

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. E103 OF 2023

**BLOOTEX LIMITED
APPELLANT**

VERSUS

**MWENDE MUYANGA.....1ST
RESPONDENT**

**THE HON. ATTORNEY GENERAL 2ND
RESPONDENT**

**EAST AFRICAN ENGINEERING CONSULTANTS LTD
.....3RD**

RESPONDENT

**G.A CONSULTANTS LIMITED.....4TH
RESPONDENT**

**SOBOCON ASSOCIATES LIMITED.....5TH
RESPONDENT**

JUDGEMENT

1. This appeal arises from the proceedings and Judgment in the Chief Magistrate's Court at Kitui Civil Case No.

192/2018. It is based on the following grounds which are pleaded on the Memorandum of Appeal dated 13/12/2023:

- (1) The learned magistrate gravely erred in law and fact by failing to appreciate sufficient or at all that the 1st respondent failed to prove by cogent evidence her involvement in the accident nor the alleged injuries suffered to the required standard or at all and thereby arrived at wrong conclusions contrary to the weight of evidence on record.**
- (2) The learned magistrate erred in law and fact by awarding excessive general damages contrary to law and fact and that is grossly unjust.**
- (3) The learned magistrate erred in fact and in law by failing to appreciate sufficiently or at all the evidence on record on the nature and salient features of the contract between the appellant and the Principal Secretary, Ministry of Land, Housing and Urban Development State Department of Housing**

and Urban Development herein represented by the 2nd respondent and thereby arrived at grossly wrong concussions and findings with regards to:

(a) Actual and beneficial ownership of the suit motor vehicle

(b) Employer of the driver of the suit motor vehicle

(c) The appellants claim to indemnity

(4) The learned magistrate gravely erred in fact by finding that the appellant failed to call the evidence of the driver when in fact, the said driver was not the employee of the appellant nor known to the appellant.

(5) The learned magistrate erred in law and fact by placing reliance on documents which did not form part of the contract between the appellant and the 1st respondent and in a manner prejudicial to the appellant and thereby arrived at wrong conclusion and findings with respect to the contractual

relationship between the appellant and the 2nd respondent and the appellant's claim to indemnify.

(6) The learned magistrate gravely erred in law by failing to appreciate sufficiently or at all relevant, applicable and binding case law and statute that were cited and placed before him and thereby reached wrong conclusions on the twin issues of actual and beneficial ownership of the suit motor vehicle and proof of the alleged injuries suffered by the plaintiff.

(7) The learned magistrate erred in law and fact by failing to appreciate sufficiently or at all that the 3rd, 4th & 5th respondents were employees and/or agents of the 2nd respondent and not the appellant leading to wrong findings on the question of liability and indemnity.

2. The appellant prays that the appeal be allowed. That the respondent's suit be dismissed with costs. That there be a declaration that:

(a) The suit motor vehicle was at all material times beneficiary owned and in actual and exclusive possession and control of the Principal Secretary Ministry of Lands, Housing and Urban Development State Department of Housing and Urban Development herein represented by the 2nd respondent and or its agents and or 3rd, 4th & 5th respondents.

(b) The registration of the suit motor vehicle in the name of the appellant was merely facilitative of the contract and did not confer actual nor beneficial ownership thereof upon the appellant.

(c) The driver of the suit motor vehicle was at all material times an employee of 2nd , 3rd, 4th & 5th respondents.

(d) That the appellant is by contract entitled to indemnity from 2nd, 3rd, 4th & 5th respondents, jointly and severally for any tortious liability

accruing from acts of the driven of the suit motor vehicle.

Background of the Appeal

3. The 1st respondent who was the plaintiff in the Lower Court now the 1st respondent in this appeal had instituted a suit in the Lower Court vide a plaint dated 2/5/2018 seeking general and special damages plus interest and cost as a result of injuries she sustained in a road accident which occurred on or about 20/10/2017. The 1st respondent had averred that she was traveling as a passenger on board of a motor vehicle registration number KCM 297J along Kitui-Machakos road when the said motor vehicle was so negligently driven and or carelessly managed or controlled that it lost control, veered off the road and crashed into a building. As a result of the said accident the 1st respondent sustained severe bodily injuries which were as follows:

- (a) Fractured pubic symphysis at the left pelvic.
- (b) Fracture of the pubic brim.
- (c) Laceration on the left lower limb

4. The 1st respondent had also alleged that she incurred some expenses which she claimed as special damages as follows:

(a) Motor vehicle search - Kshs. 500/=

(b) Medical Report Kshs. 5,000/=

5. The 1st respondent had sued Blootex Limited, the appellant herein. In its defence the appellant admitted that it was registered as the owner of the motor vehicle registration number KCM 279J Nissan Double Cabin. He further admitted the occurrence of the accident on 20/10/2017 but denied that the 1st respondent was a fare paying passenger in the said motor vehicle or that the vehicle was being driven by the appellant's driver, agent or employee. The appellant further denied negligence and the manner in which the accident was alleged to have occurred.

