



**Kerongo v Wambogo & 2 others (Civil Appeal E187 of 2023)
[2024] KEHC 6131 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E187 OF 2023**

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

PATRICK NYARIKI KERONGO APPELLANT

AND

DANIEL THIGE WAMBOGO 1ST RESPONDENT

ABDI HALLOW MAHAD 2ND RESPONDENT

JOSEPHAT MWANIA 3RD RESPONDENT

*(Being an appeal from the judgment of Hon. L.B Koech Senior Principal
Magistrate in the Nairobi MCCC No 5518 of 2019 delivered on 10th March 2023)*

JUDGMENT

1. By way of a Plaintiff dated 26th July 2019, the 1st Respondent herein sued the appellant, the 2nd respondent and the 3rd respondent. He claimed that on 7th May 2017, while he had lawfully parked his motor vehicle registration number KBK 945N at a designated parking spot at Umoja Sector II area, the 3rd respondent negligently drove motor vehicle registration number KBP 243B causing it to violently ram into the front right side of his motor vehicle. According to the 1st respondent, the motor vehicle driven by the 3rd respondent belonged to the appellant and the 2nd respondent. He therefore sought special damages of Kshs. 160, 814/= and costs of the suit as well as interest from the date of filing the suit.
2. During trial, the 1st Respondent called three witnesses in support of his claim. PW2, a PC Philip Mugo Atia testified that on 7th May 2017, motor vehicle registration number KBK 945N had been parked at a designated parking spot at Umoja Sector II area, Nairobi. He stated that the driver of motor vehicle registration number KBP 243B was found culpable for the accident and he produced a police abstract in support of the same. In the abstract, the insurance details of the motor vehicle were captured as Trident Insurance Company Limited while the appellant was the policyholder.



3. PW3, a legal officer at Mayfair Insurance Company Limited testified that the 1st Respondent's insurer instructed M/s Touchline Insurance Investigators to establish and trace the whereabouts of the owner of the motor vehicle registration number KBP 243B as of 7th May 2017. He produced the investigation report prepared by the investigators which established that the 2nd Respondent was the registered owner of motor vehicle registration number KBP 243B while the appellant was the beneficial owner of the said motor vehicle.
4. The appellant filed a statement of defence dated 15th February 2021 and a witness statement of even date. In his statement of defence, he denied being the registered and/or beneficial owner of motor vehicle registration number KBP 243B. The 2nd and 3rd respondents neither participated in the trial nor in this appeal.
5. Upon hearing the matter, judgment was entered against the appellant on 100% liability for a sum of Kshs, 160,000 plus costs of the suit and interest at court rates.
6. The appellant being dissatisfied with the judgment filed the appeal dated 13/03.2023 on the following grounds:
 - a. The learned magistrate finding that the appellant was the beneficial owner of motor vehicle KBP 243B was not supported by any evidence at all
 - b. The lower court failed to appreciate the fact that by the Respondent's evidence the said motor vehicle KBP 243B, was registered in the name of the 2nd Respondent and was indeed in the actual possession of the 2nd Respondent at the time of the accident
 - c. The lower court failed to establish that the 3rd Respondent had never been employed and was not the agent of the appellant at the time of the accident or at all
 - d. The subordinate court failed to make a find that there was no direct or indirect connection between the motor vehicle in question and the driver of the motor vehicle vis a vis the appellant.
 - e. The 1st Defendant Respondent failed to call any evidence to establish beneficiary ownership and the allegation that the appellant was the insured remained just an allegation on the record.
 - f. The Learned magistrate fell into grave error in his ruling that no prejudice had been shown by the applicant when the applicant had clearly demonstrated loss to be occasioned by the demolition of the perimeter wall pursuant to an exparte order not warranted in at an interlocutory stage.
 - g. The learned magistrate failed to appreciate that the appellant having denied ownership and /or any beneficial interest in the motor vehicle it was necessary for the respondent to table evidence of such beneficial ownership and in the absence such evidence the finding by the court is erroneous.
 - h. The 1st Respondent having failed to call the maker investigation report and/ or the person who gave the investigation officer the information, the same was not admissible, was hearsay not capable of forming the basis of the court's finding.



