

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. E226 OF 2024

NAFAS WORLD (K) LTD
APPELLANT

-VERSUS-

EVA WANDIA MURIITHI..... RESPONDENT

*(Being an appeal from the judgment of Hon. E. Wanjala (PM) delivered on 25th
November, 2022 in Nairobi Milimani CMCC No. 3116 of 2016)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 25.11.2022 in **Nairobi Milimani CMCC No. 3116 of 2016**. The suit had been commenced by way of a plaint dated 19.05.2016 by **Eva Wandia Muriithi**, the plaintiff in the lower court (*hereafter the Respondent*) seeking *inter alia* judgment by way of general and special damages as against **Nafas World Auto (K) Ltd**, defendant before the lower Court (*hereafter the Appellant*) in respect of a road traffic accident that occurred on 22.06.2015. It was generally averred that on the date in question the Respondent was a lawful passenger aboard motor vehicle registration **No. KCC 011C** (*hereafter the suit motor vehicle*) along KAPA Area when the Appellant, as registered owner of the suit motor vehicle, occasioned it to roll several times, in a self-involving accident.
2. On 11.10.2016, the Appellant filed a statement of defence denying the key averments in the plaint and pleaded in the alternative and without prejudice to the averments in the statement of defence averred that it has been wrongly sued, having prior to the accident

sold the suit motor vehicle, as such there exists no cause of action as against it to warrant the suit.

3. The suit proceeded to full hearing during which both the Respondent and Appellant called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court found the Appellant 100% liable for causing the accident and proceeded to award the Respondent general damages in the sum of Kshs. 600,000/- inclusive of interest on the latter sum from the date of judgment plus costs of the suit.

4. Aggrieved with the outcome, the Appellant preferred the instant appeal on the following grounds: -

“1. That the learned Magistrate erred in law and fact in that the honorable Court failed to consider the effect of the Appellant having sold the subject motor vehicle in February, 2015 to Halfan Mohamed Mwachingonzi.

2. That the learned Magistrate erred in law and fact in failing to correctly apply the principle of vicarious liability.

3. That the learned Magistrate erred in law and fact in holding that the Appellant was liable for the accident despite the fact that the Appellant was not the driver or managing the motor vehicle thus reaching an erroneous finding in the judgment.

4. That the learned Magistrate erred in law and fact in not considering the evidence that the Respondent did not sue the driver despite the fact that the driver was his workmate hence the Magistrate holding, the Appellant liable despite the fact that the Appellant is not a person or could not drive the motor vehicle thus arriving at a wrong judgment.

5. That the learned Magistrate erred in law and fact in not considering the evidence that the Respondent and the driver were not employees of the Appellant thus arriving at a wrong judgment.

6. That the learned Magistrate erred in law and fact in holding the Appellant 100% liable whereas the Appellant was not the driver in control of the motor vehicle at the time of the accident thus arriving at a wrong judgment.

7. That the learned Magistrate erred in law and fact in not considering the evidence that the Respondent was on board of the company motor vehicle driven by the company driver and that the Appellant had no control at all thus arriving at the wrong judgment.

8. That the learned Magistrate erred in law and fact in that she arrived at a judgment that was against the law and evidence that was availed to the trial Court.” (sic)

5. Directions were taken on disposal of the appeal by way of written submissions. Both parties duly complied. That said, the Court has considered the Record of Appeal, as well as, the submissions by the respective parties.
6. As rightly observed by the respective parties, this is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123**. Further, an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1KAR 278**. It is apparent from the memorandum of appeal and Appellant’s submissions that the appeal turns on the singular question of liability.
7. In **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91**, it was settled that cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings.

Hence a review thereof is apposite before dealing with evidentiary matters. That said, the gist of the respective parties' pleadings had earlier been captured in this judgment as such the same does not warrant a restatement at this juncture.

8. Nevertheless, the trial Court after restating the pleadings and examining the evidence on record pronounced itself on liability in the impugned decision as follows-;

“The plaintiff’s evidence was that on the suit accident date she was a passenger in the suit vehicle driven by Kevin Mutinda, through PC Pius Kariuki from Athi River Police Station, she produced a police abstract to confirm occurrence of the accident, the evidence of the defence was that he sold the vehicle on 02.02.2015 to Jacinta Wangui since the defendant is a car dealer though no such evidence was before Court, he produced a log book in the names of Halfan Mohamed Mwachingozi husband to Jacinta but the log book was issued in 2016 yet the copy of records relied on by the plaintiff is dated 06.10.2015 indicated that the suit vehicle as at the date of the accident and search belonged to the defendant, the defendant did not enjoin Jacinta Wangui the alleged purchaser of the vehicle or Halfan Mohamed Mwachingozi the husband to the purchaser as parties to this suit, thus premised on the evidence on record, the plaintiff having been a passenger did not contribute to the occurrence of the suit accident, the defendant herein as the registered owner of the suit vehicle as at the time of the accident even though states that they had sold the vehicle to Jacinta on 02.02.2015 no such evidence is before Court and that Jacinta is the wife of the registered owner Halfan Mohamed Mwachingozi who was registered in 21.07.2016, the defendant did not enjoin these two people in the proceedings to assist the Court determine the real issue in dispute, as such premised on the evidence on record and on balance of probabilities, I hold that the defendant is 100% liable for the accident.”

9. The applicable law as to the burden of proof is found in **Section 107, 108 and 109** of the **Evidence Act**. See -: The Court of Appeal in **Mumbi M'Nabea v David M.Wachira [2016] eKLR**. The duty of proving the averments contained in the plaint lay squarely on the Respondent and *vice versa* with respect to the averments in the statement of defence. In **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the Court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

10. It is undisputed that the case before the trial Court related to a road traffic accident involving the Respondent and the suit motor vehicle, in which she was aboard. By the Respondent’s pleadings and evidence before the lower Court, the occurrence of the accident is not disputed. However, what the Appellant vehemently disputes both before the lower Court and on appeal is that at the time of the accident it was not the owner of the suit motor vehicle having sold the same to a third party.
11. Relevant to the disputed issue, during the trial, the Respondent testified as **PW2**, the gist of her evidence was that on the date in

question she was aboard the suit motor vehicle when the same was involved in an accident. That the suit motor vehicle was being driven by one Kelvin Mutinda. She went on to adduce into evidence the documents appearing in her list of documents as **PExh.1-6** among them being a Police Abstract as **PExh.1** and Copy of Records in respect of the suit motor vehicle as **PExh.4**. She further stated that CRBC was the owner of the vehicle as per the Police Abstract whereas the Appellant has not been named in the latter. She further confirmed not being an employee of the Appellant.

12. On behalf of the Appellant, **Mehabub Alam** testified as **DW1**. Adopting his witness statement, he proceeded to adduce into evidence the documents appearing in the Appellant's list of documents as **DExh1-3**. It was his testimony that the Appellant was not the owner of the suit motor vehicle, as it had sold the same to one Jacinta Wangui, whereas the purported driver of the said motor vehicle was not its employee.
13. He went on to state that he sold the suit motor vehicle on credit in February of 2015 to one Halfan Mohamed Mwachingozi who was the husband to Jacinta Wangui, however there was no sale agreement filed. He stated that on 02.02.2015 he filled a transfer form in respect of the transaction. He however confirmed as per the Copy of Records adduced by the Respondent, the same captured the Appellant as the owner of the suit motor. That as per the Transfer of Motor vehicle adduced by the Appellant, is captured that the latter transferred the vehicle to Jacinta Wangui.
14. With the above in reserve, on whether negligence and or vicarious liability can attach as against the Appellant on account of ownership

of the suit motor vehicle, **Section 8** of the **Traffic Act** 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.”

15. Further, it is settled that although a copy of record is *prima facie* proof of ownership, the presumption is rebuttable. The Court of Appeal in **Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR**, observed that-;

“It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise.

Section 8 of the Traffic Offences Act 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 section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of Osapil v. Kaddy [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only prima-facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

This Court adopted the interpretation above in the case of Securicor Kenya Ltd v. Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O’Kubasu’ Deverell JJ.A) and held that;

“Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

16. In **Jared Magwaro Bundi & Another v Primarosa Flowers Limited [2018] eKLR**, the Court of Appeal reviewed previous decisions on

the beneficiary ownership of a motor vehicle, before holding the respondent therein liable, based on possessory ownership and usage of the accident vehicle. In reviewing past decisions on the matter, the Court stated *inter alia* 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 a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.

The position taken by the court in Jael Muga Opija (supra) and Mohamed Koja (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case ...”

See also **Nancy Ayemba Ngaira v Abdi Ali [2010] eKLR.**

17. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR** while discerning the question of legal and evidential burden held *inter alia*;

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to

do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

18. Thus, in this case, the initial onus of proof was on the Respondent to demonstrate that the Appellant was as at 22.06.2015, the registered owner of the suit motor vehicle, which she did through production of **PExh.4** being the Copy of Records. Hence the Respondent discharged her initial burden of proof regarding ownership. However, as earlier noted, the presumption placed by production of the Copy of records, is rebuttable.
19. Which brings us to the Appellant's rebuttal evidence. Right from the pleadings, the Appellant denied ownership of the suit motor vehicle as of the date of the accident, asserting that it had sold the same. It relied on **DExh.1** (*transfer form*), **DExh.2** (*Identity Card*) and **DExh.3** (*PIN*). **DExh.1** despite capturing the transacting parties being the Appellant (*as transferor*) and one Jacinta Wangui (*as transferee*) the same was not registered. **DExh.2** and **DExh.3**, on their parts, did not aid in demonstrating that ownership of the suit vehicle had been transferred. Meanwhile, as noted from the record of proceedings, **DW1** was categorical that the Appellant had not evinced a Sale Agreement in respect of the suit motor.
20. It warrants mentioning at this juncture, that this Court did not have the benefit of the original record of proceedings. Curiously, a review of the Record of Appeal, appearing at **Page 33, 34 & 35** are Log Book Delivery, Log Book and Sale Agreement in respect of the suit motor vehicle. Notably, the latter three documents were not captured as documents forming part of the Appellant list of documents dated 15.09.2016 that was marked as **DExh1-3**.

21. Why do I digress on the above? As earlier noted, **DW1** testimony was to the effect that he only adduced three (3) documents being **DExh1-3**. He was further categorical on cross-examination that there was no Sale Agreement adduced in respect of the suit motor vehicle. Meanwhile, the trial Court's decision was premised on the material evidence presented before it which in my view did not encapsulate the documents presently appearing at Pages 33, 34 & 35 being a Log Book Delivery, Log Book and Sale Agreement. The question that begs at this juncture would be were these documents snuck in at the appeal stage, in the record of appeal, whereas neither the Respondent nor the trial Court had the benefit of the same? Without the benefit of the original record of the lower Court, the only reasonable conclusion is that the same have been belatedly added to the record of appeal and did not form part of the original record of proceedings before the lower Court.
22. It is important to note that it was saliently contested both before the lower Court and on appeal by the Appellant concerning ownership of the suit motor vehicle. However, **DExh.1**, on the face of it, while undated, was not conclusive as to whether there was a transfer of actual, beneficial and or possessory ownership of the suit motor vehicle. Whereas despite the Appellant, having duly executed **DExh.1**, the responsibility fell on the Jacinta Wangui, to transfer the suit motor vehicle into her name. It appears that she did not, a consequence of which as of 22.06.2015, the search revealed that the suit motor vehicle was still registered in the Appellant's name.
23. Here, had the Appellant intended to buttress the fact that it was not the owner of the suit motor, in the absence of the sale agreement, that would have *prima facie* rebut the copy of record, onus was on

the Appellant to enjoin the persons it claimed to be owners of the suit motor vehicle, to the lower Court suit. It did not pick up the gauntlet in the aforesaid regard. The trial Court did not err in arriving at the aforesaid conclusion, as it did.

24. Applying the dicta in **Jared Magwaro Bundi** (supra) to the facts of this case, the Court is of the considered view that the Appellant failed to sufficiently rebut the evidence tendered by the Respondent regarding ownership, by showing that in the material period, he was neither the de facto, beneficial, or possessory owner of the suit motor vehicle. The Sale Agreement which appears to have been belatedly introduced on appeal, it must be stated that the trial Court did not have the benefit of the same whereas the evidence of both **DW1** and record of proceedings confirms the same.
25. Concerning the doctrine of vicarious liability as raised in the Appellant's grounds of appeal, the Court of Appeal in **John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others** [2015] eKLR, stated as follows regarding the doctrine-;

"14. The main issue that fell for determination by the first appellate court was whether, in the aforesaid circumstances, the appellant was vicariously liable for the negligent acts of the 2nd respondent, the lawful driver of the motor vehicle. BLACK'S LAW DICTIONARY, 9th edition at page 998 defines vicarious liability in the following words: "Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."

15. In HCM Anyanzwa & 2 Others v Luigi De Casper & Another [1981] KLR 10, this Court held that "vicarious liability depends not on ownership but on the delegation of tasks or duty." We believe the learned judge misdirected

himself when he addressed himself to the issue of legal ownership of the motor vehicle in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent, who was an employee of the third respondent. It is the third respondent who had supervisory power over his driver and not the appellant. The appellant cannot therefore be held to be vicariously liable.
16. The reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle in a case of this nature, to the total exclusion of employer/employee relationship, would amount to grave injustice to the appellant.”

26. The above dicta puts it well concerning the doctrine of vicarious liability, to wit, I do not intend to reinvent the wheel. That said, it is notable from the pleadings and eventual impugned decision of the trial Court that the doctrine was neither a pleaded issue nor the premise on which the trial Court arrived at its determination. Palpably, the learned Magistrate, arrived at her decision, the Appellant having failed to discharge its evidentiary burden on proof as concerns ownership of the suit motor vehicle. Therefore, it would be moot to proceed to address myself on whether the learned Magistrate erred in law and fact in failing to correctly apply the doctrine wherein the said doctrine was neither a pleaded issue nor the premise on which the trial Court arrived at its determination on liability.
27. In the end the trial Court decision on liability cannot be faulted in light of this Court's earlier discussion on the evidentiary material and cited dicta on the question of proof of ownership in respect of a motor vehicle. The Respondent had on a balance of probabilities discharged its burden of proof on who was the registered owner of

the accident causing motor vehicle. The Respondent having vehemently protested ownership failed to discharge its evidential burden on the issue, to wit, any concern over who was the driver, employee manager and or in control of the suit vehicle would equally be a moot question.

Quantum

28. The Plaintiff suffered bruises on the head and a fracture of left clavicle. I have read the evidence and relevant authorities. The nature and location of the injuries are grievous. The award of Ksh 60,000 by the lower court is therefore not excessive and is upheld.
29. Therefore, in totality of the above the Appellant's appeal lacks merit and is dismissed with attendant costs in favour of the Respondent.
30. Orders accordingly!

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 18TH DAY OF DECEMBER 2025.

**HON L P KASSAN
JUDGE**

**In the presence of;
Nyaranda for Appellant
Otieno for Respondent
Carol – Court Assistant**