

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E144 OF 2024

EXECUTIVE SUPER RIDES LIMITED.....

.....1ST APPELLANT

OBADIAH

MUNGAI

THUKU.....2ND APPELLANT

VERSUS

LUCY ACHIENG OWUOR & NORBERT OUMA OGOLA

(Suing as the Administrators of the Estate of the late

COLLINS ODHIAMBO OUMA)1st

RESPONDENT

VINCENT MUGOZWE MANYALA.....2ND

RESPONDENT

NATHAN MWITI MWENDWA.....3RD

RESPONDENT

JUDGMENT

(Being an appeal from the decision rendered vide MCCC No.771 of 2019 rendered on 30th October 2024)

1. By a plaint dated 28th October 2019 and amended on 30th November the plaintiff sued the defendants seeking for judgment against defendants for the following orders: -

a) General damages;

b) Special damages as stated in paragraph 9;

c) Costs of this suit;

d) Interest at court rate;

2. The plaintiffs case is that on or about the 11th day of November, 2016, the deceased herein was carefully travelling as a passenger on board motor vehicle registration number KCF 515K along Maai Mahiu road when the said motor vehicle was so negligently and/or carelessly driven and/or controlled that the same was allowed to veer off the road and overturned fatally injuring the deceased.

3. The plaintiff attributes the cause of the accident on the negligence of the defendants and lists the particulars of negligence of the driver of motor vehicle registration number KCF 515K as follows:

- a) *Driving the said motor vehicle in excessive high speed in the circumstances.*
- b) *Driving the said motor vehicle without due care and attention.*
- c) *Driving the said motor vehicle so dangerously and/or negligently and without regard to the passengers on board and particularly the deceased.*
- d) *Driving the said motor vehicle recklessly and in total violation of the traffic rules.*
- e) *Failure to slow down, stop, brake, swerve and/or take any other reasonable step to avoid the said accident.*
- f) *Driving a defective motor vehicle.*
- g) *Causing the accident.*

4. The plaintiff avers that at the time accident the deceased was aged 25 years and working as a carpenter. Further he was the sole bread winner of his family and dependants, being his wife Lucy Achieng Owuor, the father Norbert Ouma Ogola, and children; Francisca Akinyi and Fabian Odhiambo aged 4 and 2 years respectively.

5. It is pleaded that by the reason of deceased's death, his dependants have been subjected to loss and suffering and deprived off their sole means of livelihood and the deceased denied his natural expectation of life.

6. The plaintiff further avers that, the family incurred expenses in the form of special damages as here below tabled:

a) Motor vehicle search-----Kshs 550.00

b) Letter of Limited grant ad litem----Kshs 1,
200.00

c) Advocates fees -----Kshs 15,000.00

d) Medical and funeral expenses-----Kshs

9,100.00

Total ----- Kshs

25,850.00

7. Finally the plaintiff avers that despite demand and notice of intention to sue, the defendant has failed and/or refused to admit liability and/or compensate the plaintiff beneficiaries for the loss and damage suffered thereby rendering this suit necessary.

8. However, the plaintiff's claim was opposed vide, a statement of defence filed by the 1st and 3rd defendants on 24th February 2020. The 1st and 3rd defendants denied being the registered owners of the motor vehicle registration KCF 515K and that the 3rd defendant was involved with the subject motor as an importer/consignee on behalf of the 1st defendant.

9. Similarly, the 1st and 3rd defendants denied more particularly that on or about the 11th November,

2016 or on any other date, the plaintiff was lawfully, carefully travelling as a passenger or aboard motor vehicle registration number KCF 515K along Maai Mahiu - Narok road and that an accident due to the negligence of the 1st and 3rd defendant as per the particulars of negligence itemized under paragraph 6(a) to (g).

10. The 1st and 3rd defendants further denied being vicariously liable for the alleged accident and stated that at all times of the occurrence of the accident it did not have any interest in the management and/or control of the motor vehicle.

11. That the 1st defendant had sold the said motor vehicle KCF 515K to one Nathan Mwitwi Mwenda pursuant to an agreement for sale dated 2nd February, 2016 and had surrendered duly executed transfer forms and reserved the right to seek for leave of the court to enjoin Nathan Mwitwi Mwenda as a third party.

