# REPUBLIC OF KENYA

# IN THE HIGH COURT OF KENYA AT KISUMU

# CIVIL APPEAL NO. E034 OF 2023

**JOEL AHOLI.....1ST APPELLANT**

**ROBERT OMAMO.....2ND APPELLANT**

**VERSUS**

**JAMES NGAHU.....RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. G. C. Serem, Resident Magistrate/Adjudicator delivered on and dated 10th February, 2023 in Kisumu SCCCOMM No. E040 of 2022 James Ngahu v Joel Aholi & another.*

## JUDGEMENT

1. This appeal emanates from the judgement and decree of **Hon. G.C. Serem** Resident Magistrate/Adjudicator delivered on and dated 10th February, 2023 in *Kisumu SCCCOMM No. E040 of 2022 James Ngahu v Joel Aholi & another*.

2. The grounds of appeal presented by the Appellants vide the memorandum of appeal dated 23rd February, 2023 upon which they seek to upset the judgement and decree of the lower court are as follows:

    i. **That the learned trial Court erred in law and in fact in failing to consider the police abstract of the purported accident.**

ii. **That the learned trial Court erred in law and in fact in failing to consider that there was never a traffic case against the Appellants herein.**

iii. **That the learned trial Court erred in law and in factfinding that the Respondent had incurred loss due to damage to the motor vehicle when she did not prove the same on a balance of probabilities.**

iv. **That the trial Court amplified on the weakness in the defence case to buttress on otherwise very weak Respondent's case.**

v. **That the trial Court imported extraneous considerations and reasons in arriving at the judgement.**

vi. **That the trial Court erred in awarding the Respondent herein with costs of the suit and he did not deserve the same.**

vii. **That the trial Court misdirected itself on the applicable principles of law by failing to take into consideration and appreciate the submissions and the authorities submitted to the Court by the Appellant.**

viii. **That the learned trial Court erred in law by failing to give reasons and/or justification to the judgement given against the Appellants is** (sic) **extremely harsh and manifestly high in the circumstances.**

3. The Appellants propose that the appeal be allowed and that this court sets aside the trial court's judgement.

4. This being the first appellate court, I am required under *Section 78* of the *Civil Procedure Act* and as was espoused in the case of ***Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123*** to re-assess, re-analyze and re-evaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In ***Selle***, **Sir Clement De Lestang** observed that:

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.***
>
> ***However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of ***Peters v Sunday***

***Post Limited [1958] EA 424*** in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> ***"i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."***

7. Notably however, this is an appeal from the Small Claims Court and *Section 38* of the *Small Claims Court Act* provides that a person dissatisfied with a decision or order of the Small Claims Court may appeal to the High Court only on matters of law, not on questions of fact, and that once the High Court determines such an appeal, its decision is final.

8. I will proceed to re-assess, re-analyze and re-evaluate the evidence adduced before the trial court and reach my own findings while abiding by the principles set in ***Selle.***

9. The matter before the trial court, based on tortious liability, was a material damage claim arising out of a road traffic accident that is said to have occurred on 9th October, 2022 in which the Respondent's vehicle is said to have been extensively damaged.

10. The Respondent (the Claimant before the trial Court) sued the Appellants vide the statement of claim dated 7th November, 2022 seeking to recover damages said to have been caused to his motor vehicle registration number KDD 091B that resulted from a road traffic accident that is said to have occurred on 9th October, 2022, claiming that the accident was caused by or attributed to the negligence of the Appellants.

11. In the filed statement of claim the Respondent sought the following reliefs:

    a. **An order that the Respondents to pay to the Claimant a sum of Ksh.430,360/- being the total repair cost of the motor vehicle registration number KDD 091B.**

    b. **Costs of the suit.**

    c. **Interest on (a) and (b) above at court rates from the date of filing suit until payment in full.**

12. The claim was resisted by the 1st Appellant who filed a response to the statement of claim dated 6th December, 2022 wholly denying liability and seeking that the same be dismissed with costs.

13. After hearing the matter, the trial court entered judgement in favour of the Respondent and against the Appellants jointly and severally as follows:

    a. **The Respondents are jointly and severally held 100% liable.**
    b. **The Claimant is awarded damages in the sum of Ksh.430,360/-.**
    c. **The Claimant is equally awarded interest from the date of judgement and costs of the suit.**
    d. **The Respondents are granted 30 days stay of execution.**

14. Being aggrieved with the judgement of the trial court and the above findings, the Appellants presented the grounds of appeal reproduced above.

15. Going to the evidence before the trial court, the Respondent testified as CW1 and adopted the contents of his statement dated 7th November, 2022 as his testimony-in-chief.

16. In his statement, the Respondent (CW1) stated that on 8th October, 2022, he was informed by his business partner **Beatrice Adhiambo Aluoch** that his motor vehicle registration number KDD 091B had been involved in a road

traffic accident along Kakamega Mumias Road. He stated that the 1st Appellant took the said vehicle for his personal use and that it is the 2nd Appellant who was the driver of the vehicle at the time the accident occured.

17. The Respondent explained that he was informed that that the accident resulted due to the negligence and/or carelessness of the 2nd Appellant, who caused the vehicle to veer off the road and ram into another vehicle.

18. That as a result of the accident, the Respondent's vehicle was damaged extensively damaged and was later taken for repairs.

19. The Respondent listed in his statement of claim the particulars of damages to his vehicle and the particulars and estimated cost of repairs, amounting to Ksh.430,360/- inclusive of VAT of Ksh.59,360/-.

20. The Respondent produced the following documents in support of his case:

- Logbook for the Respondent's motor vehicle indicating the registered owner thereof as Aisha Motor Dealers Limited – CExh1.
- Motor vehicle hire purchase agreement with the seller as Aisha Motor Dealers Limited and the purchaser as the Respondent – CExh2.

- Certificate of examination and test of the Respondent's vehicle (examination done after the accident) – CExh4.

21. Upon being cross-examined, the Respondent told the trial court that he purchased the vehicle on hire purchase terms and that the agreement stated that the purchaser would be liable to the seller if the vehicle was involved in an accident. He further stated that the agreement provided that the Respondent would at all times have the vehicle comprehensively insured, but admitted that at the time of the accident, the vehicle had a third-party insurance cover.

22. On being further cross-examined, the Respondent told the trial court that he gave the 1st Appellant, who was his friend, the vehicle to use at the request of the Appellant and not on hire basis. blamed the 1st Appellant for causing the accident, stating that the 1st Appellant joined the roundabout and changed lanes from the outer to the inner lane when Respondent's vehicle was already on the roundabout.

23. The Respondent further stated that he had no relationship with the 2nd Appellant regarding the vehicle.

24. The Respondent called **Beatrice Adhiambo Oloo** as his witness (CW2). The witness told the trial court that on 8th October, 2022, she gave the 1st Appellant the vehicle which belonged to the Respondent, who was her business partner.

That on the next day, the 1st Respondent informed her that the vehicle had been involved in a road traffic accident, while the same was being driven by the 2nd Appellant. CW2 proceeded to Mumias Police Station to make a follow-up and the officers at the station encouraged the witness and the 1st Appellant to amicably resolve the matter. The witness stated that the Appellants agreed to repair the vehicle and referred her to a mechanic and sent to the mechanic Ksh.6,000/- to commence the repairs. The Respondents failed to pay for the repairs.

25. Upon being cross examined, CW2 told the trial court that she gave the vehicle to the 1st Appellant with the knowledge and authority of the Respondent.

26. The Respondent called **Senior Sergeant of Police Julius Kiprotich,** a traffic police officer as CW3. The witness testified before the trial court and stated that the accident in question occurred on 8th October, 2022 at Ekoma area along Mumias – Kakamega Road and was reported to Mumias Police Traffic Base and that he attended to the scene with a colleague.

27. The officer stated that the accident involved motor vehicle registration numbers KDD 091B and KBE 861A, which had been parked off the road facing Mumias direction.

28. CW3 told the trial court that police investigations revealed that the 2nd Appellant, who was the driver of motor vehicle registration number KDD 091B was wholly to blame for the accident as he veered off the road, as evidenced by skid marks that were at the scene, and rammed into the other vehicle, which had been parked completely off the road.

29. The witness produced the police abstract that was issued regarding the accident that was issued on 22nd October, 2022 following the occurrence of the accident, as CExh3. He stated that the police did not prefer any charges against either of the drivers.

30. The Claimant called as CW4 **Andrew Wanjohi Njenga,** a motor vehicle assessor with 7 years of experience, who told the trial court that on 24th October, 2022, he was instructed by the Respondent to carry out an assessment on motor vehicle registration number KDD 091B, which he proceeded to physically do on the same day. He prepared a report on his observations and findings on the extent of damage and estimated repair costs, which he forwarded to the Respondent. The total estimated repair cost was Ksh.430,360/-.

31. CW4 produced the assessment report as CExh5.

32. Upon being cross-examined, CW4 told the trial court that the figures of costs of the required 23 spare parts that he

stated in his report were based on open market sources, from different spare part shops.

33. The 1st Appellant testified as RW1 and told the trial court that the Respondent was not known to him. He stated that he hired motor vehicle registration number KDD 091B and was involved in an accident while being driven by the 2nd Appellant. The 1st Appellant explained that he gave the 2nd Appellant the vehicle as he (the 1st Appellant) had no driving licence and that he paid for the 2nd Appellant's services.

34. Upon being cross examined, RW1 said that he was a passenger aboard the vehicle when the accident occurred. He stated that the vehicle was in good running condition when he received it from CW2. He stated that the Respondent was to blame for the damage on the vehicle as he did not comprehensively insure the vehicle as per the hire purchase agreement.

35. The 2nd Respondent testified as RW2 and told the trial court that while he was driving the vehicle towards Mumias on 8th October, 2022 with RW1 on board, there was a lorry ahead of the vehicle and it was raining. That he then embarked on overtaking the lorry and did not know that there was another oncoming vehicle ahead. As a result, he lost control and hit another vehicle. He stated that the police did not find him culpable. He stated that he had no dealings whatsoever with

the Respondent and that it is the 1st Appellant who gave him the vehicle.

36. On being cross examined, RW1 told the trial court that when he realized that there was an oncoming vehicle as he attempted to overtake the lorry that was ahead of him, he swerved, lost control and hit motor vehicle registration number KBE 861A that was off the road.

37. The appeal was canvassed by way of written submissions. Although the Appeal was expressed to have been preferred by both Appellants, the submissions that were in support of the appeal filed only addressed the position of the 1st Appellant. As a matter of fact, the same were titled as *"The 1st Appellant's Submissions".* I therefore take it that the 2nd Appellant did not file submissions and/or canvass the appeal.

38. The 1st Appellant submitted that the trial court did not have jurisdiction to determine the claim as the accident in question occurred at Ekama area along the Kakamega – Mumias Road, and that the claim should have been filed at the court geographically most proximate to the pace where the cause of action arose, thus either Kakamega or Munias Law Courts and not Kisumu Small Claims Court.

39. The second issue that the Appellants addressed in their submissions is that the trial court erred in finding the 1st

Appellant liable yet no negligence was proved against him. He submitted that the Respondent did not meet the requirements of *Section 107(1), 109* and *112* of the *Evidence Act* and that the trial court therefore ought to have dismissed the claim against him. The 1st Appellant urged that as he was not the one driving the vehicle and was only a passenger, he was not to blame for the accident and the police abstract indicated that the matter was "pending under investigations".

40. The 1st Appellant stated that CW3 confirmed that the vehicle was being driven by the 2nd Respondent, a fact corroborated by the police abstract – CExh3.

41. The 1st Appellant stated that the Respondent was not, for the reasons that he proffered, entitled to compensation from him.

42. The 1st Appellant did not address and/or challenge the figures or amounts and/or costs of repairs that were stated in the assessor's (CW5's) report.

43. In his submissions, the Respondent urged that whether the matter should have been filed in Kisumu, Kakamega or Mumias courts was an issue of fact and that this court has no jurisdiction to address the same on appeal, more so considering that the issue was never presented before the trial

court for a determination on geographical proximity, which is an issue of fact, to be made.

44. The Respondent further submitted that the Appellants admitted that the vehicle was in serviceable condition when the 1st Respondent received it from CW2 and when the 2nd Appellant drove it, on the instructions of the 1st Appellant.

45. The Respondent submitted that the evidence presented by the Respondent and his witnesses, as admitted by the 2nd Appellant, was that it was the 2nd Appellant who was negligent as he attempted to overtake another vehicle without first ensuring that it was safe to do so, resulting in him losing control and colliding with motor vehicle registration number KBE 861A, that was stationary, off the road. He stated that as the 2nd Appellant was under the directions of the 1st Appellant as the latter's driver, the 1st Appellant was vicariously liable for the negligence of the 2nd Appellant.

46. The Respondent concluded that the claim was proved against both Appellants on a balance of probabilities and the trial court reached the proper findings and could not be faulted.

47. In reaching her determination on liability in the judgement rendered on 10th February, 2023, the learned Adjudicator stated as follows:

***"5. CW3 who was the police officer stated that when he arrived at the scene of the accident, he found that the driver of motor vehicle KDD 091B had veered off the road and hit a motor vehicle at the side of the road and he was blamed for the accident. The 2nd Respondent testified and stated that he tried to overtake and did not know there was a vehicle ahead. It is common knowledge that you should not overtake if the road is not clear hence the 2nd Respondent was liable. Was the 1st Respondent equally liable for the accident?***

***6. RW1 who was the 1st Respondent testified and stated that he is the one that hired the vehicle and since he couldn't drive, he requested the 2nd Respondent to drive. This was a fact that was confirmed by the 2nd Respondent. In the Court of Appeal case of Nakuru Automobile House Limited v Ziaudin MBA Civ App No. 63 of 1986, the learned Judges of Appeal – Nyarangi, Platt and Gachuhi – agreed in their respective judgements that:***

> ***"….to fix liability on the owner of the car for negligence of its driver, it is necessary to show that either the driver was the owner's servant or that at the material time, he was acting on the owner's behalf as his agent. To establish the agency relationship, it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in performance***

***of a task or duty delegated to him by the owner" (As per Nyarangi Judge of Appeal pp 4).***

***7. In this case the 2nd Respondent was doing a duty that had been delegated to him by the principal who was the 1st Respondent. The duties carried out were those that were delegated. On those grounds, he was equally vicariously liable."***

48. Upon a careful re-evaluation of the entire record of appeal, the judgement of the trial court, the grounds of appeal, and the rival submissions by the parties, and bearing in mind the limited appellate jurisdiction conferred by *Section 38* of the *Small Claims Courts Act*, I am of the considered view that the following issues arise for determination:

a. Whether the trial court had jurisdiction to hear and determine the claim.

b. Whether the Respondent proved his claim against the Appellants on a balance of probabilities.

c. Whether the 1st Appellant was in possession and control of motor vehicle registration number KDD 091B at the time of the accident and whether he was vicariously liable for the acts of the 2nd Appellant.

d. Whether the 2nd Appellant was negligent and whether such negligence caused the accident.

e. Whether the police abstract indicating that the accident was pending investigations absolved the Appellants from liability.

f. Whether the Respondent strictly proved special damages as awarded by the trial court.

**Whether the Small Claims Court had jurisdiction**

49. The 1st Appellant submitted that the trial court lacked jurisdiction on account of geographical proximity, arguing that the accident occurred along the Kakamega–Mumias Road and that the claim ought to have been filed either in Kakamega or Mumias and not in Kisumu. This issue was neither pleaded nor raised before the trial court for determination.

50. While it is trite law that issues of jurisdiction may be raised at any stage of proceedings, including on appeal, it is equally settled that where jurisdictional objections are dependent on contested or ascertainable facts, such issues ought to be raised and ventilated at the trial stage to allow the court to receive and interrogate the relevant evidence.

51. Jurisdictional questions that are purely legal may be raised at any time; however, those that require factual inquiry cannot be properly determined for the first time on appeal.

52. In the present case, the question of geographical jurisdiction would have required evidence on proximity, convenience and the factual basis upon which the Small Claims Court at Kisumu assumed jurisdiction. No such evidence was tendered and the issue was never submitted to the trial court for determination.

53. I therefore agree with the Respondent's submission that this ground raises an issue of fact, which this court is barred from entertaining under *Section 38* of the *Small Claims Courts Act.*

54. In any event, the Appellants are deemed to have submitted to the jurisdiction of the trial court by fully participating in the proceedings without objection. This ground therefore fails.

**Whether the Respondent proved his case on a balance of probabilities.**

55. The applicable standard of proof in civil litigation is proof on a balance of probabilities. The nature and meaning of this standard was clearly articulated in ***William Kabogo Gitau v George Thuo & 2 others [2010] eKLR*****,** where the court held that a party discharges this burden by demonstrating that the occurrence of the facts relied upon is more probable than not, upon a consideration of the entire body of evidence. The court observed as follows:

> ***"In ordinary civil cases, a case may be determined on a balance of probabilities. This means that a court is required to weigh the evidence adduced by the parties and decide whose evidence is more probable. If the evidence adduced by the plaintiff is such that it persuades the court that it is more probable than not that the defendant was negligent, the plaintiff will have proved his case on a balance of probabilities. Put differently, if the court is satisfied that the plaintiff's case is 51% probable as against the defendant's case at 49%, then the plaintiff has discharged the burden of proof."***

56. In the instant case, the Respondent testified as CW1 and called three other witnesses whose evidence was largely consistent and mutually reinforcing. The occurrence of the accident, the involvement of the Respondent's vehicle, the manner in which the accident occurred and the extent of damage were all corroborated by independent testimony, including that of a traffic police officer and a qualified motor vehicle assessor.

57. On the other hand, while the Appellants denied liability, the evidence of the 2nd Appellant substantially supported the Respondent's version of events. The 2nd Appellant admitted that he embarked on overtaking another vehicle before first ensuring that it was safe to do so and lost control when he saw an oncoming vehicle, swerved and veered off the road and collided with motor vehicle registration number KBE 861A

that was stationary, parked off the road. This was an admission of negligence by the second Appellant. Upon weighing the totality of the evidence, I am satisfied that the Respondent discharged the burden placed upon him.

**Possession, control and vicarious liability of the 1st Appellant.**

58. The evidence before the trial court was clear and uncontroverted that motor vehicle registration number KDD 091B was handed over to the 1st Appellant his request. The 1st Appellant stated that he hired it. CW2 testified that she released the vehicle to the 1st Appellant with the Respondent's authority. The 1st Appellant admitted that he had hired the vehicle and was in it as a passenger at the time of the accident.

59. Further, the 1st Appellant testified that he engaged the 2nd Appellant to drive the vehicle on his behalf because he did not possess a driving licence, and that he paid him for that service. The 2nd Appellant confirmed that he was driving under the instructions of the 1st Appellant and had no relationship whatsoever with the Respondent.

60. These facts lead irresistibly to the conclusion that the 1st Appellant was in possession and control of the vehicle at the material time and that the 2nd Appellant was his driver and/or agent. Applying settled principles of vicarious liability,

including those restated in ***Nakuru Automobile House Limited v Ziaudin MBA [1986] KLR 275*****,** the trial court correctly held that the 1st Appellant was vicariously liable for the negligent acts of the 2nd Appellant, which, as I have stated above, the latter admitted.

**Negligence of the 2nd Appellant.**

61. The manner in which the accident occurred was established through both independent and admission evidence. CW3, the traffic police officer who attended the scene, testified that investigations revealed that the 2nd Appellant veered off the road and collided with a vehicle that had been parked completely off the road. Skid marks observed at the scene supported that conclusion.

62. More critically, with an apology on being repetitive, the 2nd Appellant admitted in his testimony that while driving in rainy conditions, he attempted to overtake a lorry without first ensuring that the road ahead was clear, realized there was an oncoming vehicle, swerved, lost control and collided with motor vehicle registration number KBE 861A.

63. This admission amounts to a clear acknowledgement of negligent driving. It is a fundamental rule of road safety that a driver must only overtake when it is safe to do so. I therefore find that the negligence of the 2nd Appellant was proved on a

balance of probabilities and that such negligence was the direct cause of the accident.

**Effect of the police abstract indicating pending investigations.**

64. The Appellants placed undue emphasis on the fact that the police abstract indicated that the accident was pending under investigations and that no traffic charges were preferred. This argument is not helpful to the Appellants' case. As was held in ***William Kabogo Gitau*** (supra) civil liability is determined independently of criminal proceedings, and the absence of a prosecution does not absolve a party from civil liability.

65. Both the trial court and this court were obligated to determine liability based on the evidence on record. The learned Adjudicator properly evaluated the evidence presented and reached her own conclusions. I find no error of law in that approach.

**Condition of the vehicle at the time it was handed over.**

66. The evidence, including that of RW1, was that the vehicle was in good running condition when it was handed over to the Appellants. There was no evidence whatsoever to suggest that any mechanical defect or pre-existing condition contributed to the occurrence of the accident. The argument regarding lack of comprehensive insurance is irrelevant to the issue of causation of the accident. That is an issue privy only to the

Respondent and Aisha Motor Dealers Limited, pursuant to the hire purchase agreement that was strictly between the two parties. I therefore find that the condition of the vehicle did not contribute to the accident in any way.

**Proof of special damages.**

67. The Respondent claimed special damages amounting to Ksh.430,360/= being the cost of repairs. He produced an assessor's report prepared by CW4, a qualified motor vehicle assessor, who physically inspected the damaged vehicle and itemised the required repairs and costs. CW4 was subjected to cross-examination and his evidence remained unshaken.

68. Courts have consistently held that in material damage claims, an assessor's report is sufficient proof of special damages where the maker testifies. In the case of ***Kennedy Onsongo & another v Grace Wanjala Mcharo [2017] eKLR,*** I held that an assessor's report meets the threshold of strict proof in such claims. I remain to be of that persuasion. Notably, the Appellants did not challenge either the figures or the necessity of the repairs. I therefore find that the Respondent strictly proved his special damages.

**Conclusion.**

69. In the final analysis, I find that the learned Adjudicator properly directed herself on the law and correctly evaluated the evidence before her. The Respondent proved his case on a

balance of probabilities. The 2nd Appellant was negligent and the 1st Appellant vicariously liable. The issue of jurisdiction was both factual and belatedly raised and the special damages awarded were duly proved.

70. No error of law has been demonstrated to warrant interference by this court. The appeal is accordingly found to lack merit and is dismissed in its entirety and the judgement of the Small Claims Court upheld.

71. Costs of the appeal for the Respondent shall be borne by the 1st Appellant, which I assess at Ksh.30,000/-. In respect of the 2nd Appellant, I make no order as to costs as he did not participate in the appeal.

72. This file is hereby closed.

DELIVERED (virtually), DATED & SIGNED this 9th February, 2026.

**JOE M. OMIDO**

**JUDGE**

FOR THE 1ST APPELLANT: **Ms. Nannungi.**

FOR THE 2ND APPELLANT: **Mr. Lore.**

FOR RESPONDENT: No appearance.

COURT ASSISTANTS: **Mr. Ngoge** & **Mr. Juma.**

**Ms. Nannungi:** I seek 30 days stay in order to advise my client on payment.

**Court:** There shall be stay of execution for 30 days.

**JOE M. OMIDO**

**JUDGE**