6. The appellant further contended that he was a contractor who was doing construction work in Kitui Town a Ministry of Transport, Infrastructure Housing and Urban Development project pursuant to a contract agreement dated 8/ 09/2016. That:

- (i) It was a term of the contract under Clause 17.1 inter-alia that:

“The Employer shall indemnify and hold harmless the contractor, the contractor’s personnel and their respective agents, against and from all claims, damages losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, willful act or breach of the contract by the Employer, the Employer’s personnel or any of their respective agents and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of sub-clause 18.3 [Insurance against injury to persons and Damage to Property]”

- (ii) Under Resident Engineer’s Vehicle, Clause 1.13 of the Bills of Quantities as subsequently amended stipulated that the contractor shall:

“Provides 1 No. brand new 4 WD Double Cabin Pick-Up vehicle for use by the Assistant Resident Engineer, Surveyor and Material Engineer as directed

by the Resident Engineer...The vehicle is to revert to the client at the end of the project after reconditioning, inspection and approval by the Government Chief Mechanical Engineer. The vehicle is subject to approval by the Resident Engineer.”

- (iii) By a letter dated 2nd November 2016, Peris Mang’ira (Mrs) KISIP National Co-Ordinator in the Ministry of Transport, Infrastructure Housing and Urban Development duly appointed East African Consulting Engineers Limited in joint venture with G.A Consultants Limited and in sub-consultancy with Sobocon Associates Limited as the Project Resident Engineer.”
- (iv) In conformity with the terms of the contract already referred to herein above, Blootex Limited, the contractor purchased a brand new 4WD Double Cabin Pick-up registration number KCM 297J and formally handed the same over to the Resident Engineer on 3rd August 2017 for use as aforesaid.
- (v) On 20th October 2017, the aforesaid project vehicle registration number KCB 297J was, while in the

exclusive use, control contractor and authorized agent of the Resident Engineer, an independent contractor and authorized agent of the employer involved in an accident at Mulu Centre some 15 km from Kitui Town causing injuries to the following:

- (a) Judy Ngina - fatal
- (b) Mark Mboti - fatal
- (c) Kitnga Wambua
- (d) Serah Kitonga
- (e) Joseph Kitonga
- (f) Felistus Mwende

7. The appellant averred that as per the said agreement it provided the required motor vehicle which was later involved in an accident on 20/10/2017 where two people died and four others were injured. The appellant sought to rely on the indemnity clause in the contract and the amended bill of quantities to pass the blame and liability arising from the said accident to the Ministry that had issued it the contract claiming that at the time of the accident the vehicle was under the exclusive use of the Resident Engineer who was an agent of the Ministry.

8. The appellant issued a 3rd party notice dated 24/8/2018 to the Ministry and the Resident Engineer which was further issued vide an order of the court dated 22/8/2018 whereby he claimed 100% indemnity and or contribution. The 1st Third Party filed a statement of defence and denied the allegations by the appellant and the allegations in the plaint, and the 3rd party notice in its entirety.
9. The pleadings closed and the matter was set down n for hearing. This suit was treated as a test suit on liability. The 1st respondent testified that she was given a lift in the said motor vehicle by the driver to go to Kitui. It was on 20/10/2017 as per her witness statement. On the way at a place called Wayani the vehicle lost control, veered of the road and crashed into a church building and she sustained severe bodily injuries. she was treated at Neema Hospital where she was admitted until the second day when she was discharged. She then went to Kitui Police Station where she reported the matte rand she recorded a statement and was issued with a P3 form.
10. The 3rd witness for the 3rd Party Shadrack Yogo testified that he was the supervisor of the project. The

contractor was to provide the project. The contractor was to provide the project motor vehicle and also the driver as per the specifications of the contract. He was also supposed to insure the motor vehicle and insure it. He was also supposed to maintain the motor vehicle during the contract period and one month after the handover of the project.

11. That the driver was not an employee of the government. That the vehicle was ferrying construction material from Nairobi when it was involved in the accident. The witness stated that the employer was supposed to identify the contractor if there was negligence on the side of the employer. He was not an agent of the Ministry of Transport but an agent of 2nd, 3rd & 4th third parties who are agents of the Ministry of the Office of Resident Engineer. He told the Court that the driver of the motor vehicle was an employee of the contractor.

12. The learned magistrate heard the matter and with respect to the issue of Liability held that the defendant was the undisputed registered owner of the motor vehicle at the time of the accident. That it could be discerned from

the copy of the records that was produced in evidence. That it was also not in dispute that the defendant had taken out an insurance cover for the said motor vehicle. That under the contract the defendant was supposed to provide a vehicle and a competent driver for use by the resident Engineer. That the defendant provided the motor vehicle which was involved in the accident. The defendant used to pay the driver of the said motor vehicle and therefore the driver was an employee of the defendant.

13. That there was no evidence to rebut the presumption. He therefore held that the defendant was the owner of the accident motor vehicle and the employer of the driver thereof. That no liability attached against the 3rd parties. The learned magistrate held that the appellant was 100% liable as he did not produce any evidence to prove contributory negligence.

14. He awarded the plaintiff Kshs. 1,500,000/= as general damages for pain and suffering and special damages of Kshs. 5,500/=. The appellant was dissatisfied with the Judgment of the learned magistrate on liability

and filed this appeal. The appeal was canvassed by way of written submissions. I have considered the submissions.

Appellants Submissions

15. The appellant submits that the appeal is premised on seven grounds of appeal and has collapsed them into issues which he has urged this court to determine. The first issue argued is:

Whether the 1st respondent proved her alleged injuries to the required standard

The appellant submits that they had in their defence denied that the 1st respondent sustained the injuries pleaded, to wit, fractured of pelvic symphysis at the left pelvic fracture of the public bum and laceration on the left lower limb and invited strict proof of the same. That the defendant served a notice to produce dated 11/12/2019 and sought production of the undernoted documents by the 1st respondent to help verify the authenticity of the alleged injuries -

- (i) Discharge summary from Kitui District Hospital
- (ii) Original X-ray films
- (iii) Original X-ray report

(iv) Documentary proof of any connection between the 1st respondent (Mwende Muyanga) and Felistas Mwende whose name appears on the documents at page 73 of the record.

16. That the 1st respondent did not produce the documents. That on 15/11/2022, the trial court directed the 1st respondent to undergo second medical examination but she refused to comply with the order. He relies on **Section 112 of the Evidence Act, Cap 80 Laws of Kenya:**

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing or disapproving that fact is upon him.”

17. The appellant further relies on **Sir John Woodlife & Syect Amir Ali’s law of evidence 18th Edition** discussing similar provision on the Indian evidence Act at page 4471 and state that:

“In the administration of Justice, it is desirable that the burden of producing evidence be

placed on the party best able to sustain it and there is authority for the view that the burden of evidence as to an issue rests on the party having the greater means of knowledge. A narrower formulation is that where the evidence as to an issue is peculiarly within the knowledge or control of a party the burden of the evidence as to such an issue rests on him.

....The section applies to those matters, which are supposed to be especially within the knowledge of a party and are not capable of being known to the other.”

18. That since the fact of the alleged injuries was especially within the knowledge of the 1st respondent and not capable of being known to the appellant, she had the burden of providing the documents listed in the notice that was served upon her. That the documents were critical in establishing the veracity and/or authenticity of the alleged injuries noting that:

- (1) The 1st respondent refused treatment at the Neema Hospital where she was first taken and requested to be discharged and was so discharged on painkillers.
- (2) The x-ray request form on page 18 of the record does not contain a report of the findings.
- (3) The medical report by Doctor Calvin Achieng date 6/3/2018 has reference document as P3 form and medical notes from Neema Hospital yet the first respondent had declined treatment at the said hospital it was prepared without critical documents to support the alleged injuries. (Page 21 of the record).

19. That given this background the 1st respondent it cannot be held that she proved the injuries to the required standards or at all. He relies on **Lucy Nyambura Gitanga -vs- Viraj Properties & Another (2021) eKLR** where the court held that failure to produce evidence which is in one's knowledge may lead to an adverse inference that had the evidence been produced it would be adverse to such a party. In **Kimotho -vs- KCB (2003) I.E.A 108** the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

20. The appellant urges the court to draw such inference against the 1st respondent. It is further submitted that a second medical report is a statutory imperative and failure to submit to a medical report is prejudicial under **Section 10(3A)** of the Insurance (Motor Vehicle Third Party Risks) Act. He submits that the learned trial magistrate erred when he awarded general damages for pain and suffering in respect of injuries that were not proved to the required standards. The appellant further contends that the learned magistrate erred in law and fact by awarding excessive general damages. That the award of Kshs. 1,500,000/= was excessive.

21. The 1st respondent in response to the submissions by the appellant contends that the issues which arise for determination are:

(1) whether the 1st respondent proved her claim for damages the required standards.

(2) Whether the appellant was liable to compensate the 1st respondent.

22. The duty of this court as the first appellate court is well settled by a line of authorities from this court and the

Court of Appeal. In James Odera T/A Odera & Associates -vs- John Patrick Machira & Company Advocates (2013) eKLR, the Court of Appeal stated that:

“This being a first appeal we are reminded of our primary role as a 1st appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the learned trial Judge are to stand or not and give reasons either way.”

23. In *Selle -vs- Associated Motor boad Company Limited* (1968) EA 123 it was held that the first appellate court has a duty to evaluate the evidence in the court below and come up with its own independent finding. The court further stated:

“...in particular, 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 into account of a particular circumstances or probabilities materially to estimate the evidence or the

impression based on demeanor of a witness is in consistent with the case generally.”

24. In essence the first appeal is in the nature of a retrial with a rider that the court does not have the benefit of seeing the witnesses and must leave room for that. This is buttressed under **Section 78** of the **Civil Procedure Act (Cap 21 Laws of Kenya)** which provides:

Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a)to determine a case finally;

(b)to remand a case;

(c)to frame issues and refer them for trial;

(d)to take additional evidence or to require the evidence to be taken;

(e)to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of

original jurisdiction in respect of suits instituted therein.”

25. See also Kamal **Jamal Mursal & Another -vs- Evelyne Nthangu Manase & Another**. I will proceed to consider the issues:

(1) Whether the respondent was entitled to damages

The appellant urges the court to determine whether the respondent proved her alleged injuries to the required standard. The contention is based on the grounds that a notice to produce date 11/12/2019 was served on the first appellant asking her to produce the following documents:

(a) Discharge summary from Kitui District Hospital.

(b) Original x-ray films

(c) Original x-ray report.

(d) Documentary proof of any connection between the first respondent (Mwende Muyanga) and Felistas Mwende whose name appears on the documents. (page 73 of the record).

26. I note that the notice was served on the 1st respondent under Section 69 of the Evidence Act. The

appellant contends that the 1st respondent did not comply with the notice to produce. The appellant list of documents includes among others discharge summary from Neema Hospital and Radiological request from Kitui Hospital. The Discharge Summary is for Felistus Mwende age 21 years. It shows some x-rays were to be done on skull, chest but the patient declined according to the discharge summary. The treatment notes from Kitui County Hospital is for Felistas Mwende aged 23. The P3 Form was issued for Mwende Muyanga aged 31 years filled on 6/3/2018. He injuries observed were fractured pubic symphysis at the left pelvic, fracture pubic brim and laceration on left lower lim.

27. When she gave evidence in court she gave her name as Mwende Muyanga Felistus and she produced her bundles of documents upon being cross-examined she gave her name as Mwende Muyanga. On cross-examination she said she was x-rayed on the leg. This contradicts the discharge summary which states that she declined the x-ray. She did not produce any x-ray. She did not produce any x-ray films. The Doctor PW2 testified that he saw an x-ray film. The complainant said she is Mwende

Mayanga and was 31 years old. Form the foregoing, the 1st respondent did not comply with notice to produce.

28. The appellant submits that the 1st respondent was served with notice to produce the documents but she did not comply. The issue then is, what are the consequences of failing to comply with notice to produce the documents. Under **Section 112** of the **Evidence Act** the 1st appellant had the burden to prove the injuries she sustained as that would be relied on to determine the quantum of damages.

29. The 1st respondent failed to produce the documents listed on the notice to produce. She also failed to o for a second medical examination. The 1st appellant had the burden to produce the documents which could aid the court in the determination of the case. This burden is placed on the party who has greater means of knowledge. The Section implies that those matters which are supposed to be within the knowledge of a party are not capable of being known to the other party. It is the 1st respondent who had the exclusive knowledge of the injuries she sustained and the treatment that she received.

30. The 1st respondent had the legal burden to prove the injuries that she sustained and the treatment given.

Section 107 of the **Evidence Act** provides that:

“Whoever desires any court to give Judgment as to any legal right or liability defendant on the existence of facts which he asserts must prove that those facts exists.”

31. This is the legal burden which rests on a party who alleges and the burden never shifts. The legal burden of proof forms the basis upon which a matter is determined. Cases are determined on the legal burden of proof having discharged or not. The decision of the court will depend on whether a party alleging the existence of certain facts which are within his/her knowledge has discharged the burden of proof imposed on him. The burden is discharged once a party has proved the existence of those facts which he alleges.

32. The 1st respondent disregarded the matters raised by the appellant as he did not comply with the notice to produce. I also note that her submissions are silent on the

issue which the appellant that she did not prove that she sustained the injuries. the evidence I have analyzed above shows that the 1st respondents evidence was contradictory.

33. There was no proof that x-rays were taken to prove the allegation that she had sustained fractures. She did not prove that she is Felistus Mwende. I find that the evidence relied on by the 1st respondent was contradictory, see her evidence and that of the doctor. The learned trial magistrate did not consider whether the 1st respondent has sustained the injuries pleaded. He did not consider whether the 1st respondent had proved that she is the one who sustained the injuries as she did not prove that she is called 'Felistus' which appeared on the treatment notes. See **Lucy Nyabura Gitonga -vs- Viraj Properties & Another (2021) eKLR (supra).**

34. The 2nd respondent failed to present herself for a second medical report. Where a person fails to present herself for examination, the Insurance is not obliged to settle her claim. **Section 10 3A** of the Insurance **(Motor Vehicle Third Party Risk) Act** provides:

“No Judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.”

35. The 1st respondent did not explain why she did not go for second medical examination. This goes further to weaken her case. Though she had the burden to prove her cases on a balance of probabilities, it is well settled that she has establish that what she alleges is probable. I find that this burden is not discharged to the required standard.

36. Indeed, the 1st respondent also pointed out that the first respondent did not prove that she sustained fractures as she never produced the x-rays and the doctor admitted that he was approached by the lawyer to compile the medical report without relying on x-ray. That the 1st respondent was misleading the court when she said she suffered fractures and yet she was only treated with pain killers and no treatment was given for the alleged fractures.

37. As for the 3rd, 4th and 5th respondents they concluded that indeed the burden was on the 1st respondent to prove the degree of the injuries sustained. They concluded the 1st respondent did not discharge this burden as it was not humanly possible that she had sustained those fractures and yet be treated and discharged. It was also the contention by the 3, 4 and 5 respondents that failure by the 1st respondent to produce documents and x-rays as demanded by the appellant left her claim in doubt. That there was a consent by all the parties that the 1st respondent presents herself for a second medical report before the hearing on 27/04/2021 which she never did without giving any plausible reason. The respondents urged the courts to find that her claim was frivolous, untenable and the award erroneous and manifestly on the higher side.

38. The 1st respondent was supposed to prove her claim on a balance of probabilities. She was supposed to adduce a preponderance of evidence pointing to proof that indeed she suffered fractures. Balance of probability does not mean unsubstantiated allegations, it calls on the party to present

evidence which the court can rely on to say, yes it is provable. The burden of proof in court cases requires a party to produce evidence to establish the truth of the facts needed to satisfy all the required legal elements of the dispute.

39. The 1st respondent claimed that she sustained fracture. The nature of injuries which was fractures are internal injuries which are in most cases proved through x-rays.

The relevance by the 1st respondent to prove her injuries with x-rays and the improvised doctor's evidence who filled a medical report without x-rays leaves the court with no option but to hold that there was no material evidence sufficient for the court to hold that she sustained fractures as alleged.

The other issue raised is whether the 1st respondent and the other claimants were Authorised passengers in the motor vehicle KCM 297J. the attorney general, who is the 2nd respondent raised this issue in its submission and stated as follows:

“15. Clause 1.13 of the bill of Quantities as amended stipulated that the contractor shall:

‘Provide 1 No. brand new 4WD Double Cabin Pick Up vehicle for use by the Assistant Resident engineer, Surveyor and material Engineer as directed by the resident Engineer... the vehicle is to revert to the client at the end of the project after reconditioning, inspection and approval by the Government Chief Mechanical Engineer. The vehicle is subject to approval by the Resident Engineer.’”

16. Also clause 138 of the Standard Specification for Road and Bridge Construction issued by the Ministry as part of the Contract dated 8th September 2016 (See document number 5 in the 3rd and 4th third party’s list of documents) expressly provided that the contractor shall do the following:-

a) Supply new vehicles and maintain them for the exclusive use of the Engineer and his staff, for any purpose whatsoever authorized by the Engineer.

b) The vehicle shall be owned by the Contractor and be licensed and comprehensively insured by the Contractor for use within Kenya by an licensed driver authorized by the Engineer

together with Authorized passengers and the carriage of goods and passengers.

c) The contractor shall provide a similar replacement for any vehicle out of service for more than twenty-four hours and shall replace any vehicle by a similar new vehicle after it has completed 150,000km.

d) the Contractor shall provide, pay including all overtime and night allowances, and house competent and licensed drivers approved by the Engineer for each of the vehicles indicated in the special specification. Sufficient drivers shall be available at night and weekends whenever required by the Engineer.

17. It is evident from the aforementioned bill of quantities as amended and the standard Specification for Road and Bridge Construction issued by the Ministry that the vehicle provided by the Contractor was for the exclusive use of the Resident Engineer while carrying out project works.

18. The plaintiff confirmed in her testimony to this Honorable Court that they were not staff of the Resident Engineer or the Ministry and also that she knew the said motor vehicle was not a public service vehicle while illegally boarding the same. This therefore means that the

plaintiff was not an authorized passenger in the said project vehicle at the time of the alleged accident.

40. So as between the appellant and the 2nd respondent the motor vehicle KCM 297J was to be used by the contractor and be licensed and comprehensively insured by the contractor for use by the licensed driver and Authorised by the engineer, together with Authorised passengers and the carriage of goods and passengers. The 1st respondent confirmed that she was not a staff of the appellant and that the motor vehicle was not a public vehicle. The first respondent admitted that she was offered a lift in the said motor vehicle and she accepted. The driver did not ask her money (fare) she also admitted that the vehicle was not a public service vehicle (PSV) this brings the doctrine of '*violati non fit injuma*' which holds that is voluntary assumption of risk where the doctrine is invoked, it must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice and famine freedom of choice before the defense can be raised against him. It must be proved the claimant

was in a position to cause freely, have full knowledge of the circumstances on which the exercise of choice is conditioned and is able choose wisely without any hindrance to his exercise of that freedom of his own free will. The claimant must be aware of the risk, its nature and extent for the doctrine to apply see the case of **Smith versus Baker.** Quoted with approval in **United Millers Ltd & Another -vs- John Magollo Njogu (2016) eKLR,** it was held that, I take the view that a person who asks for a lift like in the present case cannot be said to have consented to negligence. In my view the driver owed him a duty of care the moment he agreed to give him a lift and the defense of voluntary assumption of use cannot apply.

41. I am persuaded by this decision as it has stated the correct position on the duty of care of the driver who offers a person a lift in his motor vehicle. He was the person a duty of care. The driver was an agent of his employer and when he offers to carry a person in the vehicle which is in his control he gives the person a duty of care and the owner is vicariously liable for the actions of his driver. The

doctrine of 'vicarious' Liability in tort imposes liability on the employers for the wrong doings of their employees.

42. It is a doctrine that holds that an employer will be held liable for torts committed while an employee is performing his duties. In this case the driver was an employee of the owner of the said motor vehicle. The owner of the vehicle was vicariously liable and the driver who offered the 1st respondent a lift owed him a duty of care. The employer will only be held liable where the accident occurred during the course of duties of the employee. The driver gave the 1st respondent a lift in the course of his duties. He was snooty on a frolic of his own and therefore he made his employer liable.

43. If find that the 1st respondent was lawfully carried as a passenger in the vehicle, the driver owed him a duty of care and as a result of the accident caused by the driver, the owner of the vehicle, cannot escape liability.

44. Who owned the motor vehicle KCM 297J?

There is no dispute that the agreement between the appellant and the second respondent stipulated that the appellant would provide a brand new 4WD SUV vehicle for

exclusive use by the Resident engineer and would revert to the client at the end of the project. The appellant submits that he was the beneficial owner although the vehicle was registered in his name. the 2nd respondent on the other hand contends that the appellant was the registered owner of the motor vehicle KCM 297J. that the appellant admitted this in his defence and also in the motor vehicle search conducted with the National Transport and Safety Authority and also the Police Abstract obtained after the accident. That the appellant replaced the motor vehicle with another one after the accident. The 2nd, 3rd, 4th & 5th respondent also contend that the appellant admitted ownership of the motor vehicle. I have considered the averments.

45. **Section 8 of the Traffic Act (Cap 403 Laws of Kenya)**

“The person whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle.”

46. Beneficial owner of a motor vehicle is the person or entity who enjoys defector ownership - possessing, using

an controlling the motor vehicle – even if not registered legal owner (Actual ownership and Possession as opposed to formal registration to determine liability.)

47. **Nancy Ayemba Ngana -vs- Abdi Ali (2020) eKLR,**

it was stated:

“There is no doubt that the registration certificate obtained from the Registrar of Motor Vehicles will show the name of the registered owner of the vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons may be defacto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such different ownership to be given and in Judicial Practice Concepts have arisen to describe such alternative forms of

ownership, actual ownership, beneficial ownership and possessory ownership.

A person who enjoys in such alternative forms of ownership may for practical purposes be much more relevant than the person whose name appears in the certificate of registration, and in the instance case at the trial level there was such alternative kind of ownership.”

48. See also **P.N.M & Another (Legal Representative of the Estate of L.M.M -vs- Telkom Kenya Limited & 2 Others (2015) eKLR** where the court held that since the registered owner had sold the vehicle, the 2nd defendant who was the beneficial owner was deemed to be the owner as the vehicle was being used for his benefit. That though the 1st defendant was the registered owner the contrary was proved as provided under **Section 8** of the **Traffic Act**.

49. The Court of Appeal in a binding decision in **Benard Muia Kiloroo -vs- Kenya Fresh Produce Exporters 2020 eKLR** held as follows:

“The presumption that the person registered as owner of the motor vehicle in the log book is the actual owner is rebuttable. That were there exists other compelling evidence to proof otherwise than the court can make a finding of ownership that is different from that contained in the log book. That each case must however, be considered on its own peculiar fact.”

50. In Court of appeal in **Jared Magwara Bundi & another -vs- Prima Rosa Flowers Limited (2018)** **eKLR**, held as follows:

“It was therefore held in Muhambi Koja (supra) that Section 8 of the Traffic Act recognizes registration book or the Registrar’s of the 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 he 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 defacto owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.”

51. There is no dispute that the appellant was the registered owner of the motor vehicle. The appellant had also insured the motor vehicle with Fidelity Insurance since it was the registered owner during the project as provided under Clause 18.3. the witnesses of the third party testified that the motor vehicle was to revert to the Ministry after the handing over of the completed project to the Ministry it was also averred that the appellant replaced the motor vehicle with a brand new one as the vehicle involved in the accident was a total write off.

52. I find that it was proved that the appellant was the registered owner of the said motor vehicle, was the one in possession of the motor vehicle and it was being driven by his employee and was being used for his benefit. There is

no contrary finding in the circumstances of this case. He appellant was the sole owner and liability attaching to the said vehicle during the project period had to be borne by the appellant who was the contractor.

53. I have no reason to fault the finding by the learned magistrate that the appellant bears the liability as he was the registered owner of the accident motor vehicle at the time of the accident. That under the contract the appellant was supposed to provide a specified vehicle for use by the Resident Engineer and that no liability could attach on the third parties. The finding by the learned Magistrate that the defence amounted to mere statements which were not substantiated as the appellant did not call any witness. That the evidence was not controverted. He only relied on the binding decision by the Court of Appeal in **John Wainana Kagwe -vs- Hussein Dairy Limited (2013) eKLR** where the court held that failure to adduce evidence is fatal as the defence remains as mere bone with no flesh in support thereof. The finding by learned magistrate on liability is upheld.

Disposition

54. The appeal partly succeeds. The 1st respondent failed to prove her injuries to the required standards. I find that the award of damages was manifestly excessive and is set aside.

55. I substitute with an award of Kshs. 50,000/= for minor soft tissue injuries for which she was treated and discharged. The appeal on liability fails and is dismissed with costs. The 1st respondent shall not be entitled to the costs of the Appeal.

Dated, signed and delivered at Kitui this 19th day of March, 2026.

**HON. LADY JUSTICE L. GITARI
JUDGE**