



REPUBLIC OF KENYA



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**Kiiri v Shah & 3 others (Civil Appeal E058 of 2021)
[2023] KEHC 21520 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E058 OF 2021
GL NZIOKA, J
AUGUST 9, 2023**

BETWEEN

JOHN NJUGUNA KIIRI APPELLANT

AND

ANISH KARA SHAH 1ST RESPONDENT

KARA COMMODITES LTD 2ND RESPONDENT

THE ESTATE OF JOHN WAMBUI KING'OCHA 3RD RESPONDENT

THE ESTATE OF NANCY WANJIKU KARANJA 4TH RESPONDENT

(Being an appeal against the judgment delivered by Hon. K. Bidali (CM) vide Civil Case No. 387B of 2019 in the Chief Magistrate's Court at Naivasha dated 29th September 2021)

JUDGMENT

1. The background facts of the case are that, on or about May 31, 2017, the plaintiff (herein an appellant) was a passenger in a motor vehicle registration No. KBM 0xxxL at Muniu area along Naivasha-Mai Mahiu road, when that motor vehicle was involved in an accident another motor vehicle registration KBK 1xxxx0, allegedly driven negligently by the 1st defendant who was a servant of the 2nd defendant cum respondents herein.
2. It is the appellant's case further case that, the 1st respondent drove the subject motor vehicle without due care and attention, in that, he drove it at an excessive speed, failed to observe the regulations of the Highway Code, to brake, swerve or in any other way to control the motor vehicle thus causing it to collide with the motor vehicle KBM 0xxxL and/or drove it on the wrong side of the road. The plaintiff further pleads that the doctrine of Res ipsa loquitur applies.
3. That as a result of the accident he suffered bodily injuries as he sustained a fracture on the 3rd to 7th right ribs, fracture of anterior column of C4 of the cervical spine, progressive right arm weakness and brachial



- plexus injury. As a result, he sued the 1st and 2nd respondent for general damages, special damages; Kshs 3,550, costs of the suit, interest on the afore sum and any other relief the court may deem fit to grant.
4. The appellant's case was supported by various documents; inclusive of his witness statement in which he literally reiterates the averments in the plaint, the medical reports from; AIC Kijabe hospital and Kinoo Medical clinic, a copy of the Police abstract from Mai Mahiu Police Station, a copy of P3 form and records of ownership of the motor vehicle registration No. KBK 1xxxY
 5. However, the defendants filed a joint statement of defence dated; 15th August 2019, denying the allegations that, the appellant was a passenger in the motor vehicle registration No. KBM 020L at the material time. The 1st defendant also denied having been the driver of the motor vehicle registration No. KBK 1xxx0 and/or being negligent as pleaded in the plaint. On its part the 2nd defendant denied being vicariously liable for the alleged negligence on the part of the 1st defendant.
 6. The defendants pleaded in the alternative and without prejudice, that if the accident occurred then it caused or very substantially contributed to by John Wambugu King'ocha, the driver of motor vehicle registration No. KBM 0xxxL in that he failed to slow down to avoid an accident and drove at a high speed.
 7. The defendants supported their case with a statement of the 1st defendant in which he stated that, he has been sued as Anish Kara Shah and yet his correct name is Anish Dhirajilal Kara Shah. That, he is a director of the 2nd defendant and was not driving motor vehicle number KBK 1xxx0 on 31st May 2017.
 8. In addition, the defendants served a third party notice upon the Estate(s) of John Wambugu King'ocha and Nancy Wanjiku Karanja. Pursuant thereto, the 3rd Parties filed a statement of defence and joined issues with the averments in the defendant's statement of defence, save to attribute negligence for the accident on the part of the plaintiff and the defendants. The particulars of negligence attributed on their part was denied.
 9. The case proceeded to full hearing and at the end, the trial court rendered its decision vide a judgment delivered on 21st September 2021, dismissing the suit on the ground that no liability was established against the defendants in that, there was no evidence showing that, the 1st defendant was the driver of motor vehicle No. KBK 1xxxx0 and that he was negligent.
 10. That, the 2nd defendant is not vicariously liable and that the doctrine does not apply in the case. The court held that there was no liability established against third parties. The court dismissed the suit against the defendants with costs to be borne by the plaintiff and the suit against the 3rd parties with costs to be borne by the defendants.
 11. It is against the judgment that; the appellant has appealed on the following grounds: -
 - a. That the Honourable Magistrate erred in law and fact by failing to have due regard, take into account and appreciate the substantive issues of law and facts raised by the Appellant during the hearing and in the submissions, authorities and other documents on record.
 - b. That the Honourable Magistrate erred in law and fact by finding that the Appellant's replies and Preliminary Objection to the Respondent's Application forming the substratum of this appeal lacked merit.
 - c. That the Honourable Magistrate erred in law and fact by finding that the Appellant's evidence in support of his claim did not meet the threshold of the balance of probability standard despite there being sufficient evidence on record to hold otherwise.



- d. That the Honourable Magistrate erred in law and fact by failing to consider that the 2nd Respondent being the undisputed owner of motor vehicle registration number KBK 123Y/ZD 3230 was undeniably and vicariously liable for the accident forming the substratum of this appeal.
 - e. That the Honourable Magistrate erred in law and fact by failing to consider and uphold the overriding objective of the law to ensure the dispensation of justice.
 - f. That in all circumstances of the case, the Honourable Magistrate erred in dismissing the Appellant's suit.
12. The appeal was disposed of vide the filing of submission, wherein the appellant in submissions dated; 24th October 2022 submitted that the burden of proof in most civil cases is a balance of probabilities as defined under the phrase preponderance of evidence in the *Black Law's Dictionary* Tenth Edition at page 1373.
 13. Further, in the case of *William Kabogo Gitau vs George Thuo & 2 others* [2010] 1 KLR 526 the court defined a balance of probabilities in a civil case stating that a civil case may be determined in favour of the party that establishes the allegations pleaded in its case to a percentage of 51% as opposed to 49% of the opposing party.
 14. Further in *Kamunduu Kaumba & anor v Kingsway Motors* (2020) eKLR, the court stated that, in determining whether the appellant proved its case to the required standard, it must be considered whether the allegations in the plaint were supported by cogent evidence.
 15. That, in the present suit the Police abstract was produced by the consent of both parties which indicates the accident occurred and the subject motor vehicle was owned by the 1st defendant. Further, the appellant produced a copy of records of the subject vehicle that indicated the 2nd defendant as the owner. Further, section 8 of the *Traffic Act* (Cap 403) states that, the person in whose name a vehicle is registered shall be deemed the owner unless the contrary is proved.
 16. Furthermore, that the 1st defendant did not controvert nor produce any evidence to show the driver, employee or servant and/or was not liable for negligence. That, he admitted to being a director in the 2nd defendant, was the owner of the subject vehicle and was aware of the accident.
 17. The appellant argued that the trial court hinged its judgment on the fact that the 1st defendant was not the driver of the subject motor vehicle at the time of the accident, which was not a cogent reason to hold that he, the appellant did not prove his case to the required standard. That, the evidence by the appellant and testimony of the respondents is evidence of a cause of action and that the appellant proved his case on a balance of probability.
 18. Further, the appellant submitted that the 2nd respondent was vicariously and wholly to blame for the accident and hence 100% liable in damages. That, the 1st defendant admitted he was the owner of the subject vehicle and intimated he was a director in the 2nd defendant and aware of the accident, which admissions was proof that he knew the driver and had given him instructions.
 19. The appellant relied on the case of; *Joseph Wabubko Mbayi v Frida Lwile Onyango* (2019) eKLR where the court quoted the case of *Jane Wairimu Turanta vs Gitahae John Vickery & 2 others* [2013] eKLR and *Morgan vs Launchbury* (1972) 2 All ER 606 where the doctrine of vicarious liability was expounded stating that to establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in his instruction and was doing so in the performance of the task or duty delegated by the owner.



