



**Chile Kenya Motors Limited v Ibencho (Civil Appeal E027 of 2024)
[2024] KEHC 15832 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E027 OF 2024
SM GITHINJI, J
DECEMBER 17, 2024**

BETWEEN

CHILE KENYA MOTORS LIMITED APPELLANT

AND

EVANS MAKORI IBENCHO RESPONDENT

*(Being an Appeal against the Judgment of Hon R.M.Amwayi – PM
delivered in Kaloleni PMCC No.E217 of 2021 on 6th March, 2024)*

JUDGMENT

Representation:

Miss Nabwana Advocates for the Appellant

Mr Kagwima for the Respondent

1. By a Memorandum of Appeal dated 18/3/2024 the Appellant sought that judgment delivered in Kaloleni Civil Suit No. E217 of 2021 by Hon. R.M. Amwayi (PM) on 6/3/2024, be set aside with costs. The Appellant raised the following grounds of appeal: -
 1. The learned trial magistrate erred in fact and in law in holding the Appellant 100% liable when no evidence was tabled to show that the Appellant was in control, had authority or derived any benefit from the use of the motor vehicle registration number KCY 605R at the time of the alleged accident.
 2. The learned trial magistrate misdirected herself in holding the Appellant 100% liable despite the fact that as a juristic person, the Appellant did not have capacity to drive the motor vehicle registration number KCY 605R and thereby cause an accident.



3. The learned trial magistrate erred in law and fact by finding that the Appellant had not proved alternative ownership for the motor vehicle registration number KCY 605R even though the Appellant had demonstrated that it was neither the possessory nor beneficial owner thereof at the time of the alleged accident.
 4. The learned trial magistrate erred in law and fact in making a finding of liability against the Appellant despite there being no evidence or nexus to prove that there was an agent, servant or any employment relationship existing between the Appellant and the driver of the motor vehicle registration number KCY 605R at the time of the alleged accident.
 5. The learned trial magistrate erred in law and fact by not applying the law on ownership of motor vehicles correctly and judiciously.
 6. The learned trial magistrate erred in law and fact by failing to consider and appreciate the Appellant's evidence with regard to the sale of motor vehicle registration number KCY 605R to Veronica Awuor Siro which occurred prior to the date of the alleged accident.
 7. The learned trial magistrate erred in law and fact by failing to appreciate that the Appellant was in the business of selling motor vehicles and the registration of motor vehicle registration number KCY 605R in its name was solely for purposes of enabling it carry out its business effectively.
 8. The learned trial magistrate erred by misdirecting herself on the legal principles in awarding damages that were excessive in the circumstances.
 9. The learned trial magistrate erred in law and fact in failing to appreciate that the Appellant had proved its case on a balance of probabilities having adduced evidence in support of its case.
- 2 The background of this appeal is that the Respondent instituted a suit before the Kaloleni Magistrate's Court against the Appellant. He filed a plaint dated 5/11/2021 seeking special damages for injuries sustained, general damages for pain and suffering and loss of amenities, and costs of the suit. His case is that at all material times, the Appellant was the registered owner of motor vehicle registration number KCY 605R Nissan March Station Wagon, which motor vehicle was being controlled and driven by the Appellant and or its duly authorized driver.
- 3 That on 19/9/2021, at around 6:30pm along the Nairobi-Mombasa highway at Magongo area, the Plaintiff was a lawful pillion passenger aboard motor cycle registration number KMFS 033Y, when the Appellant's driver drove motor vehicle registration number KCY 605R so recklessly and carelessly that the same lost control and hit the said motor cycle from the rear side. As a result, the Respondent sustained serious injuries. The particulars of negligence were listed thereon, as well as particulars of injuries and loss of amenities.
- 4 The Appellant's statement of defence is dated 2/6/2023, wherein it was averred that while the Appellant was the registered owner of the said motor vehicle, it was not the insured, possessory and beneficial owner of the same. That vide a sale agreement dated 10/4/2021, the Appellant had sold the motor vehicle to one Veronica Awuor Siro for a consideration of Kshs. 700,000/-. That upon payment of the deposit, Kshs. 170,000/- the Appellant handed over possession to the said Veronica who was to complete the balance in 20 monthly instalments. The Appellant denied liability and negligence and urged the court to dismiss the suit.
- 5 The Respondent's case stood on the testimonies of three witnesses. Evan Makori Ibencho (PW1), the Respondent herein, adopted his written statement as part of his evidence in chief. He narrated how the accident occurred, and produced copies of treatment notes (PEXH-1), P3 Form (PEXH- 4), search



records of the vehicle and company (PEXH 5 & 6), receipts (PEXH-7), demand letter and statutory notice (PEXH 8 & 9). He told the court that he had since healed. On cross-examination, he added that although he did not know the name of the driver of the motor vehicle, he was to blame for the accident. He stated that according to the records, the Appellant was the registered owner of the motor vehicle and the insured.

- 6 Dr. Darius Wambua Kiema (PW2) examined the Respondent and prepared a medical report and receipt thereof (PEXH 2a and 2b). His conclusion is that the Respondent had sustained soft tissue injuries expected to heal with no permanent disability. Inspector Salma Menza (PW3) produced police abstract and P3 form as PEXH 3 and 4 respectively. She narrated that the motor vehicle was being driven by one Fanuel Oloo when the accident occurred. That it rammed the motor cycle from behind and as a result, the Respondent sustained injuries. She told the court on cross examination that the motor vehicle was to blame for the accident. She did not know whether the said Fanuel was an employee of the Appellant.
- 7 The Appellant had one witness, Talha Arshad (DW1) who relied on his witness statement as his evidence in chief. He told the court that the motor vehicle had been sold to one Veronica as at the time of the accident. The witness added on cross examination that the vehicle had not been transferred to Veronica since she was yet to complete the purchase price. He however did not have any certificate of insurance to confirm that the vehicle was in Veronica's name.
- 8 The trial court found that the Appellant was the registered owner of the motor vehicle and proceeded to find the Appellant 100% liable and/or vicariously liable for the accident. The learned magistrate thus awarded the Respondent Kshs. 180,000/- as general damages; Kshs. 2950/- special damages; and costs of the suit together with interest.
- 9 This appeal was canvassed by way of written submissions.

Appellant's Submissions

- 10 In the written submissions dated 6/9/2024 filed by the firm of Laverne Nabwana & Company Advocates, counsel submitted that vicarious liability for negligence that results in a road traffic accident is not pegged on legal ownership of a motor vehicle but on the delegation of duty to the driver. To support this argument, counsel cited the case of John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR. According to counsel, the trial magistrate misdirected herself in addressing herself only on the issue of ownership instead of considering whether the driver was under the instruction or authority of the Appellant.
- 11 Further, quoting the case of United Millers Limited v Benjamin Okari Oigo [2010] eKLR, counsel argued that finding the Appellant 100% liable was both legal and logically impossible since the Appellant is a company, not capable of driving a motor vehicle.
- 12 Counsel argued that the said Veronica assumed all risk and liability over the motor vehicle upon taking possession thereof. That the trial court completely disregarded that part of the Appellant's evidence. Counsel added that whoever had control or authority over the tortfeasor is the relevant party to bear vicarious liability. She relied on the case of Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR.

The Respondent's Submissions

- 13 In the submissions dated 11/10/2024, filed by the firm of Kagwima Karanja & Company Advocates, counsel identified three issues for determination. Firstly, whether the Appellant was the registered owner of the motor vehicle. Guided by the case of Nancy Ayemba Ngaria v Abdi Ali [2010] eKLR,



counsel submitted that in judicial practice, concepts have arisen to describe alternative forms of ownership to include actual ownership, beneficial and possessory ownership.

- 14 Counsel submitted that by dint of section 38 of the *Evidence Act*, the police abstract produced by PW3 confirmed that the motor vehicle was registered in the Appellant's name, and that under section 8 of the *Traffic Act*, ownership had been sufficiently proven. Counsel relied on the cases of Joel Muga Opija v East African Sea Food Limited [2013] eKLR; Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR; and Muhambi Koja v Said Mbwana Abdi [2015] eKLR.
- 15 Secondly, whether the learned magistrate erred in finding the Appellant vicariously liable for the accident. Regarding this issue, counsel submitted that since the Appellant withdrew the third-party notice and that ownership had been established prima facie, the trial magistrate did not err in holding that the Appellant was vicariously liable, as no case had been established against a third party. Counsel found guidance in the case of James Gikonyo Mwangi v D M (minor suing through his mother & next friend, I M O) [2016] eKLR; Robert Njoka v Alice Wambura Njagi & 3 others [2013] eKLR; and Harrison Geita v Twiga Chemicals Limited [2014] eKLR.
- 16 Lastly, was the issue for costs. Counsel urged the court to dismiss the appeal and the Respondent be awarded costs together with interest on the decretal sum from the date of judgment till payment in full.

Determination

- 17 A first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify. (See the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. Therefore, having considered the evidence before the trial court, the memorandum of appeal, submissions and authorities presented by both parties, I adopt the following issues for determination: -
- i. If ownership of the motor vehicle registration No. KCY 605R was properly determined;
 - ii. If the appellant was vicariously liable for the accident;
 - iii. Whether the appeal is merited;
 - iv. Who shall bear the costs of the appeal?
- 18 Section 8 of the *Traffic Act* is couched in the following terms: -
- “The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
- 19 It is also trite that that the presumption of ownership of a vehicle, under Section 8 above, is rebuttable as was aptly held by the Court of Appeal in the case of *Ignatius Makau Mutisya -v- Reuben Musyoki Muia*, that Section 8 of the *Traffic Act* has been interpreted to mean that the registration of the motor vehicle is not conclusive proof of ownership. The Appellate court cited the case of *Osapil -vs- Kaddy* (2000) 1 EALA 187 where the Court of Appeal of Uganda held that;
- “Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.”
- 20 The Appellant was therefore required to prove on a balance of probability that as a matter of fact the motor vehicle had been transferred as at the date of the accident.



21 The civil standard of proof was considered in the Canadian case of R -v- Layton, (2009) SCC 36 (CanLII), (2009) 2 SCR 540 where it was stated: -

“... with reference to the civil standard of proof. R. D. Wilson, N. J. Garson and C. E. Hinkson’s Civil Jury Instructions (2nd ed. (loose-leaf)), at § 4.7.4, provides the following sample instruction for explaining balance of probabilities to a civil jury: -

What does “proof on a balance of probabilities” mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”

22 No doubt, the Respondent produced copies of search records and police abstract which establish that the Appellant was the registered owner of the motor vehicle.

23 The Appellant, on the other hand exhibited a copy of a sale agreement dated 10/4/2021 between itself and the said Veronica Awuor Siro. DW1 admitted on cross examination that the vehicle could not be transferred to the purchaser since she had not cleared the balance of the purchase price. He added that according to the agreement, the said Veronica was to insure the vehicle. I also note that that the next of kin and witness in the said agreement is identified as Fanuel Oloo, which name popped up in PW3’s testimony. According to PW3, the said Fanuel Oloo was at the time of the accident, the driver of the said motor vehicle.

24 In the circumstances, I am satisfied that the Appellant discharged the burden of proof when it adduced evidence to demonstrate that it had sold the vehicle to a third party.

25 On the issue of vicarious liability, it is clear from the determination of the first issue that the appellant had sold the motor vehicle to a third party who assumed all risk and liability over the use of the said motor vehicle upon taking possession of it.

26 In Jared Magwaro Bundi & another v Primarosa Flowers Limited [2018] eKLR, the Court of Appeal stated thus; -

“.. It was therefore held in Muhambi Koja (supra) that Section 8 of the Traffic Act recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered”.

27 Following the foregoing considerations, the finding of this court is that the appellant was not liable for the accident in issue and the trial court erred in finding that the Appellant did not prove on a balance of probabilities that it transferred ownership to the said Veronica.

28 The outcome is that this appeal is merited, it is therefore allowed in its entirety. The appellant is awarded the costs of the lower court case and of this appeal.



JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Juma holding brief for Ms Nabwana for the Appellant
2. Mr Kiragu for the Respondent(absent)

