REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA,

HIGH COURT CIVIL APPEAL NO. E039 OF 2024

JAMES NGUGI NJONGE----------1ST APPELLANT STANLEY GACHII MWANGI----------2ND APPELLENT

VERSUS

JOHN VENGE KINGOO----------RESPONDENT

(Being an appeal from the judgement of Honorable E. Cherop (Adjudicator) delivered on 23rd April 2024 vide, Small Claims Civil Case No. E23 of 2024).

JUDGMENT

1. By a statement of claim dated 20th November 2023, the claimants sued the respondents namely; Gabriel Ngaruiya Gatehi, Philomena Odhaimbao, John Venga Kingoo and Philemon Aroto Odhiambo seeking for judgement against the respondents for: -

    a) *Kshs. 380,480 costs of repair/restitution*

b) *Kshs. 294,000 loss of user/income*

c) *Special damages Kshs 43,550,*

d) *Costs of the claim and interest of the above prayers at 12% per annum from date of filing the suit.*

e) *Any other remedy that the court may deem fit to grant*

2. The claimants pleaded that they are the registered owners of motor vehicle KCH 835L Toyota Hiace Matatu (hereinafter "subject vehicle") while the respondents are jointly and/or severally the lawful, beneficial and/or registered owners of motor vehicle registration number KAV 997U Toyota Corolla

3. That on or about the 17th day of December 2022, the subject vehicle was being lawfully driven along the Naivasha — Nairobi Highway and t Ihindu area the respondents vehicle was carelessly, negligently, and/or recklessly driven and/or controlled causing it to violently collide with the subject vehicle.

4. The particulars of negligence and/or recklessness attributed to are outlined as; driving at inordinate, excessive and/or unreasonable speed, and/or haste in the circumstances of the case.
5. The claimants also rely on the doctrine of res ipsa loquitor, rule of the road, waiver and/or estopped in support of their case.
6. It is averred that as a result of the accident, the claimants' vehicle was extensively damaged on the following parts: -

    a) *Front Windscreen Glass;*

    b) *Nose Cut;*

    c) *RH Door Assy;*

    d) *RH Tyre Busted and Pipe Damaged.*

7. That as a consequence of the damage, the claimants suffered loss and damage and hold the respondents jointly, severally, primarily and/or vicariously liable.

8. However, the claim was opposed by the 2nd, 3rd and 4th respondents vide a response to statement of claim dated 14th February 2024. They denied being the registered and/or beneficial owners of the vehicle KCA 997U Toyota Corolla, the occurrence of the accident as alleged. The particulars of negligence, loss, damages and expenses incurred by the claimants and attributed to them and/or their driver was denied.
9. However, the respondents pleaded that in the alternative and on a without prejudice basis, if the accident occurred then it was solely caused and/or contributed to by the owner and/or the driver of the subject vehicle KCH 835K Toyota Hiace.
10. The particulars of negligence tabulated to the driver of vehicle KCH 835K Toyota Hiace are as follows: -
    a) *Failure to keep to his lane thus encroaching on the lawful path of a motor vehicle registration*

KAV 997U Toyota Corolla as required by the Highway Code.

b) *Driving a defective motor vehicle.*

c) *Negligently and recklessly causing motor vehicle KCH 835K Toyota Hiace Matatu to loss control and ram on Motor Vehicle registration KAV 997U Toyota Corolla.*

d) *Driving absent mindedly without paying attention to road traffic rules and regulations as espoused under the Traffic Act CAP 403 and the High Way Code.*

e) *Overtaking without due regard to the safety of other road users.*

f) *Driving at unreasonable and excessive speed.*

g) *Being negligent and reckless generally*

h) *Failing to swerve, control and manage his motor vehicle in any manner what so ever to avert an accident.*

11. The respondents further aver that, if the accident occurred as alleged, then it occurred without any negligence of their part and/or was inevitable.
12. On 20th February 2024, the claimants, through there advocate on record, Mr. Njuguna, withdrew the claim against the 1st respondent.
13. Be that as it may, the case proceeded to full hearing. The claimants' case was supported by the evidence of (CW1) No. 96714 PC Josephat Makau who confirmed the occurrence of the accident and produced the police abstract as pexh.4. The witness stated that the accident occurred when vehicle KAV 997U left its lane and hit the matatu. That the OB indicates that the results of investigation that that vehicle was to blame.
14. (CW2) James Ngugi Njonge, relied on the statement filed alongside the claim. He averred that the respondent's vehicle was overtaking and went to his lane causing the accident. That he tried to swerve

to avoid the accident but his vehicle was hit on the right. He stated that the vehicle would generally operate unless it was off for service and that the income generated is Kshs 9,800 per day after deduction of expenses. That it took a month to repair the vehicle.

15. The respondents' case was supported by the evidence of (RW1) Philemon Aroto Odhaimbo who relied on his witness statement where he averred that on 16th December 2022 she borrowed the subject vehicle from John Venge for purposes to travel to Homa Bay the following day for a family event.