20. The appellant argued that, he had proved on a balance of probability that the respondents were vicariously liable for the negligence of the driver and he was therefore entitled to damages. That, he sustained severe injuries as a result of the road traffic accident and suffered permanent degree of injury assessed at 25% of his right upper limb.
21. That for the award of general damages, he relied on the case of *Hellen Atieno Oduor vs S.S Mehta & Sons Ltd and Mutbitu Nanua* (2015) eKLR where the court awarded general damages of; Kshs. 1,500,000 where the plaintiff sustained a fracture of the right tibia and fibula, multiple fractures of the ribs on the right side of the chest, chest injury and hemithorax, blunt abdominal trauma, fracture of the right scapula, surgical scars of the right knee, interiorly and right ankle joint medially, and incapacity at 10%.
22. Reliance was also placed on the case of; *Mehari Transporters Ltd vs Damus Muasya Maingi* (2013) eKLR where the appellate court upheld the award of Kshs. 1,500,000 by the trial court where the plaintiff sustained blunt injuries to the chest, fractures of the 4th, 6th and 7th ribs on the right side with puncture of the pleural leading to hemothorax, blunt injury to the abdomen with a tear in the liver and severe internal bleeding leading to hemoperitoneum, a deep cut wound on the right arm, many cuts and bruises on the whole right arm, fracture of the scapula, several fracture of the tibia and fibula at the ankle joint, and incapacity was assessed at 8%.
23. That, taking into account the above precedents, inflation trends and passage of time, the appellant urges the court to set aside the judgment and orders of the trial court and award general damages of Kshs. 2,000,000 and special damages of Kshs. 3,550.
24. However, the 1st and 2nd respondents in their submissions dated; 10th January 2023 argued that the appellant's case in the trial court was not about the 1st and 2nd respondents being vicariously liable for the conduct of the unidentified driver, who is a stranger to the suit, as this allegation was not pleaded in the plaint.
25. That, the 1st and 2nd respondent did not have an opportunity to challenge the new allegation in the pleadings or evidence and that entertaining the issue at this stage will deny them an opportunity to be heard. Reliance was placed on the case of; *Chalicha F C S Ltd v Odhiambo & 9 Others* [1987] KLR 182 where Gachuhi JA (as he then was) held that no order can be made outside the pleading unless by consent. That the object of pleadings is that both parties should know the issues between them that they each have full information of the case to meet and prepare evidence to support his case or meet his opponent.
26. Further, in the same case Apaloo JA, went to state that a case is governed by principles of law, that a judge's feeling of sympathy cannot be an acceptable substitute for the law, that there is justice to a plaintiff as well as to a defendant.
27. That, the right to be heard before any adverse decision is taken against a person is fundamental and permeates the entire judicial system and therefore the court should not deprive the 1st and 2nd respondents a fair hearing.
28. Further, the trial court did not overlook justice when it decided the issues raised and addressed by the parties in pleadings and evidence. That, considering pleadings and evidence presented in support is not a technicality that can be pushed aside peremptorily.
29. Reliance was placed on the case of; *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR where Kiage JA stated that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.



30. That, it is impossible to decide a case fairly and on its merits by disregarding pleadings and evidence as stated in the case of; *Gitau v Kenya Methodist University (KEMU)* (Petition 5 of 2020) [2021] KEHC 322 (KLR) where Mativo J (as he then was) stated that resolution on merits occurs when a lawsuit is decided according to procedural rules that are designed, interpreted and implemented to give parties a full opportunity to participate in presenting the proof and reasoned arguments on which a court can decide a case and that do not systematically affect the outcomes of the case.
31. The 1st and 2nd respondent further submitted that the appellant was obliged to prove his case that the 1st respondent was the 2nd respondent's driver and negligently cause the accident. However, the respondents disproved these matters.
32. The respondents cited the case of; *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR where the Court of Appeal quoted Lord Denning in *Jones vs National Coal Board* [1957] 2 QB 55 and stated that in our legal system the judge sits to hear and determine the issue raised by the parties and not to conduct an investigation or examination on behalf of society at large.
33. Further, that the court could not consider matters beyond the pleadings including the new allegation that the 1st and 2nd respondent were vicariously liable for the negligence of another person. That, the appellant was entitled to amend his plaint but did not do so, hence the trial court could have entered the realm of speculation if it decided the dispute based on the new allegation that was introduced during submissions. Reliance was placed on the case of; *Matiba vs Attorney General* [1995-1998] 1 EA 192 where it was held that no man shall be condemned unless he is given a fair opportunity to be heard.
34. Furthermore, it was argued that the new allegation in the appellant's submissions was an ambush and cited the case of; *Arthur Wamiti Njoroge v The Disciplinary Tribunal & another* [2017] eKLR where it was stated in litigation parties should put place their different positions clearly, plainly and without tricks.
35. That the appellant having failed to discharge his burden of proof, the new and contradictory matters in his submissions should not aid his case. The case of *Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR was cited where the Court of Appeal stated that the appellant failed to prove his claim by evidence and what was in his submissions could not aid his as it works against the law.
36. On the issue of damages, it was submitted that while liability was not admitted, damages of Kshs. 800,000 for pain and suffering would be adequate. That in the case of; *Gabriel Kariuki Kigathi & another v Monica Wangui Wangechi* [2016] eKLR, the court award Kshs. 450,000 where the claimant suffered a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries to both hands and both legs.
37. Further in the case of; *George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi* [2016] eKLR the respondent had two loose teeth, blunt trauma to the neck and chest, fracture to the left clavicle, fractures on the 4th and 5th ribs, blunt trauma to the spinal column and right scapula area, and dislocation of the left shoulder joint the court awarded Kshs. 450,000.
38. Furthermore, in the case of; *Beatrice Khamede Erick Wanunu & another* [2019] eKLR the court upheld the award of Kshs. 800,000 where the claimant suffered a fracture of the left shoulder blade, injury of the left brachial plexus and a puncture wound of the left elbow joint.
39. Finally, the 3rd and 4th respondents filed submissions dated; 18th January 2023 and submitted that no grounds have been advanced against the dismissal of the appellant's case in their favour and there is no



cause of action against them. That, the appellant's evidence was uncontroverted that the accident was caused by the negligence of the 1st respondent and that the 2nd respondent was vicariously liable. In the circumstances it defeats logic why they were enjoined in the appeal and thus the appeal against them should be dismissed with costs.

40. Further, they were enjoined in the suit by the 1st and 2nd respondents who blamed them for the accident in their defence. As a consequence, the burden of proof lay with 1st and 2nd respondents to prove the accident was caused or substantially contributed by their negligence, which they failed to do.
41. That, the trial court found the appellant failed to prove liability and negligence on a balance of probability and this court should reject the notion that the trial court considered irrelevant matters or failed to consider relevant material before it hence the appeal is devoid of merit.
42. Having considered the appeal in the light of the materials placed before the court I find that, the role of the first appellate court is to evaluate the evidence adduced afresh and arrive at its own decision as held in the case of; *Selle & another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123. Where the Court of Appeal stated that: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

43. Pursuant thereto and in considering the evidence herein, I find that, the main issue to determining is whether the appellant proved his case on the required standard. In particular, whether the appellant adduced adequate evidence to support the claim against the 1st respondent as the driver of the subject motor vehicle and/or drove that vehicle in a negligent manner, or simply put, whether the trial court erred in holding that, the plaintiff had not proved liability against the defendants.
44. In my considered opinion, the starting point is to consider the appellant's pleading in the plaint. In that it is trite law that, parties are bound by their pleadings as held in the case of; *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR where the Court of Appeal stated that: -

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or



defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

45. In the instant matter, the appellant pleads at paragraph 4 of the plaint that, “the motor vehicle registration number KBK 1xxxx0 was being driven by the 1st defendant the agent, servant and/or employee of the 2nd defendant” and that the “2nd defendant was the registered owner thereof. This is the crux of the matter herein is whether indeed the 1st respondent was the driver of that motor vehicle
46. The appellant further pleads at paragraph 5 of the plaint that the 1st respondent drove the subject vehicle in negligent manner and that the 2nd respondent is vicariously liable for the negligence acts of the 1st respondent. That too had to be proved.
47. The 1st defendant categorically denied having been the driver of that motor vehicle and therefore the appellant was under a legal duty to prove the same. It suffices to note that, it is settled law that the plaintiff has the primary role of adducing evidence to support the pleadings.
48. I note from the evidence of the appellant both in his statement filed in court and/or in the evidence in chief, he did not testify that the 1st defendant was the driver motor vehicle in question at the time of the accident. In addition, the appellant produced a copy of Police abstract in support of its case, however, a perusal thereof does not indicate that, the 1st defendant was the driver of the motor vehicle KBK 1xxxx0. The question is: where did the plaintiff get the information that, the 1st defendant was driving that motor vehicle at the material time?
49. I further note that from the cross-examination of the 1st defendant by the appellant’s counsel that, the same was as brief as the witness is indicated as having responded as follows: -

“On 31/5/17 an accident occurred. I am not denying ownership. I am one of the directors of Kara commodities”.
50. Indeed, no question was put to the 1st defendant as to whether, he was the driver of the subject motor vehicle or not. As such it cannot be said that the witness evidence was rebutted.
51. It also suffices to note that, contrary to the pleadings at paragraph 4 and 5 of the plaint, where the plaintiff avers (at the expense of repeating what is stated herein) that; the 1st defendant was the driver of said motor vehicle and the 2nd defendant its registered owner. The submissions filed by the appellant in the trial court departs from the pleadings wherein at paragraph 10 of the submissions, it is indicated that, the respondent’s subject motor vehicle was being driven by a “driver who is not privy to the suit” So who was this other driver? and why didn’t the appellant attempt to establish the same from the Police officers who visited the scene after the accident and/or investigated it. Doesn’t this submission vindicate the 1st respondent?
52. In my considered opinion, the appellant failed completely to adduce any evidence to prove that the 1st defendant was the driver of the subject motor vehicle. Therefore, the 1st defendant cannot be held liable for acts he knows nothing about.
53. The next question is whether, in view of the finding that, the appellant has not proved the 1st respondent was the driver of the subject motor vehicle, whether the issue of whether the 1st respondent was negligent in driving that motor vehicle arise. I find the answer in the negative.



54. In the same vein, the further issue that arise is; whether in the given circumstances, the 2nd defendant vicariously liable. The doctrine of vicarious liability is the liability held by a person or entity that is in charge (called the principal or master) of another person (called the agent or servant). The person, usually an employer, is responsible for the actions of their employee (or other subordinate) if that employee causes harm or injury to another person.
55. Thus the liability under the doctrine of vicarious liability is secondary. The master cannot be liable for acts for which the employee or servant is not. If the plaintiff could not adduce evidence to prove who was driving the subject motor vehicle, his or her relationship with the 2nd defendant and/or whether, in the ordinary course of business on that day in question that driver, servant or employee was on authorized duty or a frolic of his own, then the 2nd defendant cannot be held liable.
56. It is therefore, the finding of this court that, trial court did not err in holding that, the appellant had not proved liability against the defendants and dismissed the suit with costs.
57. Similarly, the liability of a 3rd party enjoined in a suit by a defendant only arises where the defendant has been held liable and is seeking for indemnity or apportionment of liability. Once the defendant is released from liability, then the 3rd party is also released accordingly and the party who brought the 3rd party in the matter bears the costs.
58. The upshot of the aforesaid is that, the appeal herein is dismissed with costs to the respondents
59. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 9TH DAY OF AUGUST, 2023.

GRACE L. NZIOKA

JUDGE

In The Presence Of:

Ms. Kuria H/B for Mr. Kamau for the Appellant

Mr. Kamau of the 1st and 2nd Respondent

Mr. Alusa H/B for Ms. Cherot for the 3rd and 4th Respondent

Ms. Ogutu: Court Assistant

