



REPUBLIC OF KENYA



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**Ndungu v Shah & 3 others (Civil Appeal E059 of 2021)  
[2023] KEHC 21906 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E059 OF 2021  
GL NZIOKA, J  
AUGUST 9, 2023**

**BETWEEN**

**PURITY WAMBUI NDUNGU ..... APPELLANT**

**AND**

**ANISH KARA SHAH ..... 1<sup>ST</sup> RESPONDENT**

**KARA COMMODITES LTD ..... 2<sup>ND</sup> RESPONDENT**

**THE ESTATE OF JOHN WAMBUI KING'OCHA ..... 3<sup>RD</sup> RESPONDENT**

**THE ESTATE OF NANCY WANJIKU KARANJA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal against the judgment delivered by Hon. K. Bidali (CM) vide Civil Case No. 390 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 31<sup>st</sup> May 2017, the plaintiff (herein an appellant) was a passenger in a motor vehicle registration No. KBM 020L at Muniu area along Naivasha-Mai Mahiu road, when that motor vehicle was involved in an accident another motor vehicle registration KBK 123Y/D3230, allegedly driven negligently by the 1<sup>st</sup> defendant who was a servant of the 2<sup>nd</sup> defendant cum respondents herein.
2. It is the appellant's case further case that, the 1<sup>st</sup> 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 020L 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 she suffered bodily injuries as he sustained a fracture of the right and left femur and fracture of of the distal radius. As a result, she sued the 1<sup>st</sup> and 2<sup>nd</sup> respondent for general damages, special damages; Kshs 300,043.31, 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 her witness statement in which she 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 123Y
5. However, the defendants filed a joint statement of defence dated; 15<sup>th</sup> August 2019, denying the allegations that, the appellant was a passenger in the motor vehicle registration No. KBM 020L at the material time. The 1<sup>st</sup> defendant also denied having been the driver of the motor vehicle registration No. KBK 123Y/ZD 3230 and/or being negligent as pleaded in the plaint. On its part the 2<sup>nd</sup> defendant denied being vicariously liable for the alleged negligence on the part of the 1<sup>st</sup> 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 020L 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 1<sup>st</sup> 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 2<sup>nd</sup> defendant and was not driving motor vehicle number KBK 123Y/ZD3230 on 31<sup>st</sup> 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 3<sup>rd</sup> 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 21<sup>st</sup> 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 1<sup>st</sup> defendant was the driver of motor vehicle No. KBK 123Y/ZD 3230 and that he was negligent.
10. That, the 2<sup>nd</sup> 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 3<sup>rd</sup> 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 considered that the 2<sup>nd</sup> 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; 24<sup>th</sup> 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 1<sup>st</sup> defendant. Further, the appellant produced a copy of records of the subject vehicle that indicated the 2<sup>nd</sup> 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 1<sup>st</sup> 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 2<sup>nd</sup> 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 1<sup>st</sup> 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 she, the appellant, did not prove her 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 2<sup>nd</sup> respondent was vicariously and wholly to blame for the accident and hence 100% liable in damages. That, the 1<sup>st</sup> defendant admitted he was the owner of the subject vehicle and intimated he was a director in the 2<sup>nd</sup> 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 Wabuhko Mbayi v Frida Lwile Onyango (2019) eKLR where the court quoted the case of Jane Wairimu Turanta v Githae 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, she proved on a balance of probability that the respondents were vicariously liable for the negligence of the driver and she was therefore entitled to damages. That, she sustained severe injuries as a result of the road traffic accident and suffered permanent degree of injury assessed at 20% of her lower limb and 5% of her upper limb.
21. Additionally, she requires to remove the implants at a future medical expense of Kshs. 300,000. That both the medical doctors of the plaintiff and defendant both gave an estimate of the future medical expenses. That under prayer (v) of her plaint, she prayed the court to award any other relief it may deem fit and urged the court to award the future medical expenses under this prayer.
22. That for the award of general damages, he relied on the case of EWO (suing as the next friend of a minor COW) v Chairman Board of Governors \_ Agoror Yombe Secondary School (2018) eKLR where the court upheld the awarded general damages of; Kshs. 800,000 where the plaintiff sustained a fracture of the right mid shaft femur with fibular fracture and facial injuries with bruises.
23. Reliance was also placed on the case of; Godfrey Wamalwa Wambu & another v Kyalo Wambua [2018] eKLR where the appellate court upheld the award of Kshs. 700,000 by the trial court where the plaintiff sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest, and cut wounds on the lower lip. He was further awarded Kshs. 15,000 as costs for future expenses.
24. 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. 1,000,000, special damages of Kshs. 300,043.31, and future medical expenses of Kshs. 300,000 for removal of the implants.
25. However, the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their submissions dated; 10<sup>th</sup> January 2023 argued that the appellant's case in the trial court was not about the 1<sup>st</sup> and 2<sup>nd</sup> 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.
26. That, the 1<sup>st</sup> and 2<sup>nd</sup> 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.
27. 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.
28. 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 1<sup>st</sup> and 2<sup>nd</sup> respondents a fair hearing.



29. 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 preemptorily.
30. 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.
31. 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.
32. The 1<sup>st</sup> and 2<sup>nd</sup> respondent further submitted that the appellant was obliged to prove his case that the 1<sup>st</sup> respondent was the 2<sup>nd</sup> respondent's driver and negligently cause the accident. However, the respondents disproved these matters.
33. 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 v 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.
34. Further, that the court could not consider matters beyond the pleadings including the new allegation that the 1<sup>st</sup> and 2<sup>nd</sup> 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.
35. 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.
36. 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.
37. On the issue of damages, it was submitted that while liability was not admitted, damages of Kshs. 450,000 for pain and suffering would be adequate and cited the case of; Jitan Nagra v Abidnego Nyandusi [2018] eKLR, the court award Kshs. 450,000 as general damages for pain and suffering where the claimant suffered a compound fracture of the right tibia/fibula, segmental distal fracture of the right femur, lacerations on the optical area, deep cut wounds on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, and bruises on the left elbow.



38. Further, they argued that the appellant produced a final invoice of Kshs. 259,999.99 from AIC Kijabe Hospital but did not avail evidence that she paid the full amount.
39. Finally, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed submissions dated; 18<sup>th</sup> 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 1<sup>st</sup> respondent and that the 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> respondents who blamed them for the accident in their defence. As a consequence, the burden of proof lay with 1<sup>st</sup> and 2<sup>nd</sup> 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 v 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 1<sup>st</sup> 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 123Y/ZD 3230 was being driven by the 1<sup>st</sup> defendant the agent, servant and/or employee of the 2<sup>nd</sup> defendant” and that the “2<sup>nd</sup> defendant was the registered owner thereof. This is the crux of the matter herein is whether indeed the 1<sup>st</sup> respondent was the driver of that motor vehicle
46. The appellant further pleads at paragraph 5 of the plaint that the 1<sup>st</sup> respondent drove the subject vehicle in negligent manner and that the 2<sup>nd</sup> respondent is vicariously liable for the negligence acts of the 1<sup>st</sup> respondent. That too had to be proved.
47. The 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> defendant was the driver of the motor vehicle KBK 123Y/ZD3230. The question is: where did the plaintiff get the information that, the 1<sup>st</sup> defendant was driving that motor vehicle at the material time?
49. I further note that from the cross-examination of the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> defendant was the driver of said motor vehicle and the 2<sup>nd</sup> 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 1<sup>st</sup> respondent?
52. In my considered opinion, the appellant failed completely to adduce any evidence to prove that the 1<sup>st</sup> defendant was the driver of the subject motor vehicle. Therefore, the 1<sup>st</sup> 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 1<sup>st</sup> respondent was the driver of the subject motor vehicle, whether the issue of whether the 1<sup>st</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> party is also released accordingly and the party who brought the 3<sup>rd</sup> 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 9<sup>th</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> respondent

Mr. Alusa H/B for Ms. Cherot for the 3<sup>rd</sup> and 4<sup>th</sup> respondent

Ms. Ogutu: Court assistant