16. That she left Nairobi for Homa Bay along Nairobi/Nakuru Highway driving at 50km/per hour and when he reached Ihindu area he noticed an oncoming matatu that had encroached on his lane while overtaking a slow-moving vehicle that was in front of it.

17. That he attempted to brake and swerve but it was too late resulting into a collision, and the vehicle was hit on the front passenger side pushing it to the side and he sustained injuries and was taken to hospital.
18. RW1 averred that he did not record a statement neither was he questioned by the investigating officer. However, one “John” issued him with court summons but when he attended court he was informed that there was no record of his case. That he has never been summoned in a traffic case. He blamed the driver of the matatu for causing the accident.
19. The respondents’ case was further supported by the evidence of RW2 John Venge Kingoo who adopted his witness statement. He admitted to being the beneficial owner of motor vehicle registration No. KAV 997U Toyota Corolla for personal use.

20. That on 16th December 2022, his friend Philemon Aroto borrowed the subject vehicle so he could travel to Homa Bay for a family event. That he occasionally assisted him with the vehicle and has never been involved in an accident. However, on 17th December 2024, Philemon's sister; Marceline Awour, informed him that they had been involved in accident along the Nairobi Nakuru Highway.
21. That the following day he visited Philemon at Naivasha District Hospital and went to view the vehicle at the Police station. That Philemon explained to him the circumstances under which the accident occurred and blamed the driver of the subject vehicle for causing the accident.
22. At the conclusion of the hearing, the parties filed their final submission. By a judgment the dated 23rd April 2024, the court found the 4th respondent liable for causing the accident. However, the 3rd respondent who is owner of vehicle registration KAV

997U was not held liable. The judgment was entered against the 4th respondent as follows: -

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

b) *Special damages ---------- Kshs. 424,030*

c) *Loss of user ---------- Kshs. 205,800*

Total ---------- Kshs. 629,830

d) *Costs and interest for special damages thereon from date of filing till payment in full.*

23. However, the claimants are aggrieved by the decision of the trial court and appeals against it on the following grounds:

a) *That the learned Trial Magistrate/Adjudicator erred in law by not properly, dutifully and or as expected of her considering/analyzing the evidence on record and the applicable principles*

of law in regard to liability and thereby arriving at a wrong finding.

b) That the learned Trial Magistrate/Adjudicator erred in law by dismissing the appellants (then claimants) claim against the 3rd respondent therein (now the respondent).

c) That the learned trial Magistrate/Adjudicator erred in law by holding that the respondent herein (then the 3" respondent) was not vicariously or otherwise liable for the accident subject of this case.

24. The appeal was disposed of vide filing of submissions. The appellants in submissions dated 25th November 2024 argued that the learned Adjudicator erred in holding that the respondent was not vicariously liable for the accident on the ground that he had lent his vehicle to his friend to attend a family event which was not on his behalf or to his benefit.

25. The appellants argued that vicarious liability does not solely arise in cases where the driver is driving a vehicle for the benefit and/or on behalf of the owner but extends to situations where the vehicle is being used for something the owner has an interest in either alone or jointly with the driver as held in the case of; *Bachu V Wainaina & Another [1977-1985] EA 29.*

26. The appellants further relies on the English case of *Omrod & Another vs Crossville Motor Services Ltd & Another (1953) 2AER 753 CA* where Denning LJ held that the owner of a vehicle can only escape liability where he lends or hires the vehicle to a third party to use for purposes in which the owners has no interest or concern.

27. The appellants argued that friends the 4th respondent's friend have an interest and concern about each other family relations, their journey, participation and attendance of family

matters/functions and was the reason why the respondent lent out his vehicle. That in the circumstances, the appellants urged the court to hold the respondent being vicariously liable for the negligence of the 4th respondent in the trial court.

28. Further, that the court allows the appeal with costs as costs follow the event as provided for under section 27 of the Civil Procedure Act.

29. The respondent in submissions dated 18th November 2024, argued that the claim against him in the trial court was specifically on vicarious liability as the registered owner of motor vehicle registration No. KAV 997U. That pursuant to section 107 of the Evidence Act, the appellants had the burden to prove their claim by documentary of oral evidence that the respondent was vicariously liable.

30. That it was not enough for the appellants to plead that he was the registered owner but they had the onus to prove that the 4th respondent in the lower

court was using the said vehicle for the respondents' benefit. The respondent relied on the case of; *Vincent Okello vs Attorney General [1995] III KALR 129* as cited in the case of *Joseph Wabukho Mbayi vs. Frida Lwile Onvango [2019] eKLR* that for the respondent to rely on the principles of vicarious liability he had to prove the driver of the vehicle at the time of the accident was in the employment of the appellant.

31. The respondent further relied on the case of; Onesmus Kinyua *Muchudu v Mishi Kambi Charo & another [2021] eKLR* where the High Court cited the case of; *Bachu v Wainaina (CA No. 14 of 1976 Nakuru Automobile House Ltd v Zavdin CA 63 of 1986)* where it was held that to establish agency relationship it was required to show that the driver was using the car at the request of the owner either expressly or implied and was doing so in

performance of a task or duty delegated to him by the owner.

