



REPUBLIC OF KENYA



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**Kimondiu v Nzenga & 2 others (Civil Appeal E197 of 2021)  
[2023] KEHC 24498 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E197 OF 2021  
MW MUIGAI, J  
OCTOBER 31, 2023**

**BETWEEN**

**JACINTA NDUNGE KIMONDIU ALIAS KIOKO ..... APPELLANT**

**AND**

**STEPHEN MUTUKU NZENGA ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MBURU KINUTHIA ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH MUSEE MUA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and order of the Senior Resident Magistrate K. Kenei sitting in Machakos Chief Magistrate Civil Suit No. 613 of 2017 and dated 9th November, 2021)*

**JUDGMENT**

**Background Proceedings In The Trial Court**

**The Plaintiff**

1. By Further Amended Plaintiff dated 14th November, 2019 against the 1<sup>st</sup> Defendant/ Respondent in which the Plaintiff/Appellant claimed that at all material times relevant to the suit, the 1<sup>st</sup> Defendant/ Respondent was the registered owner of motor vehicle registration number KBN 617K whilst the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants were the previous registered owner and beneficial owner respectively of the said motor vehicle.
2. Contending that on or about 26/6/2016 at 6:30pm or thereabouts, along Machakos- Kitui Road at Kaani Shopping Centre, whilst the Plaintiff/Appellant was lawfully standing at the stage (off the road) and in the process of boarding motor cycle Registration Number KMDR 810T the Defendants/ Respondents and/ or their authorized driver/agent, drove, managed and/ or controlled motor vehicle



registration number KBN 617K so carelessly and negligently that he caused it to swerve out of its lawful course and to hit the Appellant, seriously injuring her.

3. Particulars of the injuries to Appellant/plaintiff were:
  - a. Blunt pelvic injury
  - b. Open book pelvic fracture
  - c. Perineal lacerations
4. Plaintiff/ Appellant averred that he incurred expenses as a result of the said accident and claimed damages. Particulars special damages were:
  - a. Filling of P3 Form- Kshs. 1,600
  - b. Medico-legal report- Kshs. 3,000
  - c. Treatment expenses- Kshs. 70,000
  - d. Cost of search at motor-Vehicle Registry- Kshs. 550Total Kshs. 75,150/-
5. The Plaintiff/Appellant prayed for judgment to be entered against the Defendants/ Respondents jointly and severally for:
  - a. General damages for pain and suffering and loss of amenities.
  - b. Special damages in the sum of Kshs. 75,150/-
  - c. Costs and interest of the suit.

### **The Defence**

6. The Defendant/Respondent in his defense dated 7th February,2020 opposed the Respondent's claims denied being the registered owner of Motor vehicle registration number KBN 617K as alleged in the Plaintiff.
7. The Defendant/Respondent further denied that an accident occurred on the said date and place involving the said motor vehicle as alleged in the plaintiff. Defendant/Respondent denied all the particulars of negligence as enumerated in the plaintiff.
8. Defendant/Respondent averred that in the alternative and without prejudice, if such accident occurred as the Plaintiff/Appellant may prove was caused solely and/ or substantially contributed to by the Plaintiff/Appellant own negligence and averred further that if indeed the alleged accident occurred the same was beyond the control of the Defendant/Respondent herein.
9. The Defendant/Respondent denied in entirety the contents of the plaintiff including particulars of injuries, loss general and special damages set out and pleaded save for the jurisdiction the Honorable Court which was admitted and prayed that the Respondent's suit against him be dismissed with costs.

### **Reply To The Defence**

10. In reply to the defence dated 24th August,2020 the Plaintiff/Appellant, averred that he reiterates the contents of the plaintiff in their entirety and put the Defendant/Respondent to strict proof of any such allegations on the contrary. Plaintiff/Appellant maintained that the 1<sup>st</sup> Defendant/Respondent was liable for the injuries sustained.



11. Whereof, the Plaintiff/Appellant prayed that the Defendant/Respondent defence be dismissed with costs and his further amended plaint be allowed.

