle Case”, I have carefully read through the proceedings and Judgment of the trial court in regard to the grounds of appeal cited by the Appellant. I have also read through the respective submissions filed by the parties and taken into consideration the cited law therein.
9. On the issue of whether the 1st and 2nd Respondents are both the registered and beneficial owners of the suit motor vehicle and if they can be held vicariously liable for the accident, I have taken into consideration the findings in the case of *Fredrick Kariuki Munene & Another v Joseph Musyoka Nzavu* [2022] eKLR, where the court held that;

“It is trite that Section 8 of the *Traffic Act* provides that the person whose name appears on the logbook is prima facie the owner of that motor vehicle but there is an exception to that rule. As was held in *Gichira Peter v Lucy Wambura Ngaku & Anor.*[2021]eKLR, registration or the details appearing on log book of a car is prima facie evidence of ownership unless the contrary is proved. There are incidents like in this instance where evidence clearly shows that sale took place but ownership had not been effected. In such instances, the buyer or purchaser is taken to be beneficial owner because for all practical purposes, he took



possession of the motor vehicle for this exclusive use because of valuable consideration. He is required to take own insurance because of the transfer of the insurable interests.”

10. In the instant case, the 1st Respondent was discharged from the suit once the 2nd Respondent admitted in its statement of defence and by DW1, John Thamara Mwangi who in his testimony stated that indeed they bought the motor vehicle from the 1st Respondent on November 28, 2014. It is therefore clear that the 1st Respondent is not a beneficial owner of the accident motor vehicle because the accident occurred on January 31, 2016 which is not disputed.
11. In its Statement of Defence dated August 6, 2020, the 2nd Respondent at paragraphs 2 and 3 stated that it sold the suit Motor Vehicle Registration Number KMDL 196C on or about December 1, 2014 to one Biriam Kasyoka Mwangangi. These fact was reiterated by DW1 in his testimony during trial. I have also perused the Sale Agreement dated December 1, 2014 at page 101 of the Record of Appeal and find it has captured the details of Biriam Kasyoka Mwangangi including his ID number, phone number and address. Further, there is a transfer of ownership certificated filled by the seller only and a certificate of registration that has the copy of ID of Biriam Kasyoka Mwangangi. At the bottom of the Sale Agreement is a declaration by the buyer that she will bear full responsibility and liability and further that she undertakes to process the transfer of the motor vehicle to her name at her own costs.
12. From the foregoing facts, this court is satisfied that the 2nd Respondent sold the motor vehicle and it was not being driven for its benefit at the time of the accident on January 31, 2016. It is also an undisputed fact that the details of the buyer were provided to the Appellant it is strange that he did not take any action to amend the Plaintiff so as to bring in the person with beneficial ownership interest of the suit motor vehicle. It will be noted that on February 27, 2020, the Appellant sought leave of the trial court to amend the Plaintiff to include the 2nd Respondent as a party on account of being introduced by the 1st Respondent in their statement of defence. He ought to have done the same when the 2nd Respondent introduced Biriam Kasyoka Mwangangi as the purchaser and beneficial owner of the suit motor vehicle in his statement of defence.
13. Having established that at the time of the accident, the motor vehicle had been sold to one Biriam Kasyoka Mwangangi vide the sale agreement dated December 1, 2014, transfer certificate, certificate of registration and copy of Biriam Kasyoka’s ID card, the question then is, can the Respondents be held liable? I am guided by the definition of Vicarious liability in the Black’s Law Dictionary 10th Edition by Bryan A. Garner as;

“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties -also termed as imputed liability”
14. From the proceedings before the trial court, no proof was tendered by the Appellant to show that there was a relationship between the Respondents and the rider who has wholly been blamed by the Appellant for the accident. The 2nd Respondent discharged the burden of proof as to who owned and or owns the suit motor vehicle at the time of the accident. Thus, it was not a supervisory party to the rider at the time of the accident, and vicarious liability cannot arise in this instance.
15. Having found that the 1st and 2nd Respondents were not the registered and or beneficial owners of the accident vehicle at the time of the accident and neither would the 2nd Respondent be held vicariously liable for the accident, the 1st and 2nd Respondents could not have been blamed for this accident. I therefore find it is of no use to delve into the issue of quantum as against a party who is not before this



court to defend themselves having been deliberately left out by the Appellant in the matter despite her address, phone number and ID number having been provided by the 2nd Respondent.

16. In the resultant, the Appeal is found to be without merit and this court proceeds to dismiss it with costs to the 2nd Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Muriuki holding brief for Mr. Karanja counsel for 1st Respondent

No appearance for and by Appellant

Court Assisant - Simon

