



REPUBLIC OF KENYA



**SBM Bank (K) Limited v Adis & another (Civil Appeal E552 of 2022)
[2025] KEHC 3162 (KLR) (Civ) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E552 OF 2022**

TW OUYA, J

FEBRUARY 27, 2025

BETWEEN

SBM BANK (K) LIMITED APPELLANT

AND

GRADUS OLUOCH ADIS 1ST RESPONDENT

TRANSLINE CLASSIC LIMITED 2ND RESPONDENT

(Being an appeal from the judgment of Judith Omollo (Adjudicator) (RM) Small Claims Court delivered on 15th July, 2022 in Nairobi Milimani SCCC No. E669 of 2022)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 15.07.2022 in Nairobi Milimani SCCC No. E669 of 2022 (hereafter the lower Court claim). The claim was filed by Gradus Oluoch Adis, the claimant before the lower Court (hereinafter the 1st Respondent) as against Transline Classic Limited, the 1st respondent before the lower Court (hereinafter the 2nd Respondent) and Chase Bank Limited (now SBM Bank (K) Limited) the 2nd Respondent before the lower Court (hereinafter the Appellant) seeking motor vehicle repair charges assessed at Kshs.605,520/-, towing fees Kshs. 28,000/-, motor vehicle registration number KCR 598X - daily earnings at Kshs.11,350/- x 32 days totaling Kshs.363,200/-, and interest from 24.09.2021 at Court's rate.
2. It was averred that on or about 24.09.2021, motor vehicle registration number KCC 995J, Scania Buss registered under the 2nd Respondent and owned by the Appellant, was negligently driven while plying along Narok-Bomet Road and caused an accident with motor vehicle KCR 598X while overtaking on



a continuous yellow line, where drivers are prohibited from overtaking thus occasioning damage to the latter vehicle, of which the 1st Respondent claims damages.

3. Despite service of summons and pleadings upon the 2nd Respondent, it failed and or ignored to file a response to the 1st Respondent's statement of claim.
4. On the part of the Appellant, it filed a response to the statement of claim denying the key averments in the claim meanwhile averred that it jointly owned motor vehicle registration number KCC 995J with the 2nd Respondent, in the capacity of a financier with the latter being a beneficial owner at the material time of the accident while it was being driven and controlled by the 2nd Respondent's driver.
5. From the record of proceedings before the lower Court, it appears that Section 30 of the *Small Claims Court Act* was applied wherein parties agreed to canvass the claim by way of filed documents and written submissions.
6. In its judgment, the trial Court found the 2nd Respondent and Appellant 100% liable for the accident meanwhile proceeded to enter judgment jointly and severally as against them to the tune of Kshs. 744,100/- plus interest at Court's rate from date of filing until payment in full and costs of the claim.

The Appeal

7. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds; -
 - “ 1. That the learned Magistrate erred in law by undermining the principle of vicarious liability that exempts a financial lender such as the Appellant from liability. It states that “vicarious liability depends not on ownership but on the delegation of tasks or duty”
 2. That the learned Magistrate erred in law failing to appreciate that the reason behind the principle of vicarious liability is to place liability on the party who should in law bear it. Therefore, to peg it on legal ownership of a motor vehicle to the total exclusion of employer/employee relationship would amount to grave injustice.
 3. That the learned Magistrate erred in law by wishing away the holding of the Court of Appeal in *Securicor Kenya Ltd – v – Kyumbu Holdings Ltd* (2005) eKLR which made an exception to Section 8 of the *Traffic Act*, Cap 403 Laws of Kenya that “even though the Appellant was still owner by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of everyone who happened to drive it.”
 4. That the learned Magistrate erred in law by giving a judgment which was clearly against the weight of the evidence.
 5. That the learned Magistrate erred in law by ignoring and disregarding precedent amounting to great injustice to the Appellant.” (sic)
8. In light of afore-captioned itemized grounds of appeal, the Appellant seeks before this Court, orders to the effect that: -
 - “ a) The appeal be allowed.



- b) Judgment of the lower Court be set aside.
- b) Costs of the appeal be award to the Appellant.

Submissions

9. The appeal was canvassed by way of written submissions of which this Court has duly considered alongside the original record, the memorandum of appeal and record of appeal.

Disposition

10. This is a first appeal, specifically from the Small Claims Court. This Court has repletely observed and must iterate that the Small Claims Court is a specialized Court on accord of legislation that establishes the said Court. That said, Section 38 of the [Small Claims Court Act](#) prescribes the nature of appeals that lie from the Small Claims Court to the High Court.
11. Ordinarily on a first appeal, the appellate Court ought not to interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Nonetheless, by dint of Section 38 of the [Small Claims Court Act](#) this is no ordinary first appeal and this Court must first satisfy itself that the appeal before it meets the prescription of Section 38 of the Act.
12. The Court of Appeal in *Kenya Breweries Ltd v Godfrey Oduyo* [2010] KECA 498 (KLR) discussed its mandate on a second appeal, that is, on points of law only. Equally, in this appeal, albeit being a first appeal, the [Small Claims Court Act](#) prescribes that an appeal to this Court from the Small Claims Court be on matters of law only. In the foregoing case, the Court of Appeal made a distinction between matters of law vis-à-vis matters of fact. Further, the same Court in its subsequent decision in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR, in addressing the question whether the memorandum of appeal, though on a second appeal, raised factual issues, recognized that an appellate Court when faced with a situation where a memorandum of appeal raises factual issues, it is at liberty to strike out the offending ground(s) while retaining those that are compliant.
13. With the above in reserve, the Court has taken the liberty of reviewing the grounds itemized in the Appellant’s grounds of appeal and is convinced that save for Ground 4 the remaining grounds comply with the plain and straight-forward statutory exclusion of matters of fact pursuant to Section 38 of the [Small Claims Court Act](#). The issue raised in Grounds 4, despite utilizing the phrase “erred in law” appears to be an attempt at legal ingenuity to dress-up and camouflage a purely factual issue with the borrowed garb of “legalness meanwhile the same seems to be a tacit invitation to address evidentiary and or factual issues in clear contravention of Section 38 of the Act. It is trite that parties are bound by their pleadings therefore applying the dicta in *Bashir Haji Abdullahi* (supra) - that accords a Court liberty to strike out offensive grounds of appeal to statutory exclusion – while taking due cognizance of the fact that the latter was an appeal arising from an election dispute, this Court is constrained to strike out Grounds 4, for the tacit invitation contained therein entreating this Court to address factual issues.
14. Having set out the above, a cursory review of the remaining grounds of appeal they appear to contemporaneously challenge the lower Court’s failure to properly apply itself to the doctrine of vicarious liability in respect of the claim before it as juxtaposed alongside the Appellant’s response to the claim itself. The learned Magistrate upon considering the evidence and submissions before her, proceeded to find that the Appellant and 2nd Respondent were jointly and severally liable despite the Appellant’s defence that it was merely a financier meanwhile was not the beneficial owner of



motor vehicle registration number KCC 995J. In rendering her decision on liability in favour of the 1st Respondent, the learned Magistrate proceeded to observe that: -

“The 2nd Respondent averred that they were financiers and cannot be held as vicariously liable as they have no control of the vehicle

Section 8 of the *Traffic Act*.... provided therein that.....

Section 107(1) of the *Evidence Act*provides.....

The 2nd Respondent alleged that they were mere financier of the 1st Respondent. The 2nd Respondent are named as co-registered owner of the motor vehicle registration number KCC 995J and therefore it was incumbent upon the 2nd Respondent to provide evidence that they were financiers which they failed to do. The claimant has proved on a balance of probabilities that the Respondents are liable and therefore I find both respondents liable at 100%” (sic)

15. By its submission before this Court the Appellant has argued that vicarious liability imposes liability on employers for the wrongful acts of their employees whereas an employer will be held liable for torts committed while an employee is conducting the duties allocated by the employer. That despite the copy of record showing joint ownership of motor vehicle registration number KCC 995J, the same has nothing to do with vicarious liability meanwhile the motor vehicle accident report form dated 19.05.2021 adduced into evidence shows that the driver of the latter motor vehicle was employed by the 2nd Respondent alone. That the trial Court erred by finding the Appellant vicariously liable for the subject accident for the activities of the driver, who at the time was unknown to the Appellant whereas the vehicle in question was being used for purposes in which it had no interest or concern, as at when it was involved in an accident. The decisions in *Ribiru v Ndung’u* (suing on behalf of the Estate of the late Joram Ndung’u Mwaniki) & 2 Others KEHC 339 (KLR), *Karisa v Solanki* [1969] EA 318 as cited with approval in *P.A Okelo & M.M Nsereko t/a Kaburu Okelo & Partners v Stella Karimi Kobia & 2 Others* [2012] eKLR, *John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 Others* [2015] eKLR, *HCM Anyanzwa & 2 Others v Luigi De Casper & Another* [1981] KLR 10 as cited in *Equator Distributors v Joel Muriu & 3 Others* [2018] eKLR and *Khambi & Another v Mahiti & Another* [1968] EA 70 as cited in *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR were called to aid in the fore stated regard.
16. The 1st Respondent in urging this Court not to disturb the apportionment of liability argued that despite the Appellant’s assertions it never produced any evidence to prove its financial interest with respect to motor vehicle registration number KCC 995J and its effect on liability for actions of the 2nd Respondent’s driver. That the 1st Respondent was not privy to the financial agreement between the Appellant and 2nd Respondent meanwhile there was tangible evidence by way of the copy of records that the former were joint owners of motor vehicle registration number KCC 995J. It was further argued that the Appellant having failed to adduced the security instrument to discharge it as to liability, the Appellant and 2nd Respondent being registered and beneficial owners respectively both became vicariously liable for the acts of the driver. The decision in *Erick Wahime Nderitu & Another v Mercy Chepkorir Koskei* [2021] eKLR was cited in support of the above proposition.
17. With the above in reserve, Section 8 of the *Traffic Act* 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.” It is settled that although a copy of record is prima facie proof of ownership, the presumption is rebuttable. The Court of Appeal in *Palace*



Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, emphasized this fact when it observed that “Section 8 of the *Traffic Act*has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership.” And as regards the principle of vicarious liability, the Court of Appeal observed in the case of John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR; -

“ 14. The main issue that fell for determination by the first appellate court was whether, in the aforesaid circumstances, the appellant was vicariously liable for the negligent acts of the 2nd respondent, the lawful driver of the motor vehicle. Black’s Law Dictionary, 9th edition at page 998 defines vicarious liability in the following words:

“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”

15. In HCM Anyanzwa & 2 Others v Luigi De Casper & Another [1981] KLR 10, this Court held that “vicarious liability depends not on ownership but on the delegation of tasks or duty.”

We believe the learned judge misdirected himself when he addressed himself to the issue of legal ownership of the motor vehicle in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent, who was an employee of the third respondent. It is the third respondent who had supervisory power over his driver and not the appellant. The appellant cannot therefore be held to be vicariously liable.

16. The reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle in a case of this nature, to the total exclusion of employer/employee relationship, would amount to grave injustice to the appellant.” (sic)

18. At the outset, having reviewed the judgment of the lower, it must be noted that on appeal the Appellant has relied heavily on the doctrine of vicarious liability, yet from the statement of claim, the doctrine was neither pleaded nor did the trial Court reference the same in its final determination on liability. Further, despite the doctrine being mentioned as pleaded by the Appellant, a perusal of the response to the statement of claim does not entail the said averment nevertheless it appears that in part the doctrine may have informed that trial Court’s determination on liability.

19. It is undisputed that the copy of records was adduced as part of the 1st Respondent’s list of documents that captured the Appellant and 2nd Respondent as joint owners motor vehicle registration number KCC 995J. However, what this Court garners to be the Appellant’s defence before the trial Court was that it was merely a financier and as such could not be held vicariously liable as a registered owner for the negligence of the driver of motor vehicle registration number KCC 995J, which at the time was beneficially owned by the 2nd Respondent. While, it may be true as submitted by the Appellant, that the doctrine of vicarious liability depends not on ownership but on the delegation of tasks or duty here it is not in dispute pursuant to Section 8 of the *Traffic Act*, ownership is a rebuttable presumption.



20. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act* whereas it was the duty of the respective parties to prove the averments contained in the respective pleadings. See Court of Appeal decisions in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR and *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347. Consequently, the Appellant having averred the its ownership was only limited to registration and not beneficial ownership, it was upon it to place before the trial Court cogent evidence illustrative of the above fact. While the legal burden was on the 1st Respondent to prove the averment in its claim on a balance of probabilities, the evidentiary burden was a shifting one, to wit, the Appellant was called upon to place tangible evidence in respect of the averments ascertaining mere financial ownership. The interlude between legal and evidentiary burden of proof was succinctly addressed by the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR where the Court held inter alia, that the “evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.
21. The Motor Vehicle Accident Claim lodged by the 1st Respondent, referenced by the Appellant was not sufficient prove to discharge the Appellant by way of beneficial ownership of motor vehicle motor vehicle registration number KCC 995J. It was obligatory of the Appellant to go the extra mile to discharge itself given that prima facie the Respondent has discharged her burden of proof on registered ownership of motor vehicle registration number KCC 995J being in the name of both the Appellant and 2nd Respondent. At the risk of repetition, while it is trite that a financier as a registered owner of a suit motor vehicle cannot be held liable for negligence of the beneficial owner, on accord of its liability being limited to financing of the security-asset, onus was one the Appellant to discharged the evidential burden that its ownership of the vehicle was only limited to financing of the same. In any event, the Appellant equally had the opportunity to discharge themselves from the proceedings before the lower Court by moving the Court appropriately with evidence of their liability as to ownership of motor vehicle registration number KCC 995J, being limited to asset financing however it would seem that they failed to take up the opportunity or adduce evidence before the lower Court.
22. At this juncture, the Appellant cannot be heard on the plea of financier or want of vicarious liability whereas a cursory review of the impugned decision the finding on liability was not pegged on vicarious liability but failure on the part of the Appellant to discharge its evidentiary burden of proof as to beneficial ownership vesting solely on the part of the 2nd Respondent.

Determination

23. In conclusion, it is this Court’s unreserved deduction that the instant appeal lacks in merit and is accordingly dismissed with the attendant costs issuing to the 1st Respondent in any event.
24. The appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2025

HON. T. W. OUYA

JUDGE

For Appellant.....Obura

For Respondent...No Appearance

Court Assistant...Martin