## Hearing In The Trial Court

### The Plaintiff's Case

12. As per the trial court proceedings, proceedings as in CC/612/2017. PW1's statement was adopted as evidence in this case from Civil Case 612/2017. PW1, Police Officer stated that vide OB 16/26/06/2016, the driver of motor vehicle Reg KBN 617 K Toyota matatu was driven along Kitui-Machakos road and on reaching Kaani Centre lost control and hit a bump. The said motor vehicle hit motorcycle number KMDQ 810T Make Sygo. The Plaintiff was a pillion passenger beside the motorcycle and was injured. He produced the Police Abstract and the matatu driver was to blame.
13. PW2 was Justina Ndunge Kioko. She testified that on 26/2/2016, she was at stage waiting for her luggage being tied when motor vehicle hit bump overtaking and lost control. He claimed that he recorded his statement and prayed it be adopted. PW2 testified that she got injured pelvic bone and that she was rushed to Machakos Level 5 Hospital and was transferred to Kenyatta National Hospital. PW2 was admitted for six weeks. PEX 1- P3 Form, PMF 1- 3 medical report, PEX 4 discharge summary/treatment notes, PEX 5 copy of records, PEX 6 care sale agreement and PEX 7 bundle of receipts. PW2 blamed the driver of motor vehicle overtaking on wrong side. She prayed for damages and cost of the suit.
14. In cross-examination, it was PW2's testimony that she used Kshs. 75,150/= for treatment. According to PW2 she used Kshs. 69,000/= and other she used in seeking treatment from the clinic. PW2 filed the receipts in court. testifying that she was on the stage waiting for motorcycle rider to tie luggage and only suddenly saw motor vehicle was near. PW2 did not see it from a far and that they were near bump, vehicle was overtaking on wrong side. According to PW2 motor vehicle was from Kitui it overtook on the left side. PW2 claimed that she did not sue driver as he ran away and sued the owner of motor vehicle. According PW2 his driver was on the wrong; the motorcycle was parked. She testified further the initial report made was wrong. They recorded their statement with police herein. PW2 lamented that driver has not been traced hence case is pending under investigations. She claimed that in her opinion the driver is to blame and that she is not healed since injury. PW2 cannot bend to firm, wash or carry water and that she has been seeing a doctor.
15. PW3 was Dr. John Mutunga. He testified that he is attached at Machakos Level 5 Hospital. PW3 HOLDS Bachelor Medicine & Surgery University of Nairobi class 1993. Testifying that he had medical of Jacinta Ndunge Kimundu alias Kioko and relied upon was discharge summary Kenyatta National Hospital, P3 form Machakos Level 5 Hospital history. According to PW3 plaintiff was involved in accident on 26/6/2019 along Machakos-Kitui road. She sustained blunt injury pelvis open book pelvic fracture i.e. both sides fracture, open as book. She sustained perennial lacerations (small cuts) around genital area. She was treated as an inpatient in Kenyatta National Hospital, X-ray confirmed the intravenous fluids administered and pain killers. PW2 claimed that after stabilization, she was discharged home. opinion formed, Jacinta suffered bone and soft tissue injuries and had not fully recovered during examination she was still using pain killers. Though she had two children any future pregnancy she will need surgery C- section due to injuries she sustained during the accident. According to PW3 the report was signed by Dr. Judy. PW3 wished to produce the same on her behalf and that he was familiar with her handwriting and signature having worked with her for six years. According to PW3 Dr. Judy was attending a seminar in Mombasa.



16. In cross-examination, PW3 testified that Dr. Kimuyu qualified in Bachelor Medicine and Surgery and that she is a general Physician. Testifying that report indicates plaintiff sustained disruption of public periscis. That report does not indicate if X-ray were availed during examination. PW3 did not examined plaintiff but the injuries she sustained take long to recover and pain may subsist for sometime and that healing of joints take some time, pain subsist. At time of preparation of reports, it's not been captured if it has united.
17. Trial Court issued 14 days to each party to file and serve their written submissions.

### **Trial Court Judgment**

18. Vide a judgement dated 11th November,2021, the trial court found that the Appellant herein proved her case against the Respondents herein on the balance of probabilities and made the following awards:
  - a. General damages Kshs. 550,000
  - b. Special damages Kshs. 75,150Total Kshs. 625,150
19. Trial Court also awarded interest on the damages as well as costs of the suit. The interest shall be at court rates from the judgment date till payment in full.
20. The trial court dismissed the suit against the 1st Defendant with costs to the 2nd and 3rd Defendants.

### **The Appeal**

21. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 8th December,2021 and file in court on 9th December,2021 sought orders that:
  1. The judgment and order of the subordinate court dated 11<sup>th</sup> November,2021 absolving the Respondent from liability be set aside and be substituted with an order allowing the Appellant's case against the Respondent as it was done against the other Defendants.
  2. This appeal be allowed with costs.
22. The appeal is brought on the grounds that:
  1. The Learned Senior Resident Magistrate erred in law and misdirected herself on the facts when she made a finding that the Respondent was not to blame for the accident contrary to the evidence tendered in court by the Appellant and her witnesses.
  2. The Learned Senior Resident Magistrate erred in law and misdirected herself on the facts when she failed to follow judicial precedents that where no evidence is placed before her to exonerate the Respondent from liability, then the Respondent is liable as testified by the Appellant.
23. The Appeal was canvassed by way of written submissions.



## Submissions

### The Appellant's Submissions

24. The Appellants in his submissions dated 3rd February,2023 and filed in court on 6th February,2023 in which Mr. Mwalimu, counsel for the Appellant submitted that it was in the documents filed by the Respondent in this case that an informal sale agreement between Joseph Musee Mua and Stephen Mutuku Nzenga of the subject motor vehicle number KBN 617K was introduced by the Appellant in his list of documents dated 3rd September,2017 and filed in court on 1/11/2012. Counsel averred that it is on basis of the said disputed sale agreement that the subordinate court relied on in discharging the Appellant from liability prompting the appellant to prefer the appeal.
25. Counsel submitted that the Appellant does not fault the judgement of the trial court except on the issue of discharging the Respondent from the liability. Counsel contented that the Respondent did not call any evidence to controvert that offered by the Appellant. According to the counsel, the Respondent did not produce any of the documents filed as exhibits in the lower court.
26. It was the position of the Appellant that the trial court erred in law in relying on the alleged sale agreement and that was not produced as an exhibit in discharging the Respondent from liability.
27. Reference was made by counsel on page 49 of the Record of Appeal to confirm that the Respondent was the Registered owner of vehicle registration number KBN 617K and which was involved in the accident.
28. Counsel averred that the Respondent's lawyers submitted that all the three Defendants including the Respondent be held jointly and severally liable and the resultant award be apportioned equally, noting that the court deviated from this admission of liability by the respondent without assigning any reason.
29. Reliance was made on the case of Linus Nganga Kiongo & 3 Others vs Town Council of Kikuyu [2012] eKLR, to buttress his point that where a party fails to call evidence in support of its case that party's pleading remains mere statement of facts since in so doing, the party fails to substantiate its pleadings.
30. Counsel urged the Court to allow the appeal in finding that the Respondent did not controvert the Appellant's evidence in the lower court and hold the said Respondent 100% liable.

### RESPONDENT'S SUBMISSIONS

31. The Respondent in his submissions dated 10th July,2023 and filed in court on 14th July,2023, Mr. Kimondo counsel for the Respondent submitted that the Respondent was not in any manner liable at all for the accident the subject matter of the suit and that the Appellant did not prove his case to the required standard of proof on a balance of probability. Counsel placed reliance on the case of Mary Wambui Kimiti Vs Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995 cited in the case of Florence Mutheu Musembi and Geoffrey Mutunga Kimiti Vs Francis Kareng'e [2021] eKLR, to substantiate his point that he who alleges must prove.
32. Counsel opined that the Appellant herein failed to prove his case on a balance of probabilities or at all as to how the Respondent could have possibly been liable for the alleged accident.
33. Reliance was further placed on the Cases of Eastern Produce (K) Limited Vs Christopher Atiado Osiro [2006] eKLR and Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd [1991] 2 KAR 258, to buttress the point that a plaintiff must prove some negligence against the defendant where the claim is based on negligence.



34. It was averred by the Counsel that should the honorable court in the highly unlikely event, find that the Appellant may have contributed in the occasioning of the accident which was denied, that it is only fair that there be equal apportionment of liability between the Appellant and the Respondent. To buttress this point counsel placed credence on the cases of Benter Atieno Obonyo Vs Anne Nganga & Another [2012] eKLR, Lakhamshi Vs Attorney General [1971] EA 118,120 as quoted in Calistus Juma Makanu Vs Mumias Sugar Co. Ltd & Another [2021] eKLR.
35. It was Counsel's submission that the trial court acted on correct principles of the law and took into account all relevant material factors in holding and finding that the Respondent was not to blame for the accident.
36. Counsel urged the court to dismiss the Appeal entirely and that he be awarded costs of this Appeal.

### **Determination/analysis**

37. The Court considered the pleadings, appeal and written submissions by parties' through Counsel and the matter/issue for determination is whether the 1<sup>st</sup> defendant should be found liable as the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.
38. The evidence on record as per the Judgment is as follows; the Copy of records produced as Exh5 for 1/11/2017 and as at 7/11/2018. In the first, the 2<sup>nd</sup> Defendant was listed as the current owner whereas the 1<sup>st</sup> Defendant was listed as current owner. The Sale Agreement PW Exh 6 shows the 3<sup>rd</sup> Defendant sold subject vehicle to the Defendant on 1/11/2017. Therefore, the 1<sup>st</sup> Defendant acquired the subject motor vehicle after the accident and cannot be held liable. What is not clear is when the 3<sup>rd</sup> Defendant acquired the subject vehicle from the 2<sup>nd</sup> Defendant. Having failed to enter appearance or file defenses the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants were held liable.
39. The Motor vehicle Copy of Records attached during the Trial shows as follows;
  - a. As at 7/11/2018 M/vehicle Reg KBN 617K was registered in the name of Stephen Mutuku Nzenga ID 21096378 from previous owner James Mburu Kinuthia ID 488148.
  - b. The other Motor Vehicle Copy of Records shows as at 1/11/2017 the current owner of motor vehicle Reg KBN 617K was James Mburu Kinuthia ID 488148.
  - c. The Car Sales Agreement undated shows one Joseph Musee Mua of ID 14456009 sold motor vehicle Reg KBN 617K to Stephen Mutuku Nzenga ID 21096378 and the Seller on 1/11/2017 received a deposit of Ksh 700,000/-
  - d. The Police Abstract shows the motor vehicle KBN 617K was involved in a road traffic accident with motor cycle KMDR 810T on 26/6/2016.
40. The Trial Court record shows that the Defendants did not adduce any evidence to rebut/ controvert the Plaintiff's case on liability. This Court notes in the Record of Appeal is A Witness statement of the Respondent,STEPHEN MUTUKU NZENGA and attached List of documents that were filed in Civil Suit 613 of 2017 and not in this case. Yet these documents were not presented before the Trial Court as evidence and were not considered in determination of liability which is now contested on appeal. This is new evidence that was not availed to the Appellant /Plaintiff to consider , respond and witness(s) subjected to cross examination to test its veracity and/or credibility of the witness (s).



41. In *Galaxy Paints Company Limited v. Falcon Guards Limited*; Court of Appeal Case Number 219 OF 1998, the Court of Appeal stated that:
- “issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”
42. In *Joseph Mbuta Nziu vs Kenya Orient Insurance Company Ltd* [2015] eKLR where the court referring to a decision of Nigerian Supreme Court, the Court of Appeal stated-
- “In *Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries Plc S.C. 91/2002*, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;
- ‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’”
43. In the case of *Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002*, Lesiit, J. citing the case of *Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998* appreciated that:-
- ‘Although the Defendant has denied liability in an amended Defense and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defense and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’”
44. *Spry, V P in Lakhamsi v Attorney General, (1971) E A 118, 120* where the court stated as follows;
- “It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it.
45. From the above authorities, it is pertinent that parties file serve and rely on pleadings during trial and present evidence to prove claims and relief sought in the said pleadings. In the instant case, the Further Amended Plaint filed, the Plaintiff sued jointly Stephen Mutuku Nzenga, James Mburu Kinuthia and Joseph Musee Mua as Defendants.
46. On record are 2 Motor Vehicle Copy of Records; one as at 7/11/2018 where M/vehicle Reg KBN 617K was registered in the name of Stephen Mutuku Nzenga ID 21096378 from previous owner James Mburu Kinuthia ID 488148; the other Motor Vehicle Copy of Records shows as at 1/11/2017 the current owner of motor vehicle Reg KBN 617K was James Mburu Kinuthia ID 488148. At the same time; there is a Car Sale Agreement and one Joseph Musee Mua of ID 14456009 sold motor vehicle Reg KBN 617K to Stephen Mutuku Nzenga ID 21096378 and the Seller on 1/11/2017 received a deposit of Ksh 700,000/-.
47. There is unexplained circumstance of the same vehicle sold twice over the same period 2017-2018 (after the accident) a sale between Joseph Musee Mua to Stephen Mutuku Nzenga and another sale by James



Mburu Kinuthia to Stephen Mutuku Nzenga and that is why the Plaintiff sued all 3 Defendants who owned ,sold and /or bought the same vehicle Reg KBN 617K at the same period when the vehicle had pending case under investigation out of the accident that occurred on 26/6/2016 at 6.30 collided with motor cycle KMDR 810T where the Plaintiff herein was injured and hence the claim for damages.

48. The occurrence of the accident by the subject vehicle and resultant injuries to the Plaintiff are proved on a balance of probabilities by evidence of PW Police Officer who produced Police Abstract, PW2 The Plaintiff who was at the scene of the accident and was injured and sought treatment and PW3 the doctor who considered treatment notes P3 Form and conducted examination on the Plaintiff and produced his Report. This evidence was not controverted by any other evidence at the Trial.
49. It is not clear whether the issue of the vehicle Reg KBN 617K being involved in an accident in 2016 and the matter pending investigations was disclosed to the buyer(s), discussed and/or agreed upon as to whom would shoulder the outcome of investigations, suit filed , defense and settlement of claim if at all later or was the sale/disposal of the vehicle intentional to avoid liability?
50. On appeal, in light of variant Sale Agreement(s) and Copy of Records over ownership of the subject vehicle Reg KