

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E228 OF 2024

GOLDEN AFRICA (K) LTD APPELLANT

- VERSUS -

CHANJI JOSEPH OWENGA 1ST RESPONDENT

JOSEPH ALECKY ODHIAMBO 2ND RESPONDENT

GREGORY MENDEL 3RD RESPONDENT

JOASH OKELLO 4TH RESPONDENT

**(Being an appeal from the judgment and decree of Hon. JMN. Olonyi RM
delivered on the 18/10/2024 in Tamu SPMCC No. E133 of 2023, Chanji
Joseph Owenga v Golden Africa (K) Ltd)**

J U D G M E N T

1. The 1st respondent filed the primary suit before the trial court vide a plaint dated **24/3/2023** for general and special damages for injuries sustained following a road traffic accident that occurred on or about the **26/10/2022**. That suit served as the test suit on liability for a cluster of files being **Tamu SPMCC E131/2023, E132/2023 and E134/2023**, respectively.
2. The appellant entered appearance and filed a statement of defence dated **25/4/2024** in which it denied the respondent's claim and claimed that it did not own the alleged suit vehicle and therefore did not know the vehicle's driver putting the 1st respondent to strict proof of his claim.

3. The matter proceeded to trial and by a judgment delivered on **18/10/2024**, the trial court decreed: -

a) Liability 100% in favour of the plaintiff against the defendant.

b) General damages Kshs. 100,000/-.

c) Special damages Kshs. 6,550/-

d) Costs of the suit to the plaintiff plus interest on (b) and (c) from the date of filing the suit and judgment respectively.

4. Being dissatisfied with the said Judgment/decreed, the appellant lodged this appeal vide the Memorandum of Appeal dated **31/10/2024** and raised thirteen (13) grounds of appeal which can be summarized as follows: -

a) The trial court erred in law by entering judgment on liability in favour of the plaintiff against the defendant at 100% despite glaring evidence to the contrary in the plaintiff's own testimony as well as that presented by the respondent.

b) The trial court erred in law and fact by disregarding the appellant's witness' testimony and evidence of the sale agreement dated 5/12/2019 proving that at the time of the accident, motor vehicle registration number KCF 193J was already sold to one Erick Odhiambo Oloo who had become its beneficial owner pending registration.

c) The trial court erred in law by awarding the 1st respondent general damages of Kshs. 100,000/- despite the weight of evidence adduced.

5. The appeal was disposed of by way of written submissions. It was submitted that the trial court's failure to consider the 1st respondent's admission of breaches of statutory duty under **section 103B of the Traffic Act**, and to apply the doctrine of contributory negligence, led to a manifest error in law and fact, resulting in an unjust finding of 100% liability against the appellant.
6. That the finding of vicarious liability against the appellant was unsupported by cogent evidence, contrary to binding precedent. That the 1st respondent's conduct amounted to a direct violation of mandatory safety provisions designed to prevent such injuries as those suffered by him, and should therefore have been factored into the apportionment of liability thus the award of **Kshs. 100,000/-** as general damages to the 1st respondent ought to be set aside.
7. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**
8. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal held that: -

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.”

9. Before the trial court, the 1st respondent testified as **PW1**. He adopted his written statement dated **24/3/2023** as his evidence in chief. It was his testimony that he was a casual labourer and used to work as a bodaboda rider.
10. That on **26/10/2022** at about 7am, he was taking his children to Muhoroni Junior Primary School when he was hit with a vehicle from behind. That he was riding his motorcycle on the left lane next to where pedestrians walk. That he was dressed in 2 jackets, reflectors and helmet. That the children onboard similarly had jackets as it was cold in the morning.
11. In cross-examination, he told the court that he was carrying 3 children on the motorcycle when the accident occurred. That he bought the motorcycle through a loan. That the insurance on the motorcycle had expired. That he had no driving licence and that he was well aware that he shouldn't have carried more than 1 passenger on the motorcycle. That the driver of the suit vehicle was listed as **Frankline Mathia Peter** on the police abstract and that he had not sued him.
12. In re-examination, he testified that he carried out a search on the NTSA site and confirmed the owner of the suit vehicle.
13. **PW2, Oduor Benard Odhiambo**, the 3rd respondent's father adopted his written statement dated **24/3/2024** as his evidence in chief. He testified that on **2/10/2022**, he was at work when he received news that his son had been

involved in an accident so he rushed to the scene but found that they had been taken to hospital. That his son got injuries on the leg and head.

14. In cross-examination, he admitted that the motorcycle had excess passengers and as such the rider could not control the motorcycle properly and could have caused the accident.

15. **PW3, No. 68316 Cpl. Josphat Kogo** testified that on **26/10/2022** there was a road traffic accident at about 0700hrs along Koru – Muhoroni road involving motor vehicle registration **KCF 193J** Nissan Salon and motorcycle **KMFU 124Y** TVS star. That upon carrying out investigations, he established that the motor vehicle got a front left tyre burst and slammed into the rear of the motorcycle.

16. In cross-examination, he told the court that **Frankline Maitha Peter** was the registered owner of the suit vehicle as per the record. That the motorcycle did not have a valid driving licence. That the 3 pillion passengers on the motorbike did not have helmets or reflective jackets. That the law only provides for one pillion passenger on a motorcycle.

17. On its part, the appellant called its head of administration, **Lutfil Abdul Wahab** as **DW1**. He testified that the appellant sold the suit vehicle on **5/12/2019** to one **Erick Odhiambo Oloo** and ceased having possession on **27/02/2020** upon completion of payment. That from clause 3 of the sale agreement, it was the purchaser's responsibility to ensure that transfer and registration of the vehicle was done. That the appellant did not know the driver of the suit vehicle.

18. In cross-examination, **DW1** testified that he did not have evidence that the appellant had relayed the registration document to the buyer to enable him effect the transfer and registration of the vehicle.

19. In **Khambi and Another v. Mahithi and Another [1968] EA 70**, the Eastern Court of Appeal held on liability as follows: -

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

20. I have considered the evidence, the grounds of appeal and the submissions on record. The aforesaid grounds of appeal can be further summarized to two; viz, whether the appellant was the owner of the subject motor vehicle and whether the appellant was vicariously liable for the accident that occurred on the **26/10/2022**.

21. On whether the motor vehicle belonged to the appellant at the time of the accident. **Section 8 of the Traffic Act** provides that the person indicated on the police abstract is the owner of the vehicle.

22. However, where ownership is in dispute, it is necessary to produce a copy of records from the registrar of motor vehicles. In **Joel Muga Opija v East African Sea Foods Ltd [2013] eKLR**, the Court of Appeal was specific that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is.

23. However, where the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied. See the cases of **Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another (2010) eKLR** and **Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki [2016] eKLR**.

24. In this case, the 1st respondent relied on the copy of records from the NTSA as proof of ownership. However, the police abstract produced by him indicated that the owner of the motor vehicle was one **Frankline Maithya Peter**.

25. On the other hand, the appellant relied on a sale agreement executed on **5/12/2019** whereby it had sold the subject motor vehicle to one **Erick Odhiambo Oloo**. In that agreement, the buyer had agreed to purchase the motor vehicle and was to bear the cost of transfer fees and any other incidental fees and was to take possession upon completion of payment of the purchase price. **Dw1** testified that the appellant ceased to have possession of the vehicle on **27/02/2020** upon completion of payment.

26. The burden of proof was on the appellant to demonstrate that the ownership of the vehicle rested with the appellant at the time of the accident. The evidence presented on sale was sufficient to discharge that burden.

27. In **Jotham Mugalo v Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001** Warsame J as he then was ruled that this burden is on a balance of probability and that mere denials in pleading was not sufficient.

“... Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of

probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act.”

28. It is also trite that evidence of sale or transfer to a third party is sufficient to prove the real owner of the vehicle. The material before the court was sufficient to invite inference of transfer of ownership notwithstanding the fact that the transfer had not been completed.

29. I disagree with the trial court’s holding that the sale agreement produced by the appellant did not have the full details of the buyer. In my view, the said sale agreement clearly identified the purchaser of the suit vehicle and the same was properly executed. A purchaser’s address is not a vital constituent of a valid contract as required by the Law of Contract.

30. In **Jared Magwaro Bundi & another v Primarosa Flowers Limited (2018) eKLR**, the Court of Appeal referred to its earlier decision in **Muhambi Koja Said v Mbwana Abdi [2015] eKLR**, where it had held that: -

“... 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”.

31. As stated above, I do not find any issue with the sale agreement. I note that the motor vehicle had been sold 3 years before the accident and that there had been no dispute between the two parties on the terms of the sale and payment of consideration.

32. The totality of the evidence adduced before the trial court proved on a balance of probability, that the appellant was no longer the owner of the motor vehicle at the time of the accident. It also proved that the appellant was no longer in control or possession of the motor vehicle and that all interests had passed to a 3rd party. The appellant's evidence disproved the evidence on the copy of records.

33. On whether the liability attached to the appellant, the doctrine of vicarious liability imposes liability on employers for the wrongful acts of their employees. As such, an employer will be held liable for torts committed while an employee is conducting their duties. The underpinning principles were addressed in the English case of **Yewens v Noakes {1880} 6 QBD 530** wherein it was stated that: -

“... a servant is a person who is subject to the command of his master as to the manner in which he shall do his work.”

34. In this case, the particulars of negligence against the appellant had to be specifically pleaded and proved. The evidence did not prove that the driver of the suit vehicle was the appellant's employee, servant or agent or that he was acting under instructions of the appellant. The matter becomes even

worse when one considers the evidence of sale of the subject motor vehicle to a third party.

35.The claimant had to demonstrate that the negligent acts or omissions of the driver were permitted by the appellant. The trial court erred in holding the appellant liable for the accident. The court did not interrogate whether the appellant was connected to the driver and whether vicarious liability attached.

36.I reiterate that the trial court erred in law and in fact in finding that the appellant was liable for the accident, vicarious liability had not been proved. The appellant was not in use possession or control of the vehicle at the time of the accident as per the evidence on record. In the circumstances, the appellant was erroneously condemned.

37.Consequently, the appeal succeeds with costs to the appellant. The judgment against the appellant delivered on the **18/10/2024** is hereby set aside.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **19th** day of **December, 2025**.

A. MABEYA, FCI Arb

JUDGE