



**Mwaka v Wamaitha (Civil Appeal 2 of 2018)
[2023] KEHC 23914 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 2 OF 2018
MW MUIGAI, J
SEPTEMBER 26, 2023**

BETWEEN

NICHOLAS MWAKA APPELLANT

AND

ESTHER WAMAITHA RESPONDENT

*(An appeal against the judgment dated 22nd December, 2017
delivered by Honorable CA Ocharo (PM) Civil suit No. 132 of 2010)*

JUDGMENT

Background

Proceedings in the Trial Court

The Plaintiff

1. In the Court record is a plaint dated 23rd January, 2010 against the Appellant in which the Respondent claimed that at all material times to the suit, the Appellant was the registered owner and/ or driver of motor vehicle registration number KAB 133M. Contending that on 14th February, 2009 along Nairobi- Mombasa Road the Respondent was a lawful passenger in motor vehicle Registration Number KAB 133M when the Appellant, his driver, servant, agent and/or employee so negligently drove, managed and/ or controlled the said motor vehicle such that it lost control, left the road and rolled several times thus occasioned bodily injuries to the Respondent. Particulars of the injuries to Respondent were:
 - a. Injury on the head
 - c. Injury on the right leg.
2. The Respondent claimed special damages and the particulars of damages were:



- a. Medical report- 3,000/=
 - b. Medical expenses-2,600/=
 - c. Police abstract -200/=
 - d. Copy of records-500/=
3. Respondents prayed for judgment to be entered against the Appellant for:
- a. General damages
 - b. Special damages
 - c. Cost of the suit
 - d. Interest on (a), (b) and (c) above at court rates.

The defence

4. The Appellant in his defense dated 21st June,2011 opposed the Respondent's claims denied being the registered owner and/or driver of Motor vehicle registration number KAB 133M as alleged in the plaint.
5. The Appellant further denied that an accident occurred on the said date and place involving the said motor vehicle as alleged in the plaint. Appellant denied that Respondent was a lawfully travelling passenger in the said motor vehicle and placed the Respondent to strict proof thereof.
6. Appellant denied all the particulars of negligence as enumerated in the plaint in toto.
7. Respondent averred that in the alternative and without prejudice, if such accident occurred which he denied, the same was an inevitable accident, that it was caused by circumstances beyond the control of the driver of motor vehicle registration number KAB 133M and that it could not have been avoided.
8. The Appellant denied in entirety the contents of the plaint including particulars of injuries and special damages save for the jurisdiction the Honorable Court which was admitted and prayed that the Respondent's suit against him be dismissed with costs and interest thereon.

Hearing in the Trial Court

9. PW1 Rider Kiboi Ibrahim told trial court that he is No. 88387 attached at Athi River Traffic Base and that he is court on behalf of base commander to produce a police abstract with regard to Esther Wamatha who was a passenger in motor vehicle registration number KAB 133M Nissan Sunny. He testified that the accident was on 14/2/2009 at around 10:30pm along Mombasa Road, Prima Rosa area. PW1 claimed that it was a self-involved accident and that the passenger was injured while the driver Felix Mureche was not found at the scene but was later arrested and charged with careless driving; that the driver was fined Kshs 3,000/=.
10. In cross-examination by Mr. Othieno, PW1 testified that the abstract is for one Esther Wamaitha and that at number 8 it shows everyone who was injured in the accident and it was abstract no. 0167694. He told court that P3 Form was issued later after treatment.
11. PW2 Esther Wamaitha gave her sworn statement and testified that when the accident happened she was 15 years old and presently 24 years old. Testifying that it was on 14/2/2009 along Mombasa road when the accident happened and that they had hired motor vehicle registration number KAB 133M. She told the Trial Court that the driver was over speeding and tried to swerve but he lost control and



rolled off the road. It was his testimony in the trial court that she was injured on the head, broken femur cut on the left hand, lower abdomen and minor injuries. She further told the Trial Court that she was taken to Mutunguni Hospital in Athi River but was referred to KNH where she was admitted for five weeks. Testifying that she was in a coma for one month then went for surgery in March; that on 30/6/2011 she went to Dr. Muttisya for preparation for the medical report in which a plate was inserted on the fracture. PW2 claimed that she lost sense of smell and had poor bladder control and that she reported the accident and was issued with a police abstract on 24/8/2009. PW2 blamed the driver and the owner of the vehicle for the accident; she was issued with a P3 form on 2/4/2009 which she produced in the trial court as an exhibit. PW2 claimed that she paid Kshs. 2,000/= for the medical report pexb 4 (a) medical report invoice pexb 4 (b) and that she had not yet healed. PW2 was yet to go for removal of the plate, have her sense of smell checked and that the loss of bladder control was slightly manageable. PW2 prayed for compensation, costs of suit and interest.

12. In cross-examination, PW2 told court that she has sued Nicholas Mwaka and that he did not know him. Testifying that he had not produced any receipts to support the special claim; that the only receipt produced total to Kshs 600/=. PW2 told court that she spent Kshs. 800,000/= on medical expenses and that she had receipt for Dr. Mutisya for Kshs 2,000/=. She claimed that the report from KNH did state that she was in a coma it states that she was in a fair general condition; that she went to clinic for follow up and that Dr. Mutisya is a consultant psychiatrist, she went to see her for bladder problem. She told court that the report states the date of accident is 14/2/2009 while the said report was made two years later.
13. The Respondent closed the case.

The Defence Case

14. DW1 Nicholas Mwaka on oath told the lower court that he is a businessman in Mlolongo and that he deals in auto parts; that on 7/10/2016 he filed a witness statement in court which adopted as his evidence. He also filed a certificate of examination and test of vehicle which he produced in the trial court as exhibit and was to the effect that the vehicle was in good working condition.
15. In cross-examination DW1 told court that he employed Alex Musee as his driver of the accident vehicle.
16. The matter was canvassed by written submissions in the Trial Court.

Trial Court Judgment

17. By a judgment dated 22nd December,2017 the Trial Court awarded a nominal figure of Kshs. 80,000/= further the trial court found that special damages were not proved as pleaded save for only Kshs 200/=. The Trial Court further entered judgment in favor of the Respondent at Kshs 480,000/= plus costs of the suit and interest at court rates from date of the judgment till payment in full.

The Application for stay of execution

18. In the Court records is a notice of motion dated 3rd December,2018 and filed in this court on 4th December,2018 and supported by an affidavit of Nicholas Mwaka. In the said application the Appellant herein sought orders that: the application be certified urgent and service whereof be dispensed with in the first instance and it be heard expert; pending the hearing and determination of the application a temporary order of stay of execution of the decree in CMCC 132 of 2010 arising from the judgment delivered on 22nd December,2017 do issue; further that pending the hearing and determination of the Appeal an order of stay of execution of the decree in CMCC 132 of 2010 arising from the judgment delivered on 22nd December,2017 do issue.



19. The first two orders sought by the Applicant were dispensed vide this Court order dated 5th December, 2018.
20. The said application was opposed by the Respondent vide her Replying Affidavit dated 21st January, 2019 and filed in court on 22nd January, 2019.
21. The application was disposed vide written submissions.
22. Vide a ruling dated 1st August, 2019 Kimei J found that the application had merit and the same was allowed in the terms that pending the hearing and determination of this appeal, an order of stay of execution of the decree in CMCC 132 of 2010 arising from the judgment delivered on 22nd December, 2017 was granted; the Appellant was further ordered to surrender L.R Matungulu/Katine/3058 together with its valuation report for authentication to the Deputy Registrar within 30 days from the date of the ruling and upon authentication be deposited in court as security with a corresponding entry being made on the Register at Lands Offices; court further ordered that in the event the title is found not to be authentic, the orders of stay would automatically lapse; lastly the cost of the Application would abide in the Appeal

The Appeal

23. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 5th January, 2018 sought orders that:
 - a. The Appeal allowed.
 - b. This Court do set aside the judgment entered in the Lower Court and dismiss the suit.
 - c. In the alternative to paragraph (b), this Honorable Court do set aside and substitute the award made in the Trial Court or revise the judgment in the Trial Court on liability and quantum.
 - d. Cost of this appeal be awarded to the Appellant.
24. The Appeal is brought on the grounds that:
 - i. The Learned Trial Magistrate erred in law and in fact in finding the Appellant guilty of negligence yet the Respondent did not produce any evidence that she hired the vehicle in which she was injured.
 - ii. The Learned Trial Magistrate erred in law and in fact in finding that there was no evidence to contradict the Appellant's Sworn Statement that the driver of the vehicle acted outside the scope of his authority.
 - iii. The Learned Trial Magistrate erred in law and in fact in finding in favor of the Respondent yet the Respondent failed to prove her case on a balance of probabilities that the injuries she sustained arose from the accident which occurred on 14th February, 2009.
 - iv. The Learned Trial Magistrate erred in law and in fact in condemning the Appellant to pay Kshs. 480,000/= to the Respondent despite the Respondent's failure to prove her case on a balance of probabilities.
 - v. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions which clearly demonstrated that the Respondent had failed to prove on the balance of probabilities that she was one and the same person referred to in the Kenyatta



National Hospital treatment notes in total disregard of the discrepancies between the description of her injuries in the hospital medical report and other medical reports.

- vi. The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's written submissions dated and filed on 13th October, 2017.
 - vii. The Learned Trial Magistrate erred in law and in fact in failing to critically examine the factual issues brought out in cross examination of the Respondent which established that the Respondent did not have a valid case against the Applicant.
25. The appeal was canvassed by way of written submissions.

Submissions

The Appellant's Submission

26. The Appellant in his submissions dated and filed on 10th May, 2023, in which Mr. Othieno, counsel for the Appellant submitted on future medical expenses (ground 7 of Memorandum of Appeal) that there was no claim made for future medical expenses and there was no evidence on record to support an award of Kshs 80,000/= in payment of the same. Counsel submitted as per the prayers in the plaint (in page 5 and 6 of the record), there was no mention of future medical expenses as it was not pleaded and court had no jurisdiction to award a claim which is not pleaded and prayed for. Counsel submitted that the witness statement (which is not a pleading), the respondent mentioned the Future medical expenses. (reference at page 9 of the record)
27. Counsel averred that dismissal of Dr. Muttisya's medical Report meant that there was no evidence on record as regards future medical expenses and therefore no basis upon which to make an award of Kshs. 80,000/= or any other amount, being that the claim was not pleaded or prayed for in the plaint.
28. Regarding the inadmissibility of the Medical Report from Kenyatta National Hospital, counsel submitted that the document was inadmissible as it was not properly produced by its maker despite notice that the document was objected to and that its maker was required to produce it in court. It was the position of the counsel that the medical report was objected to by the Appellant when it was stated by the Appellant in the Pre-trial questionnaire (page 30 of the record) at question 12 that it required the makers of medical reports, maker of P3 Forms and makers of Police abstract. And that the Respondent's pre-trial questionnaire (at page 28 of the records) stated in answer to question 12 that he also required a medical expert. Counsel placed reliance on section 35 of the *Evidence Act* to buttress his point on documents produced in civil proceedings.
29. It was submitted by counsel for the Appellant that pursuant to the provisions of the *Evidence Act*, the medical report from Kenyatta National Hospital did not qualify as an admissible document whose contents may be relied on as evidence before the court.
30. On the wrongful exercise of discretion, Mr. Othieno relied on the case of Mulji Vs Partab Singh (1931) (volume 13) LRK 1, and averred that in as much as the trial court had discretion when awarding general damages, no court of law has the jurisdiction to award a claim which is not pleaded in the plaint. According to counsel the discretionary decision was clearly wrong because the court misdirected itself on acting in a matter not pleaded hence arrived at a wrong conclusion.
31. It was the Appellant's case that the trial court's finding that notes by the doctor on the plaintiff's loss of smell and lack of proper bladder control were not supported by any treatment notes so that the sum of Kshs. 400,000/= would suffice. Counsel opined that there are legal authorities to establish the



quantum of general damages awarded for leg fracture and the trial court was duty bound to refer to them and use them as a guidance to base its award of general damages.

32. Reliance was made on the cases of Mulji Vs Partab Singh (1931) (volume 13) LRK 1 and Mbogo and Another Vs Shah (1968) E.A 93, on the judicial discretion of courts from the case as a whole. It was the counsel's submission that court of appeal should interfere with the exercise of judicial discretion by an inferior court in that the inferior court misdirected itself when it accepted the medical report from Kenyatta National Hospital as Evidence as judicial discretion cannot be used to override the provisions of statute law which provisions rendered the said report as inadmissible evidence. It was contended by the counsel that the trial court acted on the said medical report by using it as the factual basis which it assessed the quantum of general damages of Kshs. 400,000 when it should not have done as this was inadmissible evidence.
33. Counsel averred that the evidence before the trial court did not meet the standard of proof as required by law and the trial court erroneously considered that the Respondent had proved the injuries claimed in the plaint hence counsel urged that the award of General Damages of Kshs. 400,000/= should be set aside and the appeal allowed on the grounds set out in the Memorandum of Appeal and addressed in these submissions. Further, counsel urged that the award of Kshs. 80,000/= for future Medical expenses should be set aside as there was no evidence on record that the Respondent needed future medical care and the costs of such care.

Respondents' Submissions

34. Respondents vide her submissions dated 5th May,2023 and filed in court on 9th May,2023, Mr. Muttisiya, Counsel for the Respondent submitted that on liability, the court delivered judgement in favor of the Respondent at 100% and general damages of Kshs. 480,000/=. Counsel was in agreement with lower court finding on liability hence according to the counsel grounds 1, 2 and 3 of Memorandum of Appeal therefore fails.
35. On quantum counsel averred that Respondent sustained injuries by fracturing right femur and cuts and foreign bodies (glasses) on the scalp. Contending that the Respondent was admitted in an orthopedic ward for 5 weeks at Kenyatta National Hospital and was put on traction for one month and eventually taken to theatre for open reduction and internal fixation of the fracture and a plate was inserted.
36. Counsel submitted that the Respondent presently complains of poor bladder control, loss of smell and there is a surgical scar on the right thigh extending to the knee. It was contended that the Respondent testified on 23rd February,2017 confirming the foregoing and also produced the P3 Form, treatment records from Kenyatta National Hospital and Medical Report dated 30th June,2011 confirming the injuries. According to the counsel, the said injuries were not controverted and/ or denied by the Appellant.
37. It was submitted by the counsel that the award of Kshs. 480,000 was very lenient and on the lower side hence as per the counsel the Respondent proved her case on a balance of probabilities. Counsel averred that the trial court critically examined the factual issues and properly established that the Respondent had a valid case against the Appellant and that grounds 4, 5, 6 and 7 of the Memorandum of Appeal therefore fail.
38. Reliance was placed on the case of Joseph Wabukho Mbayi Vs Frida Lwile Onyango (2019) eklr, to buttress a point that the suit motor the vehicle belonged to the Appellant and it was driven by someone in the lawful employment of the Appellant hence vicarious liability.



39. Counsel averred that the Respondent proved negligence on the issue of liability and the appellant was vicariously liable further that the Respondent proved that she sustained injuries as a result of the Appellant's negligence and submitted documents in support of the injuries. It was urged that finding of the court both on liability and quantum should not be disturbed.

Determination/analysis

40. The Court has considered the appeal, Trial Court Proceedings and judgement and written submissions by parties through Counsel and the issue subject of determination is liability and quantum.

41. It is trite law that the legal burden of proof lies with the person who alleges as outlined in Section 107 (1)-112 of the *Evidence Act*, Cap 80 Laws of Kenya.

42. In *Palace Investment Ltd Vs Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Court of Appeal held: -

Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

43. In *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526, the Court stated that: -

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

44. This being the first Appeal court, its duty as in *Selle Vs Associated Motor Boat Co* [1986] EA 123 is as follows: -

“the evidence in the case generally.” The appellate court is not bound necessarily to accept the findings of fact by court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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 the 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.”



45. The thrust of Appellant’s appeal is that the Respondent failed to prove her claim and did not discharge the burden of proof; that she was injured as per injuries outlined in the Plaintiff, and it was from the accident that occurred on 14/2/2009 and that the Appellant was responsible for the accident and liable and liable for negligence as particularized in the Plaintiff.
46. The Appellant took issue with Medical Report produced by the Respondent, submitting that the said Medical Report was inadmissible document as it was not produced by its maker despite notice that the document was objected to and that its maker was required to produce it in court. Counsel submitted that medical report was objected to by the Appellant in the Pre- Trial Questionnaire (page 30 of the Record) at question 12 that it required the “makers of Medical Reports of P3 Forms Makers of Police Abstract” further that the Respondent’s questionnaire (at page 28 of the Record) stated in answer to question 12 that’s he also required a Medical Expert. Counsel opined that the evidence on record, as contained in the pre-trial documents filed by both parties clearly shows that the Medical experts were to be summoned and their attendance in court could only be for the purpose of each Medical Expert defending their respective reports.
47. The issue of admissibility was raised before the Trial Court. It was the submissions by Counsel that for the first time here future medical expenses is mentioned at page 8 line 34 of the record that the Respondent stated in her evidence before court that she sought future medical expenses for around Kshs. 500,000/= for scan and physiotherapy. She did not remove the plate placed in her right leg, she did not produce evidence or any document or amount she will need to have the plate removed and the cost of doing so.
48. Counsel in this case pinned that even in the Kenyatta National Hospital Report (page 12 of the record) there is no mention the plate would need to be removed as it is only in the medical report by Dr. Syengo the it is mentioned (at page 14 of the Record line 19) that the plate will be removed at a costs of up to Kshs. 100,000/=. Counsel contended that there was no evidence on record as regards future medical expenses and therefore no basis upon which to make an award of Kshs. 80,000/= or any other amount as the claim was not pleaded or prayed for in the plaintiff.
49. It was the Appellant’s submission that the Respondent’s claim lacked credibility on major items of claim and therefore any other evidence would need to be proved strictly in the manner prescribed by the *Evidence Act*.
50. It is trite law that the burden and standard of proof are discharged by either direct or indirect evidence by the witnesses. The direct and indirect evidence may include documentary evidence that may be produced by the author or any other lawful witness.
51. Blacks Law Dictionary defines direct evidence to mean
Evidence in form of testimony from a witness who actually saw, heard or touched the subject of questioning.
52. Section 63 (2) of the *Evidence Act* provides:
“direct evidence” means—
(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;



- (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
- (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

.....

53. In State Vs Baker, 249, Or. 549, 438 P.2d 978 (1968) in this case, it was observed that
- “Direct evidence includes what is heard as well as what is seen; indeed, what is perceived by senses. Without looking to defendant’s admissions about riding with his relatives to Portland to sell wire, there was evidence from which the jury could find guilt.”
54. The burden/standard of proof maybe established through indirect and/or documentary evidence in form of primary or secondary evidence as provided by Sections 64-68 of the Evidence Act.
55. In the instant case, on appeal, the Appellant submitted that the Trial Court did not meet the standard of proof as required by law and the trial court erroneously considered that the Respondent had proved injuries claimed in the plaint. Opining that both parties requested for the attendance of “Medical Experts” and therefore it was erroneous for the trial court to hold as it did.
56. This court upon perusing the Record of Appeal finds that there are two copies of Pre-trial Questionnaires filed on 26/5/2016 at page 28 at Clause 12 and 13 it is written a medical a medical expert will be required and experts agreed on their respective reports. The other questionnaire was filed on 7/10/2016 and at clause 12 it is typed experts required are Maker of Medical Reports, Makers of P3 Forms and Makers of Police Abstract.
57. It is evident on typed proceedings that during the hearing, PW2, testified that she was involved in a road accident on 14/2/09 along Mombasa road. They had hired motor vehicle registration number KAB 133M. the driver was over speeding and tried to swerve but he lost control and the car rolled off the road. She was injured on the head, broken femur cut on left hand, lower abdomen and minor injuries. She taken to Mutunguni Hospital in Athi River but was referred to KNH where she was admitted for five weeks where she was in a coma for one month and went for surgery in March. Later on 30/6/2011 she went to doctor Mutisya for preparation for the medical report. A plate was inserted on the fracture. She reported the accident and was issued with a police abstract on 24/8/2009. She blamed the driver and the owner of the vehicle for the accident and was issued with a P3 Form on 2/4/09.
58. In cross examination she stated that the Report from KNH does not state that she was in a comma, it states she was in a fair general condition. She went to the fracture clinic for follow up Dr. Mutisya is a Consultant Psychiatrist. She went to see her for the bladder problem. The report was made two years later.
59. The Trial Court Proceedings highlighted above confirm that the Appellant did not object to the production of the police abstract, the P3 Form, Treatment notes and medical reports. At no point in the proceedings was the issue of the maker of reports/ documents be availed. The Appellant/ Advocate did not issue Notice to Produce under Section 69 of the Evidence Act to the makers of these documents to appear in court and produce the documents during the proceedings. Secondly, the Appellant would have raised the issue of having the makers produce the documents at the subsequent hearing date and the documents marked for Identification (MFI. The only concern was/with the contents of the



Reports that were subject to cross examination not the production of the Reports which was not challenged and they were produced as exhibits in court.

60. Was the production of medical reports not by Makers illegal/unlawful or cause prejudice to the Appellant?

Section 35 (2) of *Evidence Act* provides:

In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

- (a) notwithstanding that the maker of the statement is available but is not called as a witness;
- (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

61. This Court finds that the Trial court's finding is established by the record, that there was no objection to production of documents/ reports but there was contest on the contents of the reports/documents. Secondly the issue of future expenses which was raised during trial was uncontested by the Appellant. Dr. Syengo in his medical report mentioned that the plate will be removed at a cost of up to Kshs. 100,000/-. Which the trial court awarded future medical expenses to the tune of Kshs 80,000/-

Liability

62. The Trial Court found that the accident was self-involving and the Defendant/ Appellant pleaded ignorance to the negligence pleaded by the plaintiff, yet the Appellant did not call the driver to explain what the inevitable occurrences that caused the vehicle to loose control and veer off the road. The trial court went on and observed that even if the vehicle was in perfect working condition a driver may handle a perfect vehicle recklessly. The trial court found that there being no explanation as to what caused the driver to lose control, the Defendant was negligent and wholly to blame for the injuries suffered by the Plaintiff [liability] at 100%.
63. The burden of proof is established by the party that seeks judgement in his favour. He who alleges must prove The Plaintiff testified, produced documents/reports and was subjected to cross examination to test veracity of the evidence and credibility of the witness. The Plaintiff/Respondent's evidence was not controverted by any evidence from the Defendant/Appellant except reliance on Defense witness testimony as recorded in CC12/2010 that the Defendant employed one Alex Musee as his driver to do deliveries of spare parts to his customers and he had no authority to carry passengers.
64. PW2 was recalled and she produced Copy of Records & Receipt PExh 5 (a) & 5 (b) that confirmed the Defendant/Appellant as owner of the subject motor vehicle Reg KAB 133 M.
65. The Police Abstract produced by PW1 is dated 24/8/2009 from Athi River accident occurred on 14/2/2009 on Nairobi-Mombasa Road near Prima Rosa at 10.30 pm of motor vehicle Reg KAB 133 M insured by Kenya Orient Ins Co and driven by Alex Mureshe who was charged with careless driving and fined Ksh 3000/-. 6 people are named as injured passengers among them PW2 Caroline Nthenya.



66. Pursuant to Order 1, Rule 3, 4 & 15 Civil Procedure Rules 2010, the Appellant ought to have joined the driver of motor vehicle Reg KAB 133M as 3rd Party to the proceedings so as to have liability determined between the defendant owner of the vehicle and the 3rd Party driver of the vehicle and who caused the accident. It is trite law that the Trial Court could not legally bind a party not joined to these proceedings either as 3rd Party or interested party and apportion liability as the Court is bound by pleadings filed by the Parties/Counsel.
67. In the case of *Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* (2014) eKLR, the Court held that:
- “A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”
68. In the case of *Joseph Wabukho Mbayi v Frida Lwile Onyango* [2019] eKLR, at paragraph 30;
- “30. It is my finding that an accident did occur on 14th May 2014 involving the appellant, who sustained injuries on the head, chest, face and lacerations on both lower and upper limbs as indicated in the P3 form. It is also my finding that the suit motor vehicle registration mark and number KAR 531V belonged to the respondent at the time of the accident and the said motor vehicle was being driven by someone who was in lawful employment of the respondent.”
69. Therefore, since the Appellant was/is the registered owner of motor vehicle Reg KAB 133M and hired/employed the driver Alex Musee/ Mureshe as driver to ferry spare parts and not authorized to carry passengers, that allegation ought to have been tested through his testimony as a witness joined as party to the Trial Court proceedings. In the absence of such eventuality, the Appellant is held 100% liable for the road accident that resulted in injuring the Respondent. The Appellant is vicariously liable for the accident.
70. In the case of *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR Odunga J (as he then was) in Paragraph 61 and 62 and 63 observed that; as regards the issue of vicarious liability, it was held in *Kansa vs. Solanki* [1969] EA 318 that;
- “Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See *Bernard V Sully* [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”



Quantum

71. The Appellant submitted that the Respondent failed to prove that the injuries were sustained from the road traffic accident and that she was/is entitled to the amount sought and awarded by the Trial Court.
72. The Appellant challenged the production of the Medical Reports and contents thereof and alleged the Trial Court failed to give effect to their objection.
73. The evidence on record is that PW1PC 88387 RIDER KIBOI IBRAHIM produced the Police Abstract Pexb 1 which was also produced in CMCC 131 OF 2010. He testified he issued the Respondent Esther Wamaitha who was a passenger in motor vehicle Reg KAB 133M NISSAN SUNNY with Police Abstract/P3 Form. The road accident occurred on 14/2/2009 around 10.30 pm along Mombasa Road Prima Rosa area. It was self-involved accident. The passenger was injured while the driver Felix/Alex Mureche/Musee was not found at the scene but was later arrested and charged with careless driving. He was fined Ksh 3,000/- or 3 months imprisonment. The driver was blame for the accident.
74. In cross examination PW1 stated the Police Abstract No 0167694. is for Esther Wamaitha as she was listed as Number 8 among everyone who was injured in the accident. The P3 Form was issued later after treatment.
75. PW2 Esther Wamaitha Mumenya from Syokimau testified the accident occurred on 14/2/2009, when she was 15 years old and was testifying at 24 years old. They hired motor vehicle Reg. KAB 133 M, the driver was over speeding and tried to swerve but he lost control and the car rolled off the road.
76. PW2 was injured on the head, broken femur and cut on the left hand, the lower abdomen and other minor injuries. She was taken to Mutunguni Hospital in Athi River but was referred to Kenyatta National Hospital and was admitted for 5 weeks in a coma for 1 month and went for surgery in March 2009.
77. On 30/6/2011 she went to Dr. Mutisya for preparation of the Medical Report. A plate was inserted on the fracture. She lost sense of smell and had poor bladder control. She reported the accident and was issued with a Police Abstract on 24/8/2009. She blamed the driver and owner of the accident. She was issued with a P3 Form on 2/4/2009 and produced as Pwexh 2. Their treatment Notes and receipt from KNH Pexhb 3. She paid Ksh 2000/- for Medical Report Pwexb 4 (a) And Invoice Pwexb 4 (b). She had not healed awaiting removal of the plate and his sense of smell checked. The bladder control is slightly manageable and sought compensation costs of the suit and suit.
78. In cross examination PW2 stated he did not know the Appellant and she did not produce receipts to prove her claim for special damages claim. The only receipts produced total Ksh 600/-. She stated she spent Ksh 800,000/- on medical expenses. She did not have any other receipts except the one for Dr. Mutisya Ksh 2000/-
79. PW2 admitted the KNH Report did not confirm she was in coma and shows she was in fair general condition. She went to the fracture Clinic for follow-up. Dr. Mutisya is a Consultant Psychiatrist and she went to see her for the bladder problem. The Report states the date of the accident is 14/2/2009 and the Report was made 2 years later.
80. PW2 was later recalled to produce Copy of Records and Receipt Pwexh 5(a) & (b).
81. Police Abstract that outlines date of accident 14/2/2009 motor vehicle Reg KAB 133 M driver Alex Muzeshe Accused charged with careless driving and fined Ksh 3000/-.



82. The Kenyatta National Hospital report confirms the Respondent Esther Wamaitha was admitted Ward 6A Consultant Prof Atonga and she was involved in a road traffic accident sustaining injuries on scalp right lower limb; Physical Findings she was in fair general condition Lower Limb Thigh swollen no open wounds extreme scalp wounds had been stitched. Investigations- Pelvic-normal Femur- displacement. Management- Patient admitted 12/3/2009 -Plating done –Brays.
83. Outcome- Patient discharged to go home but through the fracture clinic. Signed by Dr. Kwamboka.
84. The Medical Report by Dr. Mutisya of 30/6/2021 confirmed accident was on 14/2/2009. The doctor relied on Athi River Medical services notes, Kenyatta National Hospital Notes, Police Doctor Report (P3 Form) and doctor's own history taking and physical examination.
85. Summary -On 14/2/2009, Esther Wamaitha was a passenger in a car. The car overturned on Mombasa Road and she sustained various injuries, she was given 1st Aid at Athi river medical Services and later was transferred to Kenyatta Hospital
86. At KNH-X-ray showed fracture of the right femur and she had cuts and foreign bodies on the scalp. She was admitted in Orthopaedic Ward for 5 weeks and put on traction for 1 month and later underwent surgery for open reduction and general fixation of fracture and plate inserted. She was on antibiotics analgesics and tetanus toxoid. The pieces of glass on her scalp were removed and the wounds cleaned. The Doctor recorded the complaints and conducted examination.
87. The doctor's opinion was the Respondent was involved in a road traffic accident and she sustained fracture of the right femur, loss of smell and developed poor bladder control. She would need further surgery to remove plate and would cost Ksh 100,000/- and treatment for existing complaints.
88. The Appellant submitted that the injuries the Respondent complained off were not included in the medical Reports. The Trial Court in the judgment confirmed that the Respondent's claim she was in a coma was not confirmed by the medical records and was not considered.
89. Secondly, the Appellant submitted that the Court considered higher damages and did not consider the Appellant's submissions. This is not true and is not borne out by the Trial Court judgment which provides;

“The Plaintiff submits a sum of Ksh 1.2 m and relied on a case where Ksh 540,000/- was awarded in 2007 which was about 10 years ago for similar injuries. The Defendant on the other hand submits Ksh 100,000/- and [raised the issue that the] medical report was prepared by Consultant Psychiatrist who is not qualified to testify on an orthopedic injury. However, I shall rely on the Discharge Summary from KNH which clearly shows that on 12/3/2009 plating was done. The sum suggested by the Defendant was/is on the Lower side. I am well guided by Plaintiffs cited authority which bears similar injuries but damages must be commensurate to injuries suffered.”
90. The Trial Court considered the submissions from the Appellant and Respondent and considered the claim against medical records and evidence and came to the general damages of Ksh 400,000/- Ksh 80,000/- for removal of the Plate not Ksh 100,000/- proposed. Ksh 800,000/- hospital costs claimed were not specifically pleaded and proved and was not awarded. The Special damages were of receipts confirmed to be from KNH vide Letter dated 5/9/2013 at Pg. 16 of Record of Appeal.



91. The Court of Appeal case of Kivati v Coastal Bottlers Limited Civil Appeal No. 69 of 1984 where it was stated that;

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”

92. In the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal stated: -

“.....Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

93. This Court finds from the pleadings evidence on record, documents produced, the Respondent established her case on a balance of probabilities. The Trial Court considered the evidence on record and only awarded damages as pleaded and proved.

94. From the injuries sustained, treatment, social support, financial strain and emotional impact sustained by the Respondent from and due to the accident and the inflationary trends 15 years on, this Court finds no basis to interfere with liability and quantum Kshs.480,000/- general damages and special damages pleaded and proved Ksh 600/- in favour of the Respondent is upheld against the Appellant.

Disposition

1. The Appeal is dismissed with costs to the Respondent by the Appellant.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN OPEN COURT IN MACHAKOS ON 26TH SEPTEMBER, 2023(PHYSICAL / VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE/ABSENCE OF:

MS OIGARA - FOR THE APPELLANT

MS ODHIAMBO - FOR THE RESPONDENTS

GEOFFREY/PATRICK - COURT ASSISTANT (S)