32. The respondent argued that evidence before the trial court was that the 4th respondent borrowed the respondent's car to attend a funeral at his rural home and which had no connections to the respondent herein. Thus the trial court rightfully discharged the claim against the respondent and in the circumstances, the court ought not to interfere with the impugned judgment and ought to dismiss the appeal with costs.

33. 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.

34. 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."

35. To revert back to the claim herein, the main issue is whether the trial court erred by holding that the respondent was not vicariously liable.

36. In dealing with the issue the trial court stated at paragraph 19 of the judgment:

"the 3rd Respondent confirmed that he had lent the 4th Respondent the suit vehicle. On board, the 4th Respondent was carrying his sister and 2 daughters. Though the vehicle was on the road with the 3rd Respondent authority, there is no indication that the vehicle was being used for his benefit or that he had instructed the 4th Respondent to perform any task on his behalf to establish principal/agent relationship".

37. It suffices to note that the doctrine of vicarious liability is a legal doctrine under which one party is held liable for the tortious acts of another, even if

the first party was not directly at fault. This is most common in the employer-employee relationship, where an employer is held responsible for wrongs committed by an employee during the "course of employment".

38. To establish vicarious liability, courts typically apply a two-stage test: stage 1: The relationship between the defendant and the wrongdoer must be one of employment or "akin to employment". Stage 2: Control Test: focuses on who has the right to control how the work is done and Integration Test: Asks if the work is an integral part of the business organization

39. In the case of; *Amalgamated Logistics International Ltd & another v MMK (2020) eKLR* the Court of Appeal stated as follows: -

> *“Vicarious liability has been well elucidated in Salmond on Torts, 1st edition at Page 83 as;*

"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master."

This Court in Joseph Cosmas Khayigila vs Gigi & Co. Ltd & Another, Civil Appeal No. 119 of 1986 established a clear test for vicarious liability as follows: -

"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was 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 the task or duty thereby delegated to him by the owner."

40. Similarly, in the case of; *Securicor Kenya Ltd v Kyumba Holdings Ltd (2005) eKLR,* the Court of Appeal stated that: -

"What is Vicarious Liability? Winfield and Jolowicz on Tort, 14th Edition says: -

"The doctrine may be stated as follows: - Where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A WILL BE VICARIOUSLY LIABLE FOR B's NEGLIGENCE IN THE *OPERATION OF THE VEHICLE. Thus in ORMROD VS. CROSSVILLE MOTOR SERVICES LTD. A, the*

owner of a car, asked B to drive the car from Birkenhead to Monte Carlo, where they were to start a holiday together. It was held that A was liable for B's negligent driving even though B might be said to be partly pursuing his own interests in driving A's car. On the other hand, liability was not imposed in MORGANS VS. LAUNCHBURY (72) where the husband, who normally used his wife's car to go to work, got a third person to drive him home after visits to several public houses. In no sense was the husband acting as his wife's agent in using the car for his work and still less was the third person her agent. It is now clear that mere permission to drive without any interest or concern of the owner in the driving does not make the owner vicariously liable, nor is there any doctrine of the "family car". Where, however, the facts of the relationship between

owner and driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner's agent." (71: [1953] 1 W.L.R. 1120 72: [1972] A.C. 127)"

41. Pursuant to the aforesaid, for the respondent herein to have been held liable, the appellant needed to prove that the 4th respondent caused the accident when undertaking a task or duty on behalf or for the benefit of the 3rd respondent. There is no evidence to that effect.

42. But even more so, the claimants at paragraph 4 of the claim do not plead that the 3rd respondent was being under the doctrine of vicarious liability and neither has it be pleaded anywhere else in the claim.

43. The claimants pleaded the said paragraph as follows:

"At all material times to this suit, the Respondents herein was/were jointly and or

severally the Lawful, Beneficial and or Registered Owners(s) and or User(s) of motor vehicle registration number KAV-997U TOYOTA COROLLA (Hereinafter called "The said motor vehicle herein") which was being driven by either one of the Respondents and or any other Lawful/authorized/designated driver thereof who was their agent, servant, employee and or otherwise be it jointly and/or severally"

44. Consequently, the 3rd respondent can be held liable on a claim that is not pleaded. I entirely associate with the sentiments in the afore case of; *Ormrod Vs. Crossville Motor Services Ltd.* (supra) that mere permission to drive a vehicle when the driver is on a frolic of their own does not make the owner of the vehicle vicariously liable.

45. In any case the appellants have a judgment and being a third party they can enforce it against the

insurer of the vehicle if there was a valid insurance cover.

46. As such, I find that, the trial court arrived at the correct and proper decision when it dismissed the claimant's case against the 3rd respondent and I consequently dismiss the appeal with costs to the respondent.

47. It is so ordered.

Dated, delivered and signed on this 4th day of March 2026

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Kurere HB for Njuguna for the Appellant

Mr. Muthui HB Mr. Mureithi for the respondent

Hannah: Court Assistant.