



**Masinde v Onyango & 3 others (Civil Appeal E032 of 2024)
[2026] KEHC 4446 (KLR) (31 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E032 OF 2024
JK SERGON, J
MARCH 31, 2026**

BETWEEN

PETER MALOBA MASINDE APPELLANT

AND

STEPHEN ODUOR ONYANGO 1ST RESPONDENT

ALNASHIR HABIB MOHAMED 2ND RESPONDENT

INTRA AFRICA ASSURANCE LIMITED 3RD RESPONDENT

KENNEDY OUMA ONYANGO 4TH RESPONDENT

(An appeal from the Judgment of the Honourable Claire Odunga, Resident Magistrate, delivered on 11th July 2024 in Kericho Chief Magistrate's Court Civil Suit No. E200 of 2021)

JUDGMENT

1. This is an appeal against the judgment of the Honourable Claire Odunga, Resident Magistrate, delivered on 11th July 2024 in Kericho CMCC No. E200 of 2021. In that judgment, the learned magistrate dismissed the suit against the original defendants (now the 2nd and 3rd Respondents in this appeal) and entered judgment jointly and severally against the Appellant (then 1st Third Party) and the 4th Respondent (then 2nd Third Party) for a sum of Kshs. 105,550/- plus costs and interest.
2. The Appellant, being aggrieved by that decision, filed a Memorandum of Appeal dated 25th July 2024 raising six (6) grounds of appeal. Both parties thereafter filed written submissions which this Court has carefully considered.
3. This being a first appeal, this Court is duty bound to re-evaluate the evidence on record and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the



witnesses testify. This principle was reaffirmed in *Cooperative Bank of Kenya Limited v Yator* [2021] KECA 95 (KLR).

4. The dispute arises from a road traffic accident that occurred on 2nd May 2020 along the Nakuru-Kericho Road at Chepseon Area involving motor vehicle registration number KAW 401P, a Toyota RAV4.
5. The 1st Respondent, Stephen Oduor Onyango, was a passenger in the said vehicle. The driver was the 4th Respondent, Kennedy Ouma Onyango, who is the biological brother of the 1st Respondent. Also on board was the sister of the 1st and 4th Respondents, one Joan Auma Onyango, who unfortunately died from injuries sustained in the accident.
6. The vehicle was registered in the name of the 2nd Respondent (Alnashir Habib Mohamed) at the time of the accident. The 2nd Respondent had, through a Staff Car Loan Agreement dated 20th February 2020, agreed to finance the purchase of the vehicle by the Appellant, who was his employee. The agreement provided that ownership would remain with the 2nd Respondent until full payment of the loan, which never occurred.
7. The Appellant was in possession of the vehicle at the material time. He testified that he had given the vehicle to the 4th Respondent, who was a mechanic, for purposes of repairs. The 4th Respondent, without the authority of either the Appellant or the 2nd Respondent, used the vehicle to ferry his siblings (the 1st Respondent and their late sister) from Nairobi to their rural home in Nyanza. It was during this journey that the accident occurred.
8. In the plaint filed on 7th October 2021, the 1st Respondent sued only the 2nd Respondent as the registered owner and the 3rd Respondent as the insurer. Conspicuously, he did not sue his brother, the 4th Respondent, who was the driver of the vehicle at the material time.
9. Subsequently, by a Chamber Summons dated 2nd December 2022, the 2nd Respondent applied to enjoin the Appellant as a Third Party. That application was allowed on 26th January 2023. Thereafter, the Appellant filed a Chamber Summons dated 19th January 2024 seeking to enjoin the 4th Respondent as a Second Third Party. That application was allowed by consent on 14th March 2024.
10. After trial, the learned magistrate delivered her judgment on 11th July 2024. She found that the 4th Respondent (the driver) was negligent and liable for the accident. She dismissed the suit against the 3rd Respondent (insurer) on the ground that it acquired ownership of the vehicle after the accident. She dismissed the suit against the 2nd Respondent on the ground that he had sold the vehicle to the Appellant and had ceded possession. She then entered judgment directly in favour of the 1st Respondent against the Appellant and the 4th Respondent jointly and severally, apportioning liability at 100%.
11. The Appellant's Memorandum of Appeal raises six grounds which can be condensed into three principal issues for determination;
 - (a) Whether the learned magistrate erred in misapprehending the nature and purpose of third party proceedings under Order 1 Rules 15–22 of the Civil Procedure Rules, thereby entering direct judgment against the third parties without proper joinder or amendment of pleadings.
 - (b) Whether the learned magistrate erred in her application of the principles of vicarious liability and ownership in finding the Appellant liable.



- (c) Whether the learned magistrate erred in evaluating the evidence and apportioning liability, including failing to find contributory negligence on the part of the 1st Respondent.
12. The Appellant contends that the trial court misapprehended the nature and purpose of third party proceedings. Under Order 1 Rule 15 of the Civil Procedure Rules, a third party notice is a procedural device whereby a defendant claims against a person not already a party to the suit;
- (a) that he is entitled to contribution or indemnity; or
- (b) that he is entitled to any relief or remedy relating to the original subject matter; or
- (c) that any question or issue relating to the subject matter should be determined between the plaintiff, the defendant and the third party.
13. The critical point, as correctly submitted by the Appellant, is that third party proceedings are derivative. They exist to determine issues between the defendant and the third party. They do not, without more, create a direct cause of action by the plaintiff against the third party.
14. In *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR, the court stated;
- “In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under Order 1 Rules 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under Order 1 Rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff.”
15. In the present case, the trial court dismissed the suit against the original defendants, the 2nd Respondent (Alnashir Habib Mohamed) and the 3rd Respondent (Intra Africa Assurance Limited). Having done so, there was no subsisting claim against the defendants for which the third parties could be called upon to indemnify or contribute. The third party proceedings ought to have lapsed.
16. The 1st Respondent never amended his plaint under Order 1 Rule 22(2) of the Civil Procedure Rules to join the third parties as substantive defendants. Nor did the trial court issue any order converting the third party notices into substantive claims. The judgment entered directly against the Appellant and the 4th Respondent in favour of the 1st Respondent was therefore procedurally irregular and, in the circumstances, a nullity.
17. This Court finds that the learned magistrate erred in law by entering direct judgment against the third parties without the necessary procedural steps being taken. This error alone is sufficient to vitiate the judgment against the Appellant.
18. Even if the procedural irregularity were overlooked, this Court finds that the trial court’s findings on vicarious liability and ownership were erroneous. The evidence on record establishes that the 2nd Respondent (Alnashir Habib Mohamed) was the registered owner of motor vehicle KAW 401P at the time of the accident. The Staff Car Loan Agreement dated 20th February 2020 provided in Clause 3:
- “That the vehicle Registration Number KAW 401P will remain the property of Mr. Mohamed c/o HPL until the loan is repaid in full. Ownership will pass upon full payment of the loan and interests.”



19. There was no evidence adduced by the 2nd Respondent that the Appellant had paid any part of the loan. The Appellant produced payslips showing no loan deductions. The 2nd Respondent failed to discharge the burden of proving that ownership had passed to the Appellant. Under Section 8 of the Traffic Act (Cap 403), the person in whose name a vehicle is registered is deemed to be the owner unless the contrary is proved. The 2nd Respondent did not rebut this presumption.
20. On the insurance claim, the 2nd Respondent lodged an insurance claim with the 3rd Respondent after the accident and was compensated. This is wholly inconsistent with his position that he was merely a financier. A financier has no insurable interest in a vehicle. By claiming and receiving insurance proceeds, the 2nd Respondent affirmed his position as owner. He cannot now disclaim ownership for purposes of liability.
22. On the employer-employee relationship, the Appellant produced a contract of service dated 6th April 2019 signed by the 2nd Respondent, and a clearance certificate dated 12th April 2021. This evidence established that the Appellant was an employee of the 2nd Respondent. The Appellant's possession of the vehicle was in the course of his employment. The trial court failed to appreciate this relationship.
23. On the scope of authority, the Appellant testified that he gave the vehicle to the 4th Respondent (Kennedy Ouma Onyango) , who was a mechanic, for purposes of repairs. The 4th Respondent, without authority from either the Appellant or the 2nd Respondent, used the vehicle for a personal trip to transport his siblings from Nairobi to their rural home in Nyanza.
24. The law is settled that a mechanic entrusted with a vehicle for repairs has implied authority only to drive for repair-related purposes. In *Nandwa v Gichuki* [1995] KLR, the court held that a mechanic who uses a vehicle for personal purposes acts outside the scope of his authority. The principal is not vicariously liable for such unauthorized use.
25. The 4th Respondent's use of the vehicle was clearly a frolic of his own. The Appellant had no control over the 4th Respondent at the time of the accident. In *Morgans v Launchbury* [1973] AC 127, it was held that a person is not vicariously liable for unauthorized use of a vehicle by another.
26. The trial court relied on *HCM Anyanzwa v Luigi De Casper* [1981] KLR and *Equator Distributors v Joel Muriu & 3 others* [2018] eKLR for the proposition that vicarious liability depends on delegation of tasks or duty. While this is correct, the delegation here was for repairs only. The 4th Respondent's deviation from that purpose to undertake a personal journey removed the Appellant from any vicarious liability.
27. The trial court found that no contributory negligence could be apportioned to the 1st Respondent. This Court disagrees. The 1st Respondent, Stephen Oduor Onyango, testified that he knew the 4th Respondent was his brother. He also knew that the 4th Respondent was a mechanic. He knew that the vehicle had been entrusted to the 4th Respondent for repairs. Despite this knowledge, he voluntarily accepted to be ferried in the vehicle to their rural home in Nyanza.
28. A passenger who voluntarily travels with a driver knowing that the driver has no authority to use the vehicle may be found to have contributed to his own injuries. In *Kinyanjui v Kiarie* [1995] KLR, the court held that such conduct constitutes contributory negligence.
29. The trial court ought to have apportioned liability, taking into account;
The 4th Respondent's negligence as the driver (primary liability);
The 1st Respondent's contributory negligence in voluntarily traveling with an unauthorized driver;



The 2nd Respondent's liability as registered owner who claimed insurance benefits;

The Appellant's limited role as an employee in possession, who had no control over the 4th Respondent's unauthorized use.

30. Apportioning 100% liability on the Appellant and the 4th Respondent while absolving the registered owner who claimed insurance proceeds was manifestly unjust and unsupported by the evidence.
31. For the reasons set out above, this Court finds that the learned magistrate committed several errors of law and fact;
 - (a) She misapprehended the nature and purpose of third party proceedings, entering direct judgment against the third parties without the necessary procedural steps of amending pleadings or converting the third party notices into substantive claims. This rendered the judgment against the Appellant a nullity.
 - (b) She erred in her findings on ownership by ignoring the 2nd Respondent's status as registered owner, his insurance claim, and his failure to discharge the burden of rebutting the presumption under Section 8 of the *Traffic Act*.
 - (c) She erred in holding the Appellant vicariously liable for the 4th Respondent's actions despite clear evidence that the 4th Respondent was acting outside the scope of his authority as a mechanic, on a personal journey, without the Appellant's knowledge or consent.
 - (d) She erred in failing to apportion liability appropriately, including failing to find contributory negligence on the part of the 1st Respondent.
32. The appeal therefore succeeds.
33. Accordingly, this Court makes the following orders;
 - (a) The appeal is hereby allowed hence, the judgment of the Honourable Claire Odunga, Resident Magistrate, delivered on 11th July 2024 in Kericho Chief Magistrate's Court Civil Suit No. E200 of 2021 is hereby set aside in its entirety insofar as it relates to the Appellant, Peter Maloba Masinde. The claim as against the Appellant is dismissed with costs.
 - (b) The Appellant shall have costs of this appeal, to be paid by the 1st, 2nd and 4th Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 31ST DAY OF MARCH, 2026

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J. K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh/Naomie

Ochieng for 2nd & 3rd Respondent

No Appearance for the Appellant

No Appearance for the 1st Respondent