12.The 1st defendant further averred that there exist two fatal accident claims arising from the same alleged accident in PMCC No. 282 of 2017 and PMCC No. 283 of 2017 filed in Naivasha where the driver/alleged unregistered owner at the time of the accident is identified as being Nathan Mwitwi Mwenda upon the court enjoining him.

13.The 1st defendant averred that by reason of the aforesaid, he would seek indemnity and/or contribution from the third party for any liability against it in favour of the plaintiff.

14.At the conclusion of trial court rendered a judgment referred to herein where judgment was entered in favour of the plaintiff as against the defendants as follows:

a) *Liability*-----100%

b) *Pain and suffering* ----- Kshs.
10,000

c)*Dependency* ----- Kshs. 3,840,000

d) Loss of expectation of life ----- Kshs.

100,000

e) Special damages-----Kshs.

18,850

f) Costs of this suit plus interest.

15. The appeal was disposed of vide filing of submissions. The appellants in submissions dated 24th April 2025, argued that the trial court erred holding them wholly liable despite evidence it was not in possession and/or control of the subject vehicle.

16. That section 8 of the Traffic Act which creates a rebuttable presumption that a vehicle involved in an accident is driven by the owner or a person for whose negligence the owner is responsible for. However, the presumption can be displaced by evidence that shows the owner had neither possession or control on the vehicle.

17. The appellants relied on the case of; Securicor Kenya Limited vs Kyumba Holdings [2005] eKLR and Board of Governors St. Mary v Boli Festus Andrew Sio [2020] eKLR where the Court of Appeal held that vicarious liability does not apply where there is no agency relationship between the owner and driver or an independent contractor or third party whom they do not exercise control over, and the vehicle is not being used for the owner's benefit.

18. That similarly, in the case of; Canon Motors Limited vs Bifatu Hayani & Another (2021) eKLR, the High Court held that the presumption of ownership under Section 8 of the Traffic Act can be rebutted where the registered owner demonstrates that the vehicle was no longer in their custody or control at the time of the incident.

19. The appellants argued that they discharged the burden of proof under section 108 and 109 of the Evidence Act when they adduced evidence

demonstrating that the 1st appellant sold and relinquished possession and control the subject vehicle of the motor vehicle to the 3rd respondent prior to the accident.

20. Further that the 3rd respondent was using the subject vehicle for hire and transport services, an activity wholly unrelated to the 1st appellant's business or interests. That the 1st appellant remained the registered owner due to the incomplete transfer process. Furthermore, there is no evidence that the driver was an employee or agent of the appellants, nor that the vehicle was operated under the appellants' instructions.

21. The case of Jared Maqwaro Bundi & another v Primarosa Flowers Limited [2018] eKLR, was relied on where the Court of Appeal held that the prima facie evidence of title to a vehicle under section 8 of the Traffic Act can be rebutted where it is shown, on a balance of probabilities that as a matter of fact

the vehicle had been transferred but not yet registered.

22. The appellants further submitted that there was no evidence of negligence attributable to them. That vicarious liability presupposes that the primary tortfeasor, in this case the driver, was negligent and such negligence can be imputed to the principal.

23. That the 1st respondent failed to prove on a balance of probability the accident was caused by their negligence. Reliance was placed on the case of; Stephen Wasike Waku & Another vs Security Express Limited [2006] eKLR where the High Court held that a party seeking justice must place before the court all material evidence and facts that would enable the court to arrive at a decision whether the relief sought is available.

24. However, the respondents filed response submissions dated 24th March 2025 and referred the court to section 107(1) of the Evidence Act, Cap 80

Laws of Kenya and argued that she testified on oath that the deceased was travelling in the subject vehicle along the Naivasha - Maai Mahiu road when it was involved in an accident and died. That her evidence was corroborated by an eye witness who was also a passenger in the subject vehicle who testified that the vehicle was being driven in a reckless and careless manner that caused it to veer of the road and overturn several times.

25. That, the appellants' witness confirmed the motor vehicle was registered in the 1st appellant's name but did not challenge the circumstances of the accident or the death of the deceased. Further, the deceased having been a passenger cannot be penalized for the poor control of the vehicle. That the 1st respondent having proved her case on a balance of probability based on the available facts and principles, the learned Magistrate did not err in apportioning liability in her favour.

26. On damages, the 1st respondent submitted that the award under the various heads was reasonable and urged the court to uphold it. The 1st respondent further submitted that costs follow the event and prayed that having proved their case, she be awarded costs of the appeal and interest on special damages be granted from the date of filing the suit while interest on general damages be granted from the date of judgment till payment in full.

27. The 1st respondent referred the court to the case of; Heinz Broer vs Buscar (K) Ltd & others [2019] eKLR where the High Court stated the rationale for awarding interest on general damages from the date of judgment and interest on special damages from the date of filing of the suit.

28. In consideration the appeal this court notes that the role of the 1st appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA

123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

29. The court stated as follows: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has 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.”

30. In evaluating the evidence herein, I note that, the trial court found the defendants liable as stated under paragraph 10, and stated as follows: -

“As to whether the accident was as a result of the defendants’ negligence, PW2 Nelson Mandela who was travelling with the deceased in the same vehicle on the date of the accident blamed driver of motor vehicle registration number KCF 515F. The police abstract indicates that the Vincent Mugoze Manyala, the 3rd defendant herein was charged with the offence of causing death. In light of the foregoing, I find that the defendants are wholly liable for the accident”.

31. A reading of the foresaid indicates that the basis of the court finding the 1st and 2nd defendants wholly liable was on the evidence of (PW2) Nelson Manderu and (PW1) No. 66274 PC Yusuf Sigei who testified as to the manner in which the accident occurred and the fact that the 3rd defendant was charged with the offence of causing death by dangerous driving.
32. However, the evidence of two witnesses did not implicate the appellants herein and therefore, the reason why the trial court simply held all defendants liable is not clear. Even more so, the nature of liability among the defendants is not clear as to whether all the defendants were held jointly and/or jointly and severally liable.
33. Furthermore, the arguments by the 1st defendant that, it had sold the vehicle to the 4th defendant is not evaluated in the analysis of the judgment.

34. Be that as it may, the 1st and 3rd defendants filed a joint statement of defence dated 24th February, 2020. There is no evidence that the 2nd defendant filed any defence and neither is there any evidence that a default judgment was sought for and/or entered against him.

35. The question is; on what basis is he moving this court to set aside the trial court's decision against him?

36. To revert back to the evidence adduced, the plaintiff at paragraph 5 of the amended plaint avers that the 1st defendant is the registered owner of the subject motor vehicle. In discharging that burden, the plaintiff produced a copy of records of motor vehicle KCF 515K from the Registrar of motor vehicles. The same shows clearly the 1st defendant was the registered owner of the motor vehicle at the time of the accident. To that extent, the plaintiff

discharged the burden of proof and it shifted to the 1st defendant.

37. The 1st defendant responded at paragraph 3 of defence by denying the contents of paragraph 5 of the amended plaint. However, in further pleadings the 1st defendant averred that although the vehicle in question is registered under its name, it had sold the vehicle to the 4th defendant.

38. In discharge of its burden, the defendant availed the evidence of Peter Kamau who described the 1st defendant as the vendor of the motor vehicle while the 4th defendant was the purchaser. In proof thereof, the 1st defendant produced a sale agreement dated 2nd February, 2016, wherein the 1st defendant sold the vehicle to Nathan Mwiti Mwenda, the 4th defendant.

39. The 1st defendant averred that it would seek for leave for the 4th defendant to be enjoined in the suit as a party. Notably, the said Nathan was

subsequently enjoined in the suit as the 4th defendant. However, he did not enter an appearance, nor filed any statement of defence and a request for judgment against the 4th defendant was made on 8th July, 2022. But there is no indication in the judgment of the trial court as to whether that judgment was entered or not.

40. It follows from the aforesaid that the 4th defendant having filed no pleadings to rebut the evidence of the 1st defendant that he sold the vehicle to the 4th defendant remain uncontroverted.

41. The law is settled under section 8 of the Traffic Act that the registered owner of a motor vehicle is deemed to prima facie the owner. However, courts have held and recognized exception to this provision by accepting that where there is evidence that the vehicle had legally changed ownership but the transfer was not complete, the provisions of section 8 may not be strictly applied.

42. In that regard, Section 8 of the Traffic Act (Cap 403) Laws of Kenya 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.”

43. The Court of Appeal, Anil v Ashur Ahmed Transporters Ltd [2023] KECA 1149 (KLR) [2023] KECA 1149 (KLR) held that: -

“11. Under Section 8 of the Traffic Act, the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. Our understanding of this provision is that the registration of the vehicle is not conclusive proof of ownership but only prima facie evidence of title to a motor vehicle. The person in whose name the vehicle is registered is therefore presumed to be the owner thereof unless proved otherwise. Our understanding aligns with the

views expressed by this Court in Securicor Kenya Ltd vs. Kyumba Holdings Ltd [2005] eKLR as follows:

“We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. 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.”

12. Our position rhymes with the cited decision so that where there exists other compelling

evidence to prove ownership, then the court can find that the owner of the vehicle is a person other than the one whose name appears in the logbook. Therefore, the presumption that the person registered as owner of a motor vehicle in the logbook is the actual owner is rebuttable”.

44. Further, in the case in *Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR* the Court of Appeal stated that: -

“Also recently, this Court in the case of Joel Muga Opinja v. East Africa Sea Food Ltd [2013] eKLR restated this position as follows:

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied”

All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao vs Silas Thiani Nkunga, Civil Appeal No.92 of 1998,

“whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case.”

44. In *Muhambi Koja v Said Mbwana Abdi [2015] eKLR*

the Court of Appeal took time to examine proof of ownership of a motor vehicle and stated that: -

“We agree. To begin with, in the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle. But situations, in the normal course of business and human interactions, may arise where the person named in those records may have passed the property in the vehicle to some other person in whom the ownership presently vests. For instance, Section 9 of the Traffic Act recognizes this situation and requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding fourteen (14) days after the date of such transfer, unless the new owner is registered as the owner thereof. The registered owner must, within seven days

from the date of the transfer inform the Registrar in a prescribed form. (He is also required to furnish) the name and address of the new owner and deliver the original registration book to the new owner.

It is the new owner who takes over from this point on and after inserting particulars of the change of ownership, forwards the registration book with the prescribed fees to the Registrar, whereupon the vehicle will be registered in the name of the new owner ...

Two scenarios are presented under this provision. There are two steps to be satisfied within fourteen days before the vehicle can be registered in the name of the new owner. As this process is in motion the new owner, though not registered, can use the vehicle on the road for a period of fourteen (14) days. If the vehicle was to be involved in an accident in this

intervening period the registration book will be in the name of the seller yet the motor vehicle will have been transferred and ownership vested in the new owner only pending registration. That new owner will be liable if evidence of transfer is led. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms. The police abstract report which is usually completed after investigations are conducted by the police and which is admissible in evidence by virtue of Section 38 of the Evidence Act, is one such proof.

The other form of evidence that had been used to prove title to a motor vehicle were tender documents that proved that the appellant in whose name the vehicle was registered had ceased to be its owner upon selling it through a tender process to a third party whose details he

supplied to the court. See Securicor Kenya Limited v Kiyumba Holdings Limited Nbi Civil Appeal No.73 of 2002 (UR)... There are certainly more than these examples but we are satisfied that these four will suffice for the purpose of this appeal.

The proviso to Section 9 (2) is the second scenario. Unlike the first scenario which is restricted to fourteen days within which the motor vehicle must be registered, the second scenario is where the previous owner has transferred the vehicle to a new owner but has either refused to comply with the requirements necessary to register it, or has died or left Kenya or cannot be traced. Only after the Registrar is satisfied as to any one or more of these conditions and upon payment of fees will the new owner be registered. In the meantime before the Registrar is satisfied, although not

named in the log book, the new owner, will for all intents and purposes be deemed to be the owner, and in case of an accident, will be held liable.”

45. It is therefore the finding of this court that the evidence of sale agreement produced by the 1st appellant exonerates it from liability for the accident herein.

46. As already stated, the 2nd defendant did not file any pleadings and cannot canvass his case at this stage and his appeal fails on that ground. Furthermore, the appeal against the 2nd and 3rd respondent was withdrawn.

47. Be that as it were, the deceased plaintiff was a lawful passenger at the time of the accident and the evidence reveal that he did not contribute in any way to the accident. The finding of liability in his favour at 100% cannot be faulted.

48. The issue herein is not against the plaintiff/respondent but the defendants as among themselves and therefore the court has no ground upon which to interfere with a judgment in favour of the 1st respondent.

49. In the given circumstances, the appeal by 1st appellant is allowed, the appeal by 2nd appellant is dismissed, no orders as to costs as I order each party meet costs of the appeal.

Dated, delivered and signed on this 10th day of February 2026

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kakumi for the 1st Respondent

N/A for the Appellant

Hannah- Court Assistant