Kimatu v Maina (Civil Appeal E016 of 2023)
[2025] KEHC 18942 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E016 OF 2023

CJ KENDAGOR, J

DECEMBER 17, 2025

BETWEEN

SOSPETER MWENDWA KIMATU ..... APPELLANT

AND

SAMUEL MUTHUI MAINA ..... RESPONDENT

(An appeal against the Judgment and Decree of the Chief Magistrates Court at Makueni by Honorable J.A. Otieno (Mrs.) dated 13{{^th}} February 2023 in Civil Case No. E113 of 2021.)

JUDGMENT

1. This appeal arises from the judgment and decree of the Chief Magistrate's Court at Makueni (Hon. J.A. Otieno (Mrs.)) delivered on 13th February, 2023, in Makueni CMCC No. E113 of 2021. In that suit, the Plaintiff sought damages arising from a road traffic accident allegedly involving motor vehicle registration number KCW 365F, owned by the Defendant.

2. Upon hearing the evidence, the trial Court found that although negligence on the part of the authorized driver had been established, the Plaintiff had failed to prove an agency relationship between the Defendant and the said driver, and consequently dismissed the suit with costs.

3. Aggrieved by that decision, the Appellant lodged a Memorandum of Appeal dated 23rd February 2023, challenging the judgment and decree on several grounds, to wit;

    a. The learned Magistrate erred in law and in fact by holding that although the Plaintiff proved that the actions of the authorized driver of motor vehicle registration number KCW 365F amounted to leaving a vehicle unattended contrary to section 66(b) of the *Traffic Act*, the Plaintiff did not prove that the Defendant was vicariously liable for the said actions.

b. The learned Magistrate erred in law and in fact by failing to appreciate the evidence of the Plaintiff and the Police officer who placed the blame of the accident upon the authorized driver of motor vehicle registration number KCW 365F.

c. The learned Magistrate erred in law and in fact by failing to appreciate that the Defendant was liable for the negligent acts of his agent and/or driver.

d. The trial Magistrate erred in law and in fact in failing to appreciate that the Defendant admitted that the Plaintiff was not to blame for the accident.

e. The learned Magistrate erred in law and in fact in failing to appreciate that although the Defendant blamed the said unauthorized driver, the Defendant did not file third-party proceedings against the said unauthorized driver despite admitting that he knew the whereabouts of the authorized driver who would have assisted in tracing him.

f. The trial Magistrate erred in law and fact in appreciating the clear evidence that the Defendant had authorized all the acts of his agent, the driver of the suit motor vehicle.

g. The trial court was in error when it disregarded all evidence and concluded that the driver of the suit motor vehicle was not Martin Karanja Mwangi, the agent of the Defendant.

h. The trial court erred in law and misdirected itself when it failed to consider the Plaintiff's evidence, submissions and authorities.

i. The learned Trial Magistrate erred in law in dismissing the suit with costs.

Appellants Submissions:

4. On behalf of the Appellant, it was submitted that the learned trial Magistrate misdirected herself on both fact and law, thereby arriving at a conclusion that was inconsistent with the evidence on record and established principles of vicarious liability.

5. The Appellant argued that the occurrence of the accident was not seriously contested and that the evidence of PC Paul Mogesi (PW1), a traffic police officer, together with that of the Appellant, clearly placed blame upon the driver of motor vehicle registration number KCW 365F.

6. The Appellant submitted that PW1 testified that the authorized driver had left the vehicle unattended, conduct which he stated would not have resulted in the accident had due precautions been taken. Counsel emphasized that the trial court expressly found that such conduct amounted to leaving a vehicle unattended contrary to Section 66 (b) of the *Traffic Act* and therefore constituted negligence.

7. The Appellant argued therefore, that having made a clear finding on negligence, the trial Court erred by declining to hold the Respondent vicariously liable. Counsel argued that the Respondent admitted ownership of the vehicle, admitted having released it to Martin Karanja Mwangi, and further acknowledged that the Appellant was not to blame for the accident. In those circumstances, it was contended, the trial Court ought to have drawn the inference that liability attached to the Respondent as owner.

8. The Appellant further faulted the trial Court for accepting the Respondent's defence that the actual driver at the time of the accident was an unauthorized person. Counsel submitted that despite alleging the existence of such a person, the Respondent neither joined him to the proceedings nor instituted third-party proceedings, notwithstanding his admission that he knew the authorized driver's identity, residence, and contact details. It was argued that the absence of such proceedings weakened the Respondent's defence and should not have been used to defeat the Appellant's claim.

9. On the question of agency, the appellant urged the Court to take into account the Respondent's admission that he was engaged in the car hire business, that the authorized driver was a taxi driver, and that the vehicle had been entrusted to him. From these facts, counsel submitted that the trial court ought to have inferred an agency relationship sufficient to ground vicarious liability.

10. Reliance was placed on several authorities, including Elias Njeru & another v Medrinigo Kimwira [2019] eKLR, Bernard v Sully (1931) 47 TLR 557, Ormrod & another v Crossville Motor Services Ltd [1953] 2 All ER 753 (CA), Jonathan Ngumbao v Piri Wa Mwatate & 3 others, Mombasa Civil Appeal No. 43 of 1987, and Paul Muthui Mwavu v Whitestone (K) Ltd [2019] eKLR, all cited for the proposition that an owner may be held liable where a vehicle is being used wholly or partly for the owner's benefit or purposes.

11. On quantum, counsel submitted that the Appellant sustained multiple and severe facial and cranial injuries resulting in permanent disfigurement, prolonged pain, and psychological trauma. It was argued that the trial Court's alternative assessment of Kshs.3,000,000/= was inordinately low and inconsistent with comparable awards. The Appellant urged this court to award Kshs.12,000,000/= in general damages together with proved special damages of Kshs.4,550/=, costs and interest.

Respondent's Submissions:

12. In opposing the appeal, the Respondent submitted that the judgment of the trial court was sound and did not warrant interference by the appellate court.

13. The Respondent submitted that the person who testified in Court and produced a national identity card in the name Sospeters Mwendwa Kimatu was not the same person reflected in the medical records, which bore the name Sospeter Mwendwa Kimatu.

14. Counsel argued that the Appellant failed to produce any affidavit or documentary evidence to reconcile the discrepancy in names, yet claimed to be a registered secondary school teacher under the Teachers Service Commission, where identity is tied strictly to one's national identity particulars. It was therefore contended that the Appellant failed to prove that he was the person who allegedly sustained the injuries forming the basis of the suit.

15. The Respondent further submitted that even assuming the Appellant's identity was established, the evidence did not support a finding of liability against the Respondent. Counsel argued that although the trial court found negligence on the part of the authorised driver, the Appellant failed to prove the existence of an agency or master–servant relationship.

16. It was submitted that the authorized driver had parked the vehicle after it developed mechanical problems and had left to look for a mechanic, and that he was not present at the scene at the time of the accident.

17. According to the Respondent, the individual who drove the vehicle at the material time was a stranger who took control without the consent or knowledge of either the Respondent or the authorized driver. On that basis, counsel submitted that the Respondent neither had control of the vehicle nor authorized the acts that led to the accident, and that vicarious liability could not arise in such circumstances.

18. On the doctrine of res ipsa loquitur, counsel argued that it was inapplicable because the circumstances of the accident had been explained and because control of the vehicle was not vested in the Respondent or his agent at the material time.

19. Reliance was placed on Emmanuel Wawole Mochawa v Harun Kariuki Kamande [2017] eKLR, Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2017] eKLR, as cited in Uchumi Supermarket

Limited & another v Boniface Ouma Were [2015] eKLR, and Obed Mutua Kinyili v Wells Fargo & another [2014] eKLR, all cited for the principle that negligence must be proved by cogent evidence and cannot be presumed merely from the occurrence of an accident.

20. On quantum, the Respondent submitted that having failed to establish liability and even the identity of the claimant, the Appellant was not entitled to any damages. It was further argued that the trial Court's alternative assessment of damages was cautious and within acceptable limits, and in any event did not arise for consideration absent liability.

21. The Respondent therefore urged the Court to dismiss the appeal with costs and to uphold the judgment and decree of the trial court delivered on 13th February, 2023.

Issues for determination:

22. Having perused the record and the submissions of the parties, it will be noted that several of the grounds of appeal overlap and are intertwined. For purposes of clarity and expediency, I have distilled the following issues for determination:

    a. Whether the trial court erred in law in dismissing the suit notwithstanding its finding of negligence on the part of the authorised driver

    b. Whether the trial court ought to have dismissed the claim on account of alleged inconsistencies regarding the Appellant's identity

    c. What quantum is appropriate

Analysis & Determination:

23. This being a first appeal, this Court is under a duty to reconsider, re-evaluate and re-analyze the evidence tendered before the trial Court and to draw its own conclusions therefrom, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify.

24. In discharging that duty, the Court must give due allowance to the findings of the trial Court, particularly on matters of fact, and will not interfere unless it is shown that the trial court misdirected itself in law, failed to take into account relevant considerations, took into account irrelevant considerations, or that its conclusions were plainly wrong.

25. In Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the Court of Appeal restated the duty of a first appellate court in the following terms:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts of the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

26. Equally, an appellate Court must exercise restraint. In Mwangi v Wambugu [1984] KLR 453, the Court of Appeal cautioned that it will not interfere with findings of fact unless they are based on no evidence, or on a misapprehension of the evidence, or where the trial court is shown demonstrably to have acted on wrong principles.

A. Whether the trial court erred in law in dismissing the suit notwithstanding its finding of negligence on the part of the authorized driver

27. The accident giving rise to the suit was alleged to have occurred along the Wote–Machakos road near Ukia Girls Secondary School. The evidence of PW1, PC Paul Mogesi, was that he was alerted of the accident late at night and proceeded to the scene together with PC Gitonga.

28. In his examination-in-chief, PW1 stated that the accident occurred "on the night of 11th/12th February, 2021", while in cross-examination he clarified that the accident occurred on 12th February, 2021 at about 2315 hours, a few minutes before midnight. The Occurrence Book extract similarly recorded the accident as having occurred on 12th February, 2021 at about 2315 hours, while the Police Abstract indicated 13th February, 2021 at about 8.30 p.m.

29. The trial Court did not treat these variations as fatal, and correctly so. It accepted that an accident did occur at the stated location during the night in question.

30. On the manner of occurrence, PW1 testified that the suit motor vehicle, registration number KCW 365F, had developed mechanical problems and had been parked by the roadside. He further testified that the authorized driver, Martin Karanja Mwangi, had left the vehicle unattended while allegedly going to seek a mechanic.

31. PW1 was categorical that, in his assessment, leaving the vehicle unattended created the circumstances that led to the accident and that had the vehicle been properly secured, the accident would likely not have occurred.

32. The learned trial Magistrate accepted this evidence. Indeed, the Court expressly found that the conduct of the authorized driver amounted to leaving a vehicle unattended contrary to Section 66 (b) of the *Traffic Act* and therefore constituted negligence. That finding was unequivocal and based on the evidence on record.

33. Having made that finding, the trial court nonetheless dismissed the suit on the basis that the Plaintiff had failed to prove an agency relationship between the Defendant and the authorized driver at the time of the accident. The Court accepted the Respondent's explanation that although Martin Karanja Mwangi was the authorized driver, he was not physically present at the scene at the time of the accident, having allegedly gone to look for a mechanic, and that an unknown and unauthorized person drove the vehicle.

34. The following matters were not in dispute on the record: The Respondent was the registered and insured owner of motor vehicle KCW 365F. The Respondent voluntarily entrusted possession and use of the vehicle to Martin Karanja Mwangi.

35. The Respondent further admitted that Martin Karanja Mwangi was his friend, that he knew his identity and contact details, and that he had released the vehicle to him. The negligence found by the trial Court arose directly from the manner in which the vehicle was left unattended after developing mechanical problems.

36. The authorized driver's absence from the immediate scene at the precise moment of impact did not negate the fact that the negligence complained of, which was leaving the vehicle unattended, was committed in the course of the authority granted by the Respondent. The risk created by that act did not dissipate merely because the driver stepped away from the vehicle.

37. The Court in Elias Njeru & Michael Murithi Ndwiga v Medrinigo Kimwira (Civil Appeal 137 of 2011) [2016] KEHC 3920 (KLR) (21 July) dealing with near-identical circumstances had this to say:

> " Although DW2 testified that he had left his co-driver a Mr Munene, to be in charge of the vehicle, there is no doubt that the 2nd Appellant had left the motor vehicle herein unattended to and with engine running and doors open. DW2 was even charged with a traffic offence in criminal case NO 614 of 2008, and was convicted on his own plea of guilty for leaving a motor vehicle unattended to with engine running. The said Mr Munene was not called as a witness. Upon careful consideration of the evidence by DW2, whereas I may not wish to read too much from it, but it leaves too much to be desired especially on the way the events unfolded."

38. Crucially, though, the Respondent did not call Martin Karanja Mwangi to testify, despite admitting that he knew him and had his contact details. Further, although the Respondent blamed the authorized driver for leaving the vehicle unattended, he did not institute third-party proceedings against him.

39. The record shows that an attempt to introduce third-party proceedings was only made late in the proceedings and was rejected by the trial Court on 26th September, 2022, the hearing having been in progress since 23rd May, 2022, when the Plaintiff withdrew the suit against the said driver for inability to trace him.

40. That chronology is essential. The Respondent had ample opportunity, after the withdrawal of the suit against the authorized driver, to move the Court to bring him back into the proceedings if indeed he was central to the defence being advanced. The Respondent did not do so.

41. In Elias Njeru & Michael Murithi Ndwiga v Medrinigo Kimwira (Civil Appeal 137 of 2011) [2016] KEHC 3920 (KLR) (21 July) the Court observed as follows;

> " Therefore, failure to secure the vehicle and leaving it unattended with the doors open and the engine running is an act of negligence on the part of the 2nd Appellant. And that negligent act by the 2nd Appellant invited this unfortunate accident. Accordingly, and I stated this earlier, the circumstances of this case were quite peculiar and apportionment of liability between the Respondent and the Appellants does not, therefore, arise. Perhaps, apportionment of liability would arise between the Appellants and the third party who they say was driving the vehicle; but was possible had they sought for contribution or indemnity from the said third party. However, that is not the case here and I will say no more on that possibility."

42. The explanation that an unknown passer-by assumed control of the vehicle, repaired it, and proceeded to test-drive any direct evidence did not support it. No such person was identified; no witness was called to explain how access to the vehicle was gained; and no investigative evidence was presented to the Court to substantiate that narrative.

43. In my view having found that the authorized driver's conduct amounted to negligence, the trial Court was required to consider whether that negligence occurred within the scope of the authority granted by the Respondent. On the evidence, it plainly did. The authorized driver was in possession of the vehicle with the Respondent's consent, and the negligent act flowed directly from that possession.

44. And so, by focusing narrowly on the question of who was physically behind the wheel at the precise moment of impact, and by accepting an unproven explanation of an unknown intervening actor, the trial Court lost sight of the governing responsibility for a vehicle placed on the road by its owner.

45. In Ormrod & another v Crossville Motor Services Ltd [1953] 2 All ER 753 (CA), Denning LJ stated:

> " The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern."

46. In not doing so, the trial Court erred in law. The finding of negligence could not logically coexist with a complete absolution of the Respondent in the absence of credible evidence severing the link between the authorized driver's negligence and the accident.

B. Whether the trial court ought to have dismissed the claim on account of alleged inconsistencies regarding the Appellant's identity

47. The Respondent, both at trial and on appeal, made heavy weather of alleged inconsistencies in the Appellant's name and age as appearing in various documents. It was contended that the person who testified as PW3, whose national identity card bore the name Sospeters Mwendwa Kimatu, was not the same person reflected in the medical records, which bore the name Sospeter Mwendwa Kimatu, and that the Appellant therefore failed to prove that he was the person who sustained the injuries forming the basis of the suit.

48. A careful examination of the record does not bear out that contention. The Appellant produced his national identity card, which bore his photograph and particulars, and he testified on oath as to the injuries he sustained and the treatment he underwent.

49. The medical records from Mediheal Hospital recorded the name Sospeter Mwendwa Kimatu, aged 45 years, while other treatment notes referred to him as Kimatu Mwendwa. The P3 form, dated 15th March, 2021 recorded the name Sospeters Mwendwa Kimatu, aged 39 years, and detailed injuries consistent with those appearing in the medical notes.

50. These variations, while untidy, were not unexplained. The difference between "SOSPETER" and "SOSPETERS" is plainly the addition or omission of a single letter. No suggestion was made, and no evidence was led, that there existed another person of similar appearance and particulars who was being passed off as the Appellant. More importantly, the Respondent did not challenge the Appellant's identity during cross-examination in any meaningful way, nor did he suggest that the person who testified was an impostor.

51. I also note that, notwithstanding the Respondent's contention that the Appellant was not the person who sustained the injuries complained of, there was no indication on the record that the Respondent sought leave of the court to subject the Appellant to a second or independent medical examination.

52. No application was made to challenge the medical findings through an alternative medical opinion, nor was any medical evidence tendered to suggest that the injuries described in the treatment notes and P3 form were attributable to a different person.

53. Needless to say, it is also material that the injuries recorded in the P3 form, the medical notes, and the Appellant's oral testimony were substantially consistent. The Respondent did not demonstrate that a different person suffered those injuries, or that the Appellant before the court could not have been the patient reflected in the medical records.

54. It suffices to state that discrepancies in names or other personal particulars cannot defeat a claim where the identity of the claimant can be discerned from the totality of the evidence. What the Court is required to determine is not perfection in record-keeping, but whether, on a balance of probabilities, the person before it is the one who suffered the injuries complained of.

55. Given the facts before me and having regard to the Appellant's testimony on record, his national identity card, the medical documentation, and the absence of any evidence suggesting substitution or fraud, I am satisfied that the identity of the Appellant was sufficiently established. The variations relied upon by the Respondent were peripheral and did not go to the substance of the claim.

56. I therefore find that the issue of identity would not justify the dismissal of the Appellant's claim.

C. What quantum is appropriate

57. As I have hitherto stated, it is settled law that an appellate court will not ordinarily interfere with an award of damages unless it is shown that the trial Court acted on wrong principles of law, misapprehended the evidence, took into account irrelevant factors, failed to take into account relevant factors, or that the award was so inordinately high or low as to represent an erroneous estimate of the damage suffered.

58. From the record, although the learned trial Magistrate dismissed the suit, she nonetheless made an alternative assessment of damages. She stated that had liability been established, she would have awarded the Appellant Kshs.3,000,000/= as general damages for pain and suffering.

59. The Appellant sustained multiple and severe facial and cranial injuries. These included fractures to the nasal bones, maxillary bones, mandible, orbital walls and sinuses, soft tissue injuries to the scalp and face, loss of consciousness, and the need for invasive surgical intervention, including fixation of fractures and tracheostomy management. The medical evidence also pointed to residual facial deformity and the likelihood of long-term psychological impact.

60. These injuries were not minor. They were extensive, involved multiple facial structures, required specialized surgical treatment, and resulted in permanent disfigurement. he Appellant testified, and the medical reports corroborated, that he endured prolonged pain and continued to suffer the effects of the injuries long after the accident.

61. Counsel for the Appellant cited several authorities in support of the proposed figure. I have considered them. While they demonstrate that Courts have recognized the seriousness of facial fractures and head injuries, I must observe that finding a case with injuries that match precisely, both in nature and sequelae, is rarely possible. Each case turns on its own peculiar facts.

62. In Duncan Kimathi Karagania v Ngugi David & 3 others [2018] eKLR, the claimant sustained multiple facial fractures, including maxillary and mandibular fractures with loss of consciousness, and was awarded Kshs.4,000,000/=. The injuries in that case were comparable in nature, though not identical, to those suffered by the Appellant herein.

63. In Moi Teaching and Referral Hospital Board & another v Leonard Kibiwott Kosgei [2018] eKLR, an award of Kes 2,000,000 was upheld for injuries that included fractures of the maxilla and mandible alongside other soft tissue bodily injuries. While helpful in illustrating the range of awards, the injuries in that case were less extensive than those before this Court.

64. Taking into account the multiplicity of facial fractures sustained by the Appellant, the invasive nature of the treatment undergone, the resultant facial deformity, and the psychological impact noted in the

medical evidence, I am satisfied that the trial Court's alternative assessment of Kshs.3,000,000/= was on the lower side.

65. At the same time, I am not persuaded that the sum of Kshs.12,000,000/= proposed by the Appellant is supported by comparable awards or by the general trend of judicial authority in this jurisdiction.

66. Doing the best with the available comparators, and bearing in mind the need for proportionality and consistency, I award the Appellant general damages in the sum of Kshs.3,500,000/=, which I consider fair and reasonable compensation in the circumstances.

67. Special damages in the sum of Kshs.4,550/= were specifically pleaded and proved and are awarded as prayed.

Disposition:

68. In the result, the appeal succeeds in the following terms:

    a. The judgment and decree of the Chief Magistrate's Court at Makueni (Hon. J.A. Otieno (Mrs.)) delivered on 13th February, 2023 in Makueni CMCC No. E113 of 2021 are hereby set aside;

    b. Judgment is entered for the Appellant against the Respondent on liability at 100%;

    c. The Appellant is awarded general damages for pain, suffering and loss of amenities in the sum of Kshs.3,500,000/=;

    d. The Appellant is further awarded special damages in the sum of Kshs.4,550/=;

    e. The awards in c & d above shall attract interest at court rates from the date of Judgment till payment in full;

    f. The Appellant shall have the costs of the suit in the lower court and the costs of this appeal.

69. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17TH DAY OF DECEMBER, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mrs. Mwendwa, Advocate for Respondent

No attendance for Appellant