



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kivala v Kange & another (Civil Appeal E030 of 2021)
[2023] KEHC 20151 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E030 OF 2021**

RK LIMO, J

JULY 17, 2023

BETWEEN

JULIUS KIVALA APPELLANT

AND

MUNYOKI JOSEPH KANGE 1ST RESPONDENT

EDWARD KOMBO KARIUKI 2ND RESPONDENT

(Appeal that arose from the judgement of Hon. M. Onkoba –Principal Magistrate delivered on 28th April, 2021 vide Mwingi PMCC No.10 of 2018)

JUDGMENT

1. This is an appeal that arose from the judgement of Hon. M. Onkoba –Principal Magistrate delivered on 28th April, 2021 vide Mwingi PMCC No. 10 of 2018.
2. In that suit, the Respondents sued the appellant for material damages in respect of material claim that was brought as a result of a road traffic accident involving motor vehicle registration No. xxxx reported to be owned by the appellant and xxxx owned by the 2nd Respondent and driven by 1st Respondent at the material time of the accident which was on 1st February, 2016. The Respondents blamed the appellant’s driver for the accident claiming that he was negligent by driving on the wrong side of the road.
3. The appellant on his part denied the particulars of negligence leveled against him pleading that he had sold the subject motor vehicle to one Titus Masila before the date of the accident and could not therefore, be held liable for the occurrence of the accident.
4. The issues before the trial court was mainly as follows:-
 - i. Who was the owner of the motor vehicle registration no xxxx.



- ii. Whether the accident occurred.
 - iii. Whether there was prove of material damages of claimed (Kshs. 3,914,196) and loss of use of motor vehicle Registration No. xxxx.
5. Before I consider the decision of the trial court this court will look at the evidence tendered at the trial in summary.
 6. Munyoki Joseph Kange (PW1) the 1st Respondent testified that he was the driver of motor vehicle xxxx a PSV on the material day and that as he drove along Mwingi-Thika Road near Kivaini Bridge, motor vehicle Registration No. xxxx encroached on his lane and caused the accident and extensively damaged the bus registration No. xxxx he was driving.
 7. The owner of the motor vehicle Registration No. xxxx, the 2nd Respondent testified and told the trial court that the bus belonged to him and that he operated it as a PSV adding that it gave him an income of Kshs. 15,000 per day. He testified that after being notified of the accident, he employed the services of a motor vehicle loss assessor who assessed the damage on the bus at a total of Kshs. 4,030,848.
He further testified that he conducted a search at National Transport and Safety Authority (NTSA) to get ownership details of the subject motor vehicle registration no. xxxx and established that the owner was the appellant herein. He tendered a copy of records from the Registrar of motor vehicle as P Ex 11.
 8. John Waweru Wachira (PW3) a motor vehicle loss assessor from Eugima Assessors testified that he assessed the damage on motor vehicle xxxx and found that the damaged parts and repairs would cost Kshs. 3,851,548 and formed the opinion that it was economical to repair and thereby, declared it a total loss. He opined that the pre-accident value of the said motor vehicle was Kshs. 4.2 million adding that Salvage would fetch around Kshs. 400,000. He tendered his report as P Ex 7. He stated that he was paid Kshs. 6,000 to do the assessment and Kshs. 18,820 to attend court and tendered a receipt of payment as P Ex 3.
 9. The appellant on his part testified and denied ownership of the subject motor vehicle. The thrust of his case is that he had already sold the subject motor vehicle to Titus Masila Mwangangi (deceased) who was he driver of the subject motor vehicle and who also perished in the accident. He tendered a handwritten agreement indicating that he sold the said motor vehicle on 15th January 2015. He further tendered a copy of Records from Registrar of Motor Vehicle (D Ex 3) which indicated that the deceased was the owner of the subject motor vehicle as at 23rd February, 2018.
 10. Paul Malusi Mwangangi (DW2) testified and informed the trial court that he was a brother to the deceased and was aware that the deceased had purchased the subject motor vehicle prior to the time of the accident. His attempt to tender documents on behalf of the estate of his late brother was however overruled because he had not taken out letters of administration and was found to have lacked the capacity to do so.
 11. The trial court evaluated the evidence tendered and found that the appellant was the owner of the subject motor vehicle (xxxx) at the material time. It further found that the 2nd Respondent had proved his claim on material loss and awarded him a total of Kshs. 3,914,198 but declined the claim on loss of use finding that, upon giving an award on the basis of total loss, there was no basis to award a claim of loss of use.
 12. The Appellant was dissatisfied with the trial court's judgment filed this appeal and raised the following grounds;



- i. That the Learned Trial Magistrate erred and misdirected himself in law and in fact in delivering judgment which was wholly against the weight of evidence.
 - ii. That the Learned Trial Magistrate erred and misdirected himself in law and fact in failing to appreciate that the Appellant herein sold the motor vehicle registration number xxxx to one Titus Masila Mwangangi a year before the accident occurred.
 - iii. That the Learned Trial Magistrate erred and misdirected himself in law and fact when he proceeded to award the Respondent damages for material damage without proof of specific damages incurred by the Respondent.
 - iv. That the Learned Trial Magistrate erred and misdirected himself in law and fact when he relied solely on the copy of records of motor vehicle registration number xxxx as proof of ownership and disregarded other documentary and oral evidence before him to pass judgment against the Appellant.
 - v. That the Learned Trial Magistrate erred and misdirected himself in law and fact when he failed to appreciate that the Appellant was not the physical, legal or beneficial owner of the motor vehicle registration number xxxx at the time of the accident.
 - vi. That the Learned Trial Magistrate erred in law and fact when he failed to appreciate the fact that the insurance policy of motor vehicle registration number xxxx at the time of the accident being P/NO.970A812749014000615 did not belong to the Appellant.
 - vii. That the Learned Trial Magistrate misdirected himself in law and fact when he failed to consider the Appellant's submissions and authorities in support thereof and proceeded to pass judgment which negated all constitutional requirements of a fair trial.
13. The Appellant in his written submissions faults the trial court for finding that he was vicariously liable for the accident. He contends that the mere fact that he was the registered owner of the subject motor vehicle as per the copy of the Registration records was not sufficient proof of ownership and/or that he was vicariously liable.
 14. He relies on the decision of *Securicor Kenya Limited v Kyumba Holdings Ltd.* [2005] eKLR where the court observed that proof of ownership as per the logbook was not in itself sufficient to create vicarious liability.
 15. The Appellant has also cited the case of *Meto & anor v Kibanguru & 3 Others* [2002] eKLR where the Court of Appeal reiterated the finding of the House of Lords in *Morgans v Launbury and Others* [1972] 2 All ER 606 on vicarious liability as follows;

“In order to fix liability on the owner of a car for the negligence of the 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 the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner.”
 16. The Appellant further submits that the Respondents did not provide clear proof of the special damages alleged to have been incurred on account of repairs carried out on the motor vehicle.
 17. The Respondent on the other hand has opposed this appeal. He faults the Appellant for failing to address several issues pleaded in his defence which they submit were within his knowledge which



included, the date he sold motor vehicle registration number xxxx, when he handed over physical possession of the motor vehicle and particulars of the sale agreement. The Respondents submit that the Appellant was bound by his pleadings and his failure to disclose the aforementioned information was detrimental to his case and that the court should not come to his aid at the appellate stage. They have cited the cases of *Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission* [2019] eKLR as well as *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR on the importance of having specific pleas in pleadings

18. On the question of ownership, the Respondents submit that they sent a demand letter dated 1/9/2016 to the Appellant which he did not protest. They have also submitted that they sent a statutory notice to ICEA Insurance Company Ltd dated 1/9/2016 which indicated the Appellant was the insured in relation to motor vehicle registration number xxxx and that the insurance company did not protest the said notice or pointed out that the appellant was not the insured. They have also placed reliance on the police abstract dated 1/2/2016 which recorded the Appellant as the registered owner of the motor vehicle. They also rely on a copy of a search from the Registrar of motor vehicles which indicated the Appellant as the owner of motor vehicle registration number xxxx as at 8/9/2016. They submit that the subsequent copy of search produced by the Appellant two years after the accident occurred indicating Titus Mwangangi as the registered owner of motor vehicle registration number xxxx was fraudulent. That the subsequent copy of search signified an illegal post humus transfer of the motor vehicle to the deceased. They have placed reliance on the doctrine of lis pendens as applied in the case of *Re Estate of Solomon Muchiri Macharia* [2016] eKLR a succession matter which involved a land parcel which had been sub-divided into various parcels while a matter relating to the land was pending in court. Mativo J(as he the was) in his ruling in an application where he allowed prayers preventing transfer or any dealings on the suit property held as follows on the doctrine;

“ Today, a lis pendens creates a cloud on title ” that prevents dealings with the property until judgment has been entered and the time for appeal has expired, at which time the lis pendens expires.’ To me, this remains the legal position in Kenya.”

19. The Respondents further submit that the Appellant ought to have instituted third party proceedings against the estate of Titus Masila. They submit that the Appellant was rightly sued as he was the registered owner of motor vehicle registration number xxxx at the time of the accident.
20. They have defended the amount awarded by the trial court stating that the figure was pleaded in the plaint and corroborated by an assessment report from Enigma Assessors.
21. This Court as the 1st appellate court has re-evaluated the evidence tendered at the trial. I have considered the appeal and the response made.
22. The main issue in this appeal revolves around the question of ownership of the subject motor vehicle that caused the accident. The recurrence of the accident is not disputed in this appeal.
23. Ownership is a question of fact which means the same is established through evidence. The law placed the burden of proof on the Respondents in the first instance.
24. Section 107 of *Evidence Act* further provide on burden of proof as follows;
 - “i. 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.



ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. There is a presumption of law that the name of the person appearing on logbook is the owner. Section 8 of the [Traffic Act](#) 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.”

26. The presumption means that the same is rebuttable again through evidence and that burden of rebutting the presumption was on the appellant. In [Nancy Ayemba Ngana v Abdi Ali](#) [2010] eKLR, the court distinguished that there are situations where a registered owner per se is not the actual owner because a beneficial owner could be more relevant when it stated as follows: -

“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 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...”

27. A similar fraction was taken in the case of [P.N.M. & another \(the legal personal representative of estate of L.M.M.\) v Telkom Kenya Limited & 2 Others](#) (2015) eKLR where the court held as follows;

“This court finds that albeit the search certificate/copy of records produced by the plaintiff showed that the 1st defendant Telkom Kenya Ltd was the registered owner of the accident motor vehicle at the material time, it is clear from the evidence gathered by the police investigating the accident, and the driver’s own statement and the vehicle’s insurance policy cover with Kennindia Assurance Co. Ltd, that the owner thereof was the 2nd defendant who was the beneficial owner as the vehicle was then being used for his benefit not the 1st defendant’s benefit. The latter had sold the accident motor vehicle and its possession and use thereof passed to the 2nd defendant. Section 8 of the [Traffic Act](#) Cap 403 of the Laws of Kenya provides that: -

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

In this case, *prima facie*, the 1st defendant was the registered owner of the accident motor vehicle. Nonetheless, the contrary was proved, that the said vehicle had at the material time of the accident been sold and possession and use delivered to the 2nd defendant.”



28. The Court of Appeal is *Benard Muia Kilovoo v Kenya Fresh Produce Exportes* [2020] eKLR gave a guiding summary of factors to be considered in determining the question of ownership of a motor vehicle as follows: -
- “
- i. The presumption that the person registered as 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.”
29. I have considered the evidence placed before the trial court in regard to the question of ownership of the subject motor vehicle xxxx. The Respondents tendered a copy of record from the Registrar motor vehicle which showed that the appellant was the owner of motor vehicle as at 8th September, 2016 when the search was conducted. The accident occurred on 1st February, 2016. The copy of the Police Abstract tendered in evidence did not contain the particulars of ownership of the subject motor vehicle.
30. On the other hand, the appellant properly presented a copy of Register from Registrar of Motor vehicle showing that as at 23rd February, 2018 the owner of the motor vehicle was the deceased. The trial court dealt with contrasting evidence placed before him by relying on the decision in *John Mugalo v Telkon (K) Ltd* where the court held that, where a defendant alleges that the motor vehicle that caused the accident did not belong to him, he bore the burden of disproving the evidence that he was the registered owner.
31. The trial court reasoned that the evidence relied upon by the appellant was not sufficient to disprove the evidence tendered by the respondents. The insufficiency pointed out are: -
- i. That the handwritten agreement authored by the appellant did not indicate how or when transfer forms were to be executed and how the consideration was paid.
 - ii. That the evidence from NTSC tendered that while ownership as at 8th September, 2016, indicated that the appellant was the registered owner, the records as at 23rd February, 2018 showed that the deceased was the registered owner which meant that ownership changed posthumously since the deceased died in the accident on 1st February, 2016.
32. This Court has re-evaluated the evidence placed before the trial court. It is important to note that the other evidence that the appellant wanted to rely on in disproving ownership was objected to and upheld by the trial court.
33. This Court finds that though the logbook of the subject motor vehicle was not tendered by the Respondents, the copy of records from the Registrar of Motor Vehicles sufficed. It indicated that the appellant was the *prima facie* owner of the motor vehicle. The Respondent in other words established on a prima facie basis (which standard is applicable in civil cases) that the appellant was the registered owner. The evidential burden upon production of the said registration documents (P Ex 4) shifted to the appellant to disprove the same if he denied ownership.
34. In my considered view, the trial court was right when it found that the charge of ownership of the subject motor vehicle was changed to reflect the name of the deceased only after his demise because of the Registration documents that showed that while the appellant was registered owner as at 8th September, 2016, the scenario had changed by 23rd February, 2018. The changes clearly show that



ownership was done after the demise of the deceased for reasons that were not made known to the trial court. That is perhaps the reasons why the trial placed no premium or probative value on the handwritten agreement indicating that the deceased was a beneficial owner of the subject motor vehicle.

35. I have however, re-evaluated the other evidence tendered by the appellant which appears to have escaped the attention of the trial court. The appellant tendered a Police Abstract which the trial court captured it as P Ex 6 in the proceedings when the appellant was being cross examined. That document was among the appellant's list of documents filed and admitted in Evidence during trial. A perusal of that document shows that Titus Masila Mwangangi (deceased) was the owner of the motor vehicle Registration No. xxxx (the subject motor vehicle).

This clearly shows that even though the logbook of the car and/or the records from NTSA (National Transport and Safety Authority) still reflected the Appellant as the registered owner, the beneficial owner was actually the deceased given the handwritten agreement, coupled with the fact that the deceased was in actual possession of the motor vehicle at the material time of the accident.

36. Besides the above, evidence of the brother of the deceased, Paul Malusi Mwangangi (DW2) corroborated the fact of beneficial ownership and thus in effect rebutted the evidence tendered by the respondents to the effect that the appellant was the registered owner of the subject motor vehicle at the time of the accident. It is in that regard that the trial magistrate misdirected itself by failing to give due weight to the appellants' case. Had the trial Court addressed its mind on the Police Abstract tendered by the Appellant as opposed to the Police Abstract tendered by the Respondents which did not show who the owner of the subject motor vehicle was, then on the applicable standard of civil cases (balance of probabilities), it could have found that the scales tilted in favour of the appellant's case at least in regard to the question of ownership of the subject motor vehicle.

37. The Court of appeal in *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR had this to say with regards to liability in a case where the buyer had not transferred ownership upon purchase of a motor vehicle and where the seller had been held liable by the court;

“In this case, there is undisputed evidence to the effect that the appellant had actually purchased the motor vehicle from Machakos District Co-operative Union Ltd, repaired it, and then sold it to the respondent. It was also in evidence that when the appellant sold the lorry to the respondent, instead of ensuring that it had been transferred, he just signed the transfer forms and gave them to the respondent to complete the said transfer. For that, the appellant was faulted by the learned Judge who stated that the appellant never intended to transfer the lorry from himself. Without saying much about that statement, we note that in the ordinary state of things, a seller of a motor vehicle hands over the motor vehicle to the buyer together with the duly executed transfer forms, and leaves it to the buyer to follow up the matter with the Registrar of Motor Vehicles. No adverse inference therefore should be made against the appellant for the sole reason that he did not follow up the respondent to ensure that the transfer had been effected.

Although no sale agreement was exhibited in Court, the fact that the appellant had sold the lorry to the respondent, and that the lorry had been in the respondent's possession for several years prior to the accident is not disputed. Indeed, learned counsel for the respondent's submission was that since the lorry was still in the Machackos Union Co-operative's name, the appellant should not even have filed this suit. That in our view is an acknowledgement by the respondent that the appellant was indeed not the owner of the lorry and should not therefore have been held liable for the accident in question.”



38. In this instance, as observed above a sale agreement though handwritten, was tendered and the same was not challenged by the Respondents on grounds of authenticity. The Police Abstract complied with oral evidence tendered in my view proved on a balance of probability that the deceased was a beneficial owner of the subject motor vehicle. It was a misdirection for the trial court to find that the handwritten agreement did not indicate how the money in consideration was paid or when the transfer form would be executed. In ordinary agreements between parties such details can be omitted and it does not mean that their omission invalidates the agreement.

39. In the case of *Muhambi Koja v Said Mbwana Abdi* [2015] eKLR the Court made the following observations: -

“But situations, in the normal course of business and human interactions, may arise where the person named in those records may have passed the property in the vehicle to some other person in whom the ownership presently vests. For instance, Section 8 of the *Traffic Act* recognizes this situation and requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding fourteen (14) days after the date of such transfer, unless the new owner is registered as the owner thereof. The registered owner must, within seven days from the date of the transfer inform the Registrar in a prescribed form. (He is also required to furnish) the name and address of the new owner and deliver the original registration book to the new owner.

It is the new owner who takes over from this point on and after inserting particulars of the change of ownership, forwards the registration book with the prescribed fees to the Registrar, whereupon the vehicle will be registered in the name of the new owner. Where, however, there is proof and the Registrar is satisfied that the above steps cannot be taken on account of the registered owner having died or left Kenya or cannot be traced or has simply refused to comply with these requirements, the vehicle may nonetheless be registered in the name of the new owner upon payment of the prescribed fees.

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.”

40. I will now turn to the other crucial question of vicarious liability. The appellant contested liability at the trial court contending that he was not vicariously liable for the actions of the deceased. The trial court held that he was liable by virtue of the fact that he was the registered owner of the subject motor vehicle.

41. The question of vicarious and tortious liability of a registered owner of a motor vehicle that causes an accident has been a subject of litigation in our courts and though varying directions have been taken by different courts, the Court of Appeal appears to have settled on the position that vicarious liability is not just begged on legal ownership but that vicarious liability should be begged on legal owner and employer/employee relationship.

42. The Court of Appeal in *Equator Distributors v Joel Muriu & 3 others* [2018] eKLR referenced its earlier decisions on vicarious liability as follows;

“We re-affirm this Court’s statement in *John Nderi Wamugi v Rubesh Okumu Otiangala & others* (2015) eKLR that where it was expressed that the reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on



legal ownership of a motor vehicle to the total exclusion of employer/employee relationship would amount to grave injustice

We are persuaded by and affirm the dicta of this Court in *HCM Anyanzwa & 2 Others v Luigi De Casper & Another* [1981] KLR 10, where it was held that “vicarious liability depends not on ownership but on the delegation of tasks or duty...”

43. There was scanty evidence tendered by the Respondent to show or shed light on how the appellant was vicariously liable for the actions of the deceased. There was no evidence of any investigations by the Police or any other agency to establish the connection between the appellant and the deceased that could have given rise to the conclusion that the deceased was employed, or acting as an agent of the appellant. In the converse the evidence tendered showed that the deceased was the beneficial owner of the subject motor vehicle. The finding by the trial court that the appellant was vicariously liable for his negligence was therefore, erroneous.

In the premises, this court finds merit in this appeal and in view of the findings, this court finds that going into the quantum would be academic and will not be in the interest of judicial time. In the end for the reasons advanced above, this appeal is allowed. The judgement of the lower court on liability and quantum is set aside in its place, the Respondents suit in the Lower Court is dismissed for want of proof. The Appellant will have costs in this appeal and the trial court.

Dated, Signed and Delivered at Kitui this 17th day of July, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

