



**Kiogora & another v Mbura (Civil Appeal E060 of 2021)  
[2023] KEHC 20886 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E060 OF 2021  
TW CHERERE, J  
JULY 27, 2023**

**BETWEEN**

**NEWTON KIOGORA ..... 1<sup>ST</sup> APPELLANT**

**DERRICK MUTUMA KINYUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KELVIN MWANGI MBURA ..... RESPONDENT**

*(Being an appeal from the judgment and decree in Nkubu  
PMCC 101 of 2019 by Hon. J. Irura on 03rd March, 2021)*

**JUDGMENT**

1. On January 7, 2018, Respondent was travelling in M/V KBY 258M owned by 2<sup>nd</sup> appellant and which was being driven by the 1<sup>st</sup> appellant when the vehicle collided with M/V KCL 583B as a result of which the respondent suffered bodily injuries. At the trial both appellants were found liable at 100% and respondent was awarded damages as follows:
  1. General damages KES. 900,000/-
  2. Special damages KES. 21,720/-

**The Appeal**

2. The appellants dissatisfied with the lower court's decision preferred this appeal on both liability and quantum.

**Analysis and Determination**

3. I have considered the evidence on record and written submissions filed by the parties and the authorities cited. This is a first appeal and this Court is empowered to review and analyze the evidence on record



and arrive at its independent conclusions. (See *Selle & another vs. Associated Motor Boat Co.Ltd. & others* (1968) EA 123).

## Liability

4. Evidence was tendered in the form of a police abstract which confirmed that Respondent was injured while travelling in M/V KBY 258M. defendant did not tender any evidence.
5. That averments that pleadings are not evidence was appreciated in *Francis Otile vs. Uganda Motors Kampala* HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence nor can they be a substitute therefor. Before that, the then *East African Court of Appeal held in Mohammed & another v Haidara* [1972] EA 166 that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997, where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd v Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself that: "Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them....."
6. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Babra and another v Raju Govindji*, HCCC No 548 of 1998 appreciated that:

"Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."
7. Again in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR Lesiit, J (as she then was) citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
8. From the foregoing, I find that plaintiff's evidence that the accident in which he was injured was caused by 2<sup>nd</sup> appellant's driver's negligence was not controverted. The defendant's attempt to improperly argue its case by way of submissions is unacceptable and such submissions are of no probative value.
9. As a passenger, the respondent had no control of the accident motor vehicle and could not have done anything to cause or avoid the accident. From the foregoing, I find that the trial magistrate's finding that 1<sup>st</sup> appellant was negligent and 2<sup>nd</sup> therefore vicariously liable was well founded.
10. From the foregoing, I find that the verdict by the trial magistrate that the Appellants were liable at 100% was well grounded.

## Quantum

11. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it



should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & anor v Lubia & anor No 2* [1987] KLR 30).

12. The Respondent medical report prepared by Dr. Kimathi Kioga on November 13, 2019 reveals that he suffered fracture of right clavicle, blunt and soft tissue injuries on head, back, chest and right arm. At the time of examination, about 2 years after the accident, the doctor noted that the fracture had pain and numbness on right upper limb and assessed permanent incapacity at 18%.
13. At the hearing, respondent asked for KES. 1,200,000/- and cited *Leonard Njenga Nganga & another v Lawrence Maingi Ndeti*, [2018] eKLR where the court on appeal awarded KES. 1,500,000.00 as general damages for a deep cut wound on the face, fracture of the right collar bone, compound fractures of the right hand, fracture of the femur, deep pierce wound on the lower lib, loss of lower teeth denture and injury to the gum, fracture and dislocation of the left foot at the ankle joint and generalized body pain and *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Adano Isacko* [2019] eKLR where KES. 700,000/- for fracture of clavicle was upheld on appeal. appellants made no offer.
14. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered and respondent's advocate in this matter did not do so. The authorities cited by appellant's on appeal were not availed to the trial court and do not therefore form part of the record of appeal.
15. After considering the extent of the injuries suffered by the respondent and the holding in *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Adano Isacko* (*supra*) which relates to similar injuries as those suffered by the Respondent, I find that the award on quantum was not excessive. I do not find it appropriate to substitute the findings of the trial court with my own assessment.
16. In conclusion, I find that the appeal has no merit and it is dismissed with costs to the respondent.

**DATED AT MERU THIS 27<sup>TH</sup> DAY OF JULY 2023**

**WAMAE.T. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Morris Kinoti

For Appellants - Mr. Njuguna for Kimondo Gachoka & Co. Advocates

For Respondent - Mr. Mutuma for Mutuma & Koskei Advocates