- i. The trial court failed to consider the appellant's evidence and written submissions.
7. The appeal was canvassed by way of written submissions. For the appellant, the submissions are dated 27th February 2024, having been filed by Kerongo & company advocates. Therein, counsel concentrated his submissions on two main issues, to wit, ownership of the motor vehicle KBP 243B and the interlocutory judgement by the trial court.
8. Regarding the issue of ownership of motor vehicle KBP 243B, counsel submitted that the 1st respondent produced in evidence the search certificate confirming that the 2nd respondent was the registered owner of the motor vehicle KBP 243B as at the date of the accident. He referred to section 8 of the *Traffic Act* to urge that since no evidence was adduced to the contrary, the certificate sufficiently established that the 2nd respondent was the owner of the said motor vehicle. With regard to the issue of beneficial ownership, counsel reiterated that the said motor vehicle was not being driven for his benefit and that there was no master-servant relationship between him and the 3rd respondent. He further relied on the case of Joel Muga Opija vs. East African Seafood Limited (Civil appeal No 309 of 2010) to buttress his submissions in this line.
9. The appellant submitted in concluding that the appellant was 100% liable, the court relied on the case of PWN & Another (the legal representative of the estate of LMM) vs. Telkom Kenya Limited & 2 Others (2015) which counsel submitted was distinguishable.
10. On the interlocutory judgment, the appellant submitted that despite the interlocutory judgement being entered on the 1st November 2019, the court was biased in the final judgment as no specific orders were made against the said parties and the final decree as extracted did not agree with the judgement as it purports to be against all the defendants. According to counsel, the said judgment had been set aside on 9th February 2021 and it is his submission that such judgment was not divisible therefore was wholly set aside. The appellant submitted that he had no association with the ownership, possession and use of the said motor vehicle and that the actual, beneficial and possessory ownership of the vehicle is in the 2nd respondent.
11. The 1st respondent's submissions are dated 22/03/2024 having been filed by Eboso & company advocates. Counsel for the 1st respondent submitted on two issues namely; the ownership of the motor vehicle of registration number KBP 243B and liability for the material accident. With regards to the issue of ownership of the motor vehicle, the respondent submitted that it is a cardinal principle of law that he who alleges must prove and invited the appellant to prove his denial of ownership. He relied on the case of Aexcel Auto Spares Limited vs. Siyama Company Limited (2019) to buttress this submission, and urged that without any other evidence, the statement of defence cannot be relied on as evidence. Counsel reiterated the evidence on record and urged the court to take judicial notice of the fact that despite the appellant disposing off the motor vehicle, he still remained the beneficial owner of the same. He thus urged that in such instances the original owner remains the registered owner while the new owner becomes the 'beneficial owner'.
12. On liability, counsel for the 1st respondent submitted that from the circumstances both the 2nd Respondent and the appellant were both owners of the motor vehicle and are vicariously liable in negligence. The respondent relied on the case of Osapil vs. Kaddy {2000} 1 EALA as cited in Nyeri CA No 162 of 2010; Harrison Geita vs. Twiga Chemicals Limited in support of these submissions. He urged for dismissal of the Appeal with costs.



Analysis & Determination

13. This being a first appeal this court has a duty to re-consider and re-evaluate the evidence and arrive at its own conclusion. It must bear in mind that it did not hear or see the witnesses testify and give an allowance for it. For this statement of the law, the decision of the Court of Appeal in *Abok James Odera T/A A.J. Odera and Associates Vs John Patrick Machira T/A Machira & Company Advocates* [2013] eKLR is apt.
14. Upon careful consideration of the grounds of appeal, record of appeal and parties' submissions and cited authorities I find two issues falling for determination. These are liability and the assessment of damages. With regards to liability herein, two issues are contested, first, whether the appellant was the beneficial owner of motor vehicle registration number KBP 243B and whether he, was liable in negligence for the accident. Ordinarily, under section 107 of the *Evidence Act*, the standard of proof in civil cases is on a balance of probability. 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 a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.
15. In *Treadsetters Tryes Ltd vs. John Wekesa Wepukhulu* (2010) eKLR Ibrahim J. (as he then was) considered the issue of burden of proof in a case of negligence and quoted Charlesworth & Percy on Negligence, 9th Edition at P.387 thus: -

“In an action for negligence as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred (sic) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”
16. The main question begging for answers before this court is whether there was sufficient evidence pointing to the appellant as the owner of the motor vehicle registration number KBP 243B. Under section 8 of the *Traffic Act*, proof of ownership of a motor vehicle is by the registration of a person as the owner of the motor-vehicle, unless proved otherwise. My understanding of this section is that the registration of the motor-vehicle is not conclusive proof of ownership but only prima facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered is presumed to be the owner thereof unless proved otherwise. This finds fort from the views expressed by this court in *Securicor Kenya Ltd vs. Kyumba Holdings Ltd* [2005] eKLR as follows:

“Our holding finds support in the decision in *OSAPIL VS. KADDY* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”
17. The same issue came for consideration before the Court of Appeal sitting in Mombasa in the case of *Muhambi Koja vs. Said Mbwana Abdi* [2015 eKLR, where it was found that in the absence of evidence to the contrary the registration certificate or logbook of a motor vehicle or an abstract of the record issued by the Registrar of Motor Vehicles constitutes the best evidence to prove ownership of a motor vehicle. It was further noted that in the normal cause of business and human interactions, situations



may arise where the person named in those records may have passed the vehicle to some other person in whom the ownership presently vests.

18. In this case, a Police abstract and an official search by the National Transport and Safety Authority produced in the trial court had the name of the 2nd Respondent as the registered owner of the motor vehicle. The Police abstract report further established that the driver of the motor vehicle in question was culpable for the accident. The appellant denied ownership of the motor vehicle stating that there was no master-servant relationship between him and the 3rd respondent (the driver) and that at the time of the accident, the motor vehicle was not being used to his benefit. PW3 produced the investigation report prepared by the investigators which established that the 2nd Respondent was the registered owner of motor vehicle registration number KBP 243B while the appellant was the beneficial owner of the said motor vehicle.
19. In my view, the evidence on record did not link the appellant to the ownership of the motor vehicle registration number KBP 243B. The report by the investigation's officer is not sufficient to dislodge the evidence in the police abstract and an extract of the registrar of motor vehicles vide search certificate which showed that the 2nd respondent was the person in whose name the motor vehicle was registered. I must also add that there are incidents such as this where evidence clearly shows that a sale took place but ownership had not been effected. In such instances, the buyer or purchaser is taken to be a beneficial owner because, for all practical purposes, he took possession of the motor vehicle for this exclusive use because of valuable consideration. He is required to take his own insurance because of the transfer of the insurable interests. The motor vehicle was indeed registered under the 2nd respondent's name and he was in actual possession and use at the time of the accident. The appellant proved on a balance of probabilities that he had no beneficial ownership of the motor vehicle.
20. Therefore, the findings of the learned Magistrate that the appellant was a beneficial owner of the said motor vehicle is unconscionable and is not backed by the evidence on record. The same cannot receive the stamp of approval by this court.
21. Flowing from the foregoing, it is also an inevitable finding that the appellant cannot be held liable for the accident that occurred. Furthermore, no evidence was led to link the appellant to the 3rd respondent. The assertions by the appellant that there existed no employee-employer relationship between him and the 3rd respondent were not challenged and neither was there evidence to establish the element of vicarious liability on the part of the appellant in this case. On the contrary, the evidence on record was direct and pointed to the offending motor vehicle being used by the 3rd Respondent and registered in the name of the 2nd Respondent. The 2nd and 3rd respondents never participated in the trial before the lower court.
22. For avoidance of doubt, it is my finding that the appellant was not the owner of the offending motor vehicle and therefore he could not have been found liable for the accident.
23. The upshot is that the Appeal has merit and is hereby allowed. The Judgment on both liability and quantum against the appellant is hereby set aside and substituted with an order dismissing the suit against the appellant in the lower court. Costs to the appellant both in lower court and high court.
24. Orders accordingly.

DELIVERED VIRTUALLY, DATED SINGED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE



