



**Qasim & Yahya Limited v Ngare & 2 others (Civil Appeal E065, E066, E067 & E068 of 2022 (Consolidated)) [2023] KEHC 19994 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E065, E066, E067 & E068 OF 2022 (CONSOLIDATED)**

**GL NZIOKA, J  
JULY 11, 2023**

**BETWEEN**

**QASIM & YAHYA LIMITED ..... APPELLANT**

**AND**

**NICHOLAS NAHASHON NGARE (ALIAS NICHOLAS NGARE  
RUKENYA) ..... 1<sup>ST</sup> RESPONDENT**

**CLARE MUTHONI MUTONGA ..... 2<sup>ND</sup> RESPONDENT**

**JRN (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND NNN  
ALIAS NNR) ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment delivered by Hon. E. Mburu (SRM) at the Chief Magistrate's Court at Naivasha vide Civil Case No. 406 of 2020 dated 16th July 2021; and Civil Case(s) No. 404, 405 and 407 of 2022zz0 dated 6th August 2022)*

**JUDGMENT**

1. The background facts of matter are that on 30<sup>th</sup> July 2019, the plaintiffs (herein “the respondents”) were travelling in the motor vehicle registration number KAH 916Y driven by the 1<sup>st</sup> respondent. That, at around 3:00pm, the subject motor vehicle was involved in a road traffic accident along the Nakuru – Naivasha Highway, with another motor vehicle registration number KCQ 491X driven by the 1<sup>st</sup> defendant, wherein the respondent’s motor vehicle was damaged and they suffered bodily injuries.
2. It is averred that the motor vehicle registration No. KCQ 491X was owned by the 2<sup>nd</sup> defendant (herein “the appellant”) and that the 1<sup>st</sup> defendant was held to blame and charged vide Traffic case No. 2226 of 2019. Subsequently, the respondents sued the defendants in the Chief Magistrate’s Court at Naivasha, vide Civil Suit No(s). 404, 405, 406 and 407 of 2020.



3. However, the 1<sup>st</sup> defendant did not to enter appearance, as a result a default judgment was entered against him and the matter proceeded to formal proof. The appellant filed a statement of defence and the matter proceeded to full hearing.
4. At the hearing of the case, the respondents relied on their witness statement as to how the accident occurred and blamed the 1<sup>st</sup> defendant for causing the accident for having driven his motor vehicle registration No. KCQ 491X at high speed taking into account the circumstances of the case, encroaching on to the lane of motor vehicle KAH916Y and overtaking when it was not safe to do so.
5. Further, that the 1<sup>st</sup> defendant failed to brake, swerve, and failed to have due regard to other road users and/or generally failed to control his motor vehicle to avoid causing the accident. That, although the 1<sup>st</sup> respondent tried to brake but it was too late and could not swerve as there was an embankment on the side of the road.
6. That, as a result of the accident the 1<sup>st</sup> and 3<sup>rd</sup> respondents suffered serious injuries requiring hospitalization and incurring expenses, while the 2<sup>nd</sup> respondent sustained fairly serious injuries and was treated and discharged.
7. Further, the respondents' motor vehicle with a pre-accident value of Kshs. 180,000 was damaged and the salvage valued at Kshs. 60,000. The 1<sup>st</sup> respondent testified that he incurred towing charges, assessment fees and payment made to obtain a copy of record.
8. In support of his case, the 1<sup>st</sup> respondent called No. 971496 PC Josphat Makau from Naivasha Traffic Base who produced the Police abstract to confirm that the accident took place and the investigations undertaken revealed the 1<sup>st</sup> defendant was to blame for the accident and he was charged at Naivasha Chief Magistrate's Court Traffic vide case No. 2226 of 2019, but did not give the results thereof.
9. The appellant on its part supported its case with the evidence of; it director Muhamud Asifder, who adopted his witness statement to the effect that the appellant was in the business of buying and selling new and used motor vehicles and in the normal course of that business sold the subject motor vehicle registration No. KCQ 491X to one Walter Otieno Ooko for a sum of; Kshs. 1,000,000 vide an agreement dated 2<sup>nd</sup> July 2018.
10. That, the buyer paid a deposit of; Kshs. 400,000 and the balance of Kshs. 600,000 was to be paid in fifteen (15) monthly instalment of; Kshs. 40,000. That, the logbook was to be transferred to the purchaser on payment of the full purchase price. Thus at the time of the accident, the appellant was not the beneficial owner of the said vehicle.
11. Furthermore, the 1<sup>st</sup> defendant was not its employee nor agent and in the circumstances it was not vicariously liable for the negligence of the 1<sup>st</sup> defendant.
12. At the conclusion of the trial, the parties filed their respective submissions and on 16<sup>th</sup> August 2022, the trial court delivered judgment in favour of the respondents and held the defendants 100% jointly and severally liable.
13. In the resultant, the trial court awarded the respondents, damages as follows: -
  - a. In CMCC 404 of 2020  
General damages----- Kshs. 600,000  
Special damages-----Kshs. 33,650
  - b. In CMCC 405 of 2020



Material damage to the vehicle----- Kshs. 120,000

Special damages ----- Kshs 5,550

c. In CMCC 406 of 2020

General damages ----- Kshs. 1,000,000

Special damages----- Kshs. 3,000

d. In CMCC 407 of 2020

General damages ----- Kshs. 250,000

Special damages----- Kshs. 3,000

The respondents were also awarded costs of the suits together with interest from the date of the judgment until payment in full.

14. Being aggrieved by the decision of the trial court, the appellant has appealed against it on the following grounds in the amended memorandum of appeal, dated 16<sup>th</sup> September 2022: -

- a. The Learned Magistrate erred in law and in fact in finding that the Defendant (the Appellant herein) was vicariously liable for the negligence of the Defendant when there was no evidence adduced to show that the 1<sup>st</sup> Defendant in driving motor vehicle Registration number KCQ 491 X was so driving as an employee or agent of the 2<sup>nd</sup> Defendant.
- b. The Learned Magistrate erred in disregarding the evidence of the 2<sup>nd</sup> Defendant's witness who clearly stated that, the 1<sup>st</sup> Defendant was the beneficial owner of the motor vehicle registration number KCQ 491 X (the motor vehicle) having purchased the motor vehicle from the 2<sup>nd</sup> Defendant prior to the date of the accident and that he was driving the motor vehicle for his own purpose and that he was not an employee or agent of the 2<sup>nd</sup> Defendant.
- c. The Learned Magistrate erred in law in placing the burden of proof on the 2<sup>nd</sup> Defendant when in fact no such burden had shifted to the 2<sup>nd</sup> Defendant.
- d. The Learned Magistrate erred in law and in fact in finding that the 2<sup>nd</sup> Defendant is vicariously liable for the negligence of the 1<sup>st</sup> Defendant without any evidence on record that could lead to such a finding.
- e. The Learned Magistrate erred in law and in fact in entering judgement against the 2<sup>nd</sup> Defendant merely because the 2<sup>nd</sup> Defendant was the registered owner of the motor vehicle despite the evidence on record that the 1<sup>st</sup> Defendant was the beneficial and insured owner of the motor vehicle.
- f. The Learned Magistrate erred in law in making an award that is inordinately so high as to warrant the interference of the same by this court.

15. The appeal was disposed of by filing of submission. The appellant filed submissions dated 1<sup>st</sup> March 2023, wherein it submitted that the learned trial magistrate erred by find the appellant vicariously liable for the negligence of the 1<sup>st</sup> defendant and failing to appreciate its case that, on the material day of the accident the subject motor vehicle was not being driven by its employee or agent, nor for its benefit.

16. That, the learned trial Magistrate erred in assuming that the appellant was liable merely because the motor vehicle was registered in its name yet it tendered evidence that it had sold the subject motor vehicle to a third party, Walter Otieno Ooko on 2<sup>nd</sup> July 2018. That, although the subject vehicle



remained registered in its name, the beneficial ownership, possession and control had been transferred to the buyer and the appellant did not know the 1<sup>st</sup> defendant.

17. The appellant relied on the case of; *Ali Lali Khalifa v Pllman Tours and Travel Ltd & Others* [2003] eKLR where the court relied on the case of *Ormord Crosville Moor Services Ltd (1954) 1 All ER 753* at 755 and held that, the registered owner of a motor vehicle can escape liability if demonstrated that he hired it out to a third party or was used in circumstances that the owner had no interest and/or that did not allow the doctrine of vicarious liability to apply.
18. Further, there was no evidence that the 1<sup>st</sup> defendant was its employee or agent and in fact, evidence was adduced that, the 1<sup>st</sup> defendant was the insured owner of the motor vehicle. The appellant urged the Court to allow the appeal.
19. However, the respondents opposed the appeal vide the submissions dated 6<sup>th</sup> March 2023 and argued that they tendered adequate evidence to show that the appellant was the owner of the motor vehicle shifting the burden to the appellant and requiring the appellant to demonstrate that the control and ownership of the same had been transferred to a different person.
20. That, the appellant failed to discharge the burden of proof as set out under section 107 of *Evidence Act*, in that it produced a sale agreement between it and Walter Otieno Ooko and signed on the buyer's behalf by John Onyango Ojoro but which did make reference to the 1<sup>st</sup> defendant.
21. Further, that the appellant failed to join the said Walter Otieno Ooko as third party to ascertain that it had in fact sold the subject vehicle to him. That in the circumstances, the trial court was right in holding the appellant was the registered owner and thus vicariously liable. The respondent relied on the High Court Civil Appeal No. 55 of 2012 Industrial and Commercial Development Corporation vs J.P.K Gateri where the Court guided by the decision of the Court of Appeal in *Kenya Bus Services Ltd vs Dina Kawira Humphrey Civil Appeal No. 295 of 2000* held that appellants were liable for the actions of the driver as they had failed to prove they had sold the motor vehicle and failed to enjoin the claimed purchaser, which would have shed light on who should bear liability.
22. The respondents further submitted that the trial court made the awards based on the injuries sustained, receipts produced and the motor vehicle assessors report. That, none of the documents adduced as evidence were challenged by the appellant.
23. Furthermore, the trial court in awarding the damages was guided by the authorities cited by the parties and in certain circumstances where it found the authorities by the parties were exaggerated, it placed reliance on other case law with comparable injuries.
24. That, the awards by the trial court cannot be deemed to be too high as to warrant the Court to interfere with the same. Reliance was placed on Court of Appeal at Nairobi Civil Appeal No. 352 of 2017 *Kenya Broadcasting Corporation vs Geoffrey Wakio* where it was held that an appellate court can only reverse an award of damages where it is convinced the trial judge acted on wrong principles of law, or the award was extremely high or very low an erroneous estimate of the damage entitled.
25. Having considered the appeal in the light of the material placed before the court and the arguments advanced vide submissions, I note that, the role of the 1<sup>st</sup> appellant court, as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123*, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.



26. The Court of Appeal thus observed: -

“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 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

27. To revert back to this matter I note that the appellant challenges the Appeal on the ground that it is not vicariously liable for the alleged negligence of the 1<sup>st</sup> defendant as the 1<sup>st</sup> defendant was not driving the offending vehicle as its servant or agent and neither was it the beneficial owner of that vehicle.

28. In that regard, it suffices to note that vicarious liability is the liability held by a person or entity that is in charge (called the principal or master) of another person (called the agent or servant). The person, usually an employer, is responsible for the actions of their employee (or other subordinate) if that employee causes harm or injury to another person.

29. Indeed, the principle of vicarious liability has been considered in various court decisions and in the case of; *Amalgamated Logistics International Ltd & another v MMK (2020) eKLR* the Court of Appeal stated as follows: -

“Vicarious liability has been well elucidated in *Salmond on Torts*, 1<sup>st</sup> ed at Pg 83 as;

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.”

This Court in *Joseph Cosmas Khayigila V Gigi & Co. Ltd & Another*, Civil Appeal No. 119 of 1986 established a clear test for vicarious liability as follows: -

“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that 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 performance of the task or duty thereby delegated to him by the owner.” (emphasis added).

30. Similarly, in the case of; *Securicor Kenya Ltd v Kyumba Holdings Ltd (2005) eKLR*, the Court of Appeal had this to say : -

“What is Vicarious Liability? *Winfield and Jolowicz on Tort*, 14th Edn says: -

“The doctrine may be stated as follows: - Where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A Will Be Vicariously Liable For B’s Negligence In The Operation Of The Vehicle. Thus In *Ormrod Vs. Crossville Motor Services Ltd.* (71) A, the owner of a



car, asked B to drive the car from Birkenhead to Monte Carlo, where they were to start a holiday together. It was held that A was liable for B's negligent driving even though B might be said to be partly pursuing his own interests in driving A's car. On the other hand, liability was not imposed in *Morgans Vs. Launchbury* (72) where the husband, who normally used his wife's car to go to work, got a third person to drive him home after visits to several public houses. In no sense was the husband acting as his wife's agent in using the car for his work and still less was the third person her agent. It is now clear that mere permission to drive without any interest or concern of the owner in the driving does not make the owner vicariously liable, nor is there any doctrine of the "family car". Where, however, the facts of the relationship between owner and driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner's agent." (71: [1953] 1 W.L.R. 1120 72: [1972] A.C. 127)"

31. As regards the subject matter herein, it is not in dispute that the motor vehicle driven by the 1<sup>st</sup> plaintiff/respondent was involved in an accident with a motor vehicle driven by the 1<sup>st</sup> defendant along Nakuru – Naivasha highway. This fact is supported by the evidence of the 1<sup>st</sup> plaintiff/respondent and the police abstract produced.
32. What seems to be in dispute is whether the 1<sup>st</sup> defendant was driving the vehicle as the servant or agent of the 2<sup>nd</sup> defendant for the doctrine of vicariously liable to arise. The plaintiffs filed several suits against the respondent being; Chief Magistrate's Civil Case No(s); 404, 405, 406 and 407 of 2020. I have gone through the pleadings in all the relevant complaints and I note that in all of them, the plaintiffs did not plead to the fact that the 2<sup>nd</sup> defendant is the registered owner or beneficial owner of the subject motor vehicle driven by the 1<sup>st</sup> defendant at the time the accident occurred.
33. The plaintiffs in their pleadings simply states at paragraph 5 that:

“The plaintiff contents that the subject accident was caused solely by the negligence of the driver of motor vehicle registration number KCQ 491X for which the 2<sup>nd</sup> defendant is vicariously liable” (emphasis added).
34. Indeed, nowhere else in the rest of the pleadings in the complaint(s) is reference made to the 2<sup>nd</sup> defendant. Further, nowhere in the entire pleadings is the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded to or stated. The plaintiff(s) did not plead to the fact that the 1<sup>st</sup> defendant was a servant and/or agent of the 2<sup>nd</sup> defendant and/or was driving the subject motor vehicle as such.
35. The cardinal rule is that parties are bound by their pleadings, which must be clear and speak to the mind of the respondent or defendant to allow the recipient adequately prepare a response or defence thereto.
36. Even then, the elements of the doctrine of vicarious liability are well settled and for vicarious liability to arise, all the elements thereof must be proved: the wrongful act must have been committed by an employee or other agent, the employee or other agent must have been acting within the scope of his or her employment or agency, and the employer or other person must have had the ability to control the employee or agent.
37. In the instant matter at the expense of repeating what is already said, there is no evidence that the 1<sup>st</sup> defendant was a servant or agent of the 2<sup>nd</sup> defendant and/or driving the motor vehicle with the authority of the 2<sup>nd</sup> defendant or was not on a frolic of his own.



38. Furthermore, even if the Plaintiff(s)/respondents proved as they have that the 2<sup>nd</sup> defendant was the registered owner, that per se independent of proof of vicarious liability would not make the 2<sup>nd</sup> defendant reliable. In that regard, Sheridan J in the case of; Cooke vs Santos Maquel & another Civil Case No. 250 of 1983 held by that: -

“... mere ownership of the car and permission were insufficient to saddle UTC with vicarious liability.”

39. It is also noteworthy that the police abstract indicates that, the 1<sup>st</sup> defendant is the insured owner of the vehicle which is insured by CIC General Insurance Co. Limited. It is not the 2<sup>nd</sup> defendant. For one to insure a subject matter of insurance the insured must have an insurable interest therein. That fact seems to support the 2<sup>nd</sup> defendant's defence that it had sold the vehicle. It therefore follows that, if the 2<sup>nd</sup> defendant is held liable, it cannot benefit from the insurance cover for the subject vehicle.

40. The trial court seems to have anchored its finding on the mere fact that the 2<sup>nd</sup> defendant was the registered owner of the vehicle in question and did not prove that it had sold the vehicle to a third party, the purchaser of the motor vehicle did not sign the sale agreement, that there was no evidence of a power of attorney authorising a third party to sign it, and that the 2<sup>nd</sup> defendant failed to enjoin the 3<sup>rd</sup> party.

41. First and foremost, the 2<sup>nd</sup> defendant denied liability. It was for the plaintiff(s) to prove it. Secondly the issue herein was not about the validity of sale between the 2<sup>nd</sup> defendant and the purchaser or a dispute of transferability or assignment of rights. Furthermore, the issue of enjoining a third party could not arise as the 2<sup>nd</sup> defendant was not conceding to liability for the action of 1<sup>st</sup> defendant or any party. It was for the plaintiff(s) to prove the 2<sup>nd</sup> defendant was liable under the doctrine of vicarious liability which was not done and which the trial court did not address.

42. The upshot of the aforesaid is that, the judgment against the appellant on liability is set aside and all consequential orders thereto. As regards costs I find that, the orders that gave rise to the appeal are court orders and costs of the appeal cannot be visited upon the respondents.

43. In further consideration of the matter, I note the plaintiffs have judgment against the 1<sup>st</sup> defendant who was insured. The quashing of the liability against the 2<sup>nd</sup> defendant does not set aside liability against the 1<sup>st</sup> defendant. It is the business of the Insurance company is to take the risk off the shoulders of its insured. The plaintiffs should pursue the 1<sup>st</sup> defendant and the Insurance Company accordingly.

44. Those then are the orders of the court.

**DATED, DELIVERED AND SIGNED ON THIS 11<sup>TH</sup> DAY OF JULY, 2023.**

**GRACE. L. NZIOKA**

**JUDGE**

**In the presence of;**

Mr Omollo for the appellant

Mr Kamwaro for the respondents

Ms Ogutu: Court Assistant

