



REPUBLIC OF KENYA



**Neem Pharmacy Company Ltd v Osoro & 2 others (Civil Appeal  
28 of 2023) [2025] KEHC 13484 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13484 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 28 OF 2023  
H NAMISI, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**NEEM PHARMACY COMPANY LTD ..... APPELLANT**

**AND**

**SAMUEL ONYANGO OSORO ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY ANDIKA KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**MIKE MOTORS & ENTERPRISES LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from Judgement and Decree of Hon. H. M. Nganga, Principal  
Magistrate in Gatundu Civil Suit No. 8 of 2017 delivered on 12 October 2022)*

**JUDGMENT**

1. This appeal arises from a suit filed in the trial court in which the Appellant was the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Respondent was the Plaintiff, the 2<sup>nd</sup> Respondent was the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Respondent was enjoined in the proceedings at the instance of the Appellant herein as Third Party.
2. The suit in the trial court sought general damages, special damages, cost of the suit and interest thereon. The appeal challenges the trial court's finding that the Appellant, as the registered owner of motor vehicle registration number KNL 380 was vicariously liable for the negligence of the 2<sup>nd</sup> Respondent, who was the driver of the said motor vehicle at the time of the accident that gave rise to the suit.
3. The particulars of the suit are that on or about 11 December 2015, the 1<sup>st</sup> Respondent was lawfully his motor cycle registration number KMDN 573N, along Thika-Nairobi Highway, when the suit motor vehicle collided with his motor cycle. The suit motor vehicle was driven by the 2<sup>nd</sup> Respondent.
4. The claim against the Appellant was founded on the doctrine of vicarious liability, with the pleading that the Appellant was the registered owner of the suit motor vehicle and that the 2<sup>nd</sup> Respondent was



its driver, agent and/or servant. The 1<sup>st</sup> Respondent sustained injuries as a result of the accident and claimed special damages amounting to Kshs 5,150/=, together with general damages.

5. The Appellant entered appearance and filed a Defence dated 28 March 2017, denying the 1<sup>st</sup> Respondent's claim in its entirety. The gist of his defence was that it was not the owner, beneficial or otherwise, of the suit motor vehicle at the time of the accident. The Appellant averred that it had sold the vehicle to the 3<sup>rd</sup> Respondent, Mike Motors & Enterprises Ltd, on 22 February 2012, for a consideration of Kshs 200,000/=. This transaction, which occurred nearly 4 years prior to the accident, was evidenced in the Motor Vehicle Sale Agreement dated 22 February 2012, which was produced in evidence.
6. The Appellant's director, DW1, testified that upon execution of the Sale Agreement and receipt of the purchase price, the Appellant transferred both ownership and possession of the said vehicle to the 3<sup>rd</sup> Respondent and handed over all necessary transfer documents. DW1 further gave uncontroverted evidence that the 2<sup>nd</sup> Respondent was not and had never been an employee, driver, or agent of the Appellant. The Appellant enjoined the 3<sup>rd</sup> Respondent as Third Party, against whom it sought indemnity or contribution.
7. The 3<sup>rd</sup> Respondent's defence filed a Statement of Defence dated 23 March 2021. DW2, a Director of the 3<sup>rd</sup> Respondent, corroborated the evidence by the Appellant, confirming that the 3<sup>rd</sup> Respondent had indeed purchased the suit motor vehicle from the Appellant on 22 February 2012 and taken possession and control thereof. DW2 further testified that on 8 March 2013, the 3<sup>rd</sup> Respondent used the suit vehicle as security for a loan of Kshs 200,000/= from a third party, Mr. Vinay Shah. The loan agreement stipulated that in the event of default, Mr. Shah was entitled to sell the vehicle to recover the debt. It was DW2's testimony that the 3<sup>rd</sup> Respondent defaulted in the loan repayment, and the vehicle was subsequently sold to the 2<sup>nd</sup> Respondent herein. This evidence established a clear and unbroken chain of transfers of beneficial ownership and/or possession, moving from the Appellant to the 3<sup>rd</sup> Respondent and finally to the 2<sup>nd</sup> Respondent, who was the driver of the vehicle at the material time.
8. Having heard the parties, the trial court delivered its impugned decision as follows:

Judgement is entered for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for:

Liability - 100% against the Defendants

General Damages - Kshs 140,000/=

Special Damages - Kshs 5,150/=

Total - kshs 145,150/=

Plus costs and interest from the date of judgement.

9. The trial court's reasoning for finding the Appellant vicariously liable was based on the amendment to section 9 of the *Traffic Act*, which places the obligation on the registered owner to surrender the registration book and inform the Registrar of the details of the new owner to enable the Registrar issue a new log book in the name of the new owner upon payment of the prescribed fees.
10. Being aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
  - i. The learned Magistrate erred in law and in fact by misconstruing the Appellant's pleadings, evidence and written submissions and hence arrived at the wrong decision;



- ii. The learned Magistrate erred in law and in fact by failing to take into account the evidence adduced during the trial and thus fell into error when he arrived at the findings and conclusions therein;
  - iii. The learned Magistrate erred in law and in fact by holding that the Appellant was the registered and legal owner of the suit motor vehicle despite clear and acknowledged evidence to the effect that the suit motor vehicle had since been sold and transferred to the 3<sup>rd</sup> Respondent, Mike Motors & Enterprises as at 22 February 2012;
  - iv. The learned Magistrate erred in law and in fact in failing to consider or analyse the Appellant's submissions and/or apply the facts hence arriving at the decision he reached in complete and utter disregard to the fact that the 3<sup>rd</sup> Respondent had taken control of the suit motor vehicle as at 22 February 2012;
  - v. The learned Magistrate erred in law and in fact in failing to apply the binding decision in *Morgans -vs- Launchbury & Others* [1971] All ER 606 and *Jane Wairimu Turanta vs Githae John Vickey & 2 Others* [2013] eKLR; that ownership of motor vehicle alone is not sufficient to create vicarious liability for negligence of anyone who happens to drive it;
  - vi. The learned Magistrate erred in law and in fact in failing to consider the provisions of section 8 of the *Traffic Act*, Cap 403 of the Laws of Kenya, which recognizes the alternative forms of ownership of motor vehicle other than registered ownership thus arrived at the wrong decision;
  - vii. The learned Magistrate erred in law and in fact in failing to apply the binding decision in the case of *Nancy Ayemba Ngaira -vs- Abdi* [2010] eKLR;
  - viii. The learned Magistrate erred in law and in fact in holding the Appellant vicariously liable due to failure to take into account the weight of the evidence adduced during trial that 3<sup>rd</sup> Respondent had taken possession and control of the suit motor vehicle as at 22 February 2012 and prior to the happening of the alleged accident.
11. The 2<sup>nd</sup> Respondent did not participate in these proceedings.
  12. Parties canvassed the appeal by way of written submissions.
  13. I have keenly read the contents of the Record of Appeal and the submissions by the respective parties.
  14. The Appellant submitted that the trial court's decision was contrary to the established principles of vicarious liability, which does not attach to the owner merely by virtue of ownership. It was the Appellant's argument that it must be proven that the driver was acting as the owner's servant or agent. Reliance was placed on the House of Lord decision in *Morgans -vs- Launchbury* (supra). The Appellant contended that the 1<sup>st</sup> Respondent had failed to adduce any evidence of an agency or employment relationship between the Appellant and the 2<sup>nd</sup> Respondent.
  15. The Appellant further submitted that the presumption of ownership under section 8 of the *Traffic Act* is rebuttable, and in this instance, it was successfully rebutted by the production of the Sale Agreement and the corroborating testimony of the 3<sup>rd</sup> Respondent.
  16. The 1<sup>st</sup> Respondent argued that the trial court's decision was an exercise of judicial discretion and that an appellate court should not interfere unless the decision is plainly wrong. Reliance was placed on the case of *Mbogo -vs- Shah & Another* [1968] EA 93. It was further submitted that the trial court correctly found the Appellant liable for its failure to comply with the mandatory provisions of section 9 of the *Traffic Act* as amended.



17. The 3<sup>rd</sup> Respondent submitted that the burden of proving the third-party claim for indemnity lay on the Appellant, which it failed to discharge. It was further argued that since the Appellant's name remained on the register, it was the prima facie owner of the vehicle under section 8.

### **Analysis and Determination**

18. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of *Selle & Another vs Associated Motor Boat Company Limited*, [1968] EA 123.
19. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.
20. The 1<sup>st</sup> Respondent has urged this Court to treat the trial court's finding on liability as a matter of discretion, which should not be lightly disturbed. In my view, the determination of liability in a negligence claim is a matter of applying settled legal principles to proven facts. It is a question of law and fact, not an exercise of discretion. The trial court's interpretation of section 9 of the *Traffic Act* was a finding on a point of law, which this Court is not only entitled but obligated to review its correctness.
21. From the grounds of appeal and the submissions of the parties, the single determinative issue before this Court is whether the trial court erred in law and in fact by finding the Appellant vicariously liable for the negligence of the 2<sup>nd</sup> Respondent, based solely on its status as the registered owner of the suit motor vehicle and its failure to comply with Section 9 of the *Traffic Act*.
22. Section 8 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. This provision creates a rebuttable presumption. Courts have consistently held that the entry in the log book is not conclusive proof of ownership. Evidence can be adduced to show that the de facto, beneficial or possessory owner is a person other than the one names in the register. In *NANCY AYEMBA NGAIRA v ABDI ALI* [2010] KEHC 1866 (KLR), the Court opined thus:
- “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 fully 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 has 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; 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 the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> defendant was one of the owners of the matatu in question.”
23. The above legal position was affirmed in *David Ogol Alwar vs. Mary Atieno Adwera & Another* [2021] eKLR among others.



24. In the instant case, the Appellant produced a Sale Agreement dated 22 February 2012. The 3<sup>rd</sup> Respondent admitted to having bought the said vehicle and taken possession. This evidence, which was not controverted, was sufficient to rebut the presumption under section 8 of the Act. The trial court, having noted such evidence, erred by failing to make a finding that the presumption had been displaced.

25. Even if the Appellant were to be considered an owner for purposes of this suit, the question of vicarious liability is governed by distinct common law principles. In the locus classicus of *Morgans vs Launchbury* (supra), the House of Lords held that to fix vicarious liability on the owner of a car, it is necessary to show that the driver was using it for the owner's purposes, under a delegation of a task or duty. Mere permission is not enough. There must be a relationship of agency or service. This principle was adopted in the case of *Jane Wairumu Turanta v Githae John Vickery & 2 others* [2013] KEHC 5826 (KLR), the Court stated:

“The Respondent raised the issue of vicariously liable since the logbook was jointly owned by the bank and Munene Don. The doctrine of vicarious liability was expounded in the case of *Morgan –vs- Launchbury* (1972)2 All ER 606 which 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. Moreover, the fact that the applicant was the owner of the vehicle by way of the logbook being in its name.

Such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive it.”

26. In the present case, the 1<sup>st</sup> Respondent did not adduce any evidence to establish that the 2<sup>nd</sup> Respondent was an employee, servant or agent of the Appellant, or that he was driving the vehicle for the Appellant's purposes. The evidence on record, in fact, points to the contrary, establishing a chain of transactions that placed the vehicle in the hands of the 2<sup>nd</sup> Respondent through a sale by a creditor of the 3<sup>rd</sup> Respondent. The essential ingredients for establishing vicarious liability were, therefore, entirely absent.

27. Further, in *Joel Muga Opija v East African Sea Food Limited* [2013] KECA 181 (KLR), the Court of Appeal held that where a registered owner has sold a vehicle and divested himself of possession and control, he cannot be held vicariously liable for the negligence of the driver. The failure to effect the transfer of ownership in the registration book does not operate to maintain a state of vicarious liability that has, in fact, ceased to exist.

28. In the premise, this appeal is meritorious and the same succeeds. I make the following orders:

- i. That the appeal is hereby allowed;
- ii. That the judgement and decree of the Senior Resident's Magistrates Court at Gatundu in Civil Suit No. 8 of 2017 delivered on 12 October 2022 is hereby set aside and substituted with the following order:

The claim against the Third Party is dismissed.

Judgement is entered in favor of the Plaintiff against the 2<sup>nd</sup> Defendant for:

Liability - 100% against the Defendant

General Damages - Kshs 140,000/=



Special Damages - Kshs 5,150/=

Total - kshs 145,150/=

Plus costs and interest from the date of judgement.

29. The Appellant is awarded cost of this appeal, payable by the 1<sup>st</sup> Respondent, assessed at Kshs 50,000/=.

**DATED AND DELIVERED AT THIKA THIS 30 DAY OF SEPTEMBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

**Delivered virtually in the presence of:**

For Appellant: Mr. Kere

For 1st Respondent: Ms. Msafiri

For 2nd Respondent: N/A

For 3rd Respondent: Kinyua

Court Assistant: Lucy Mwangi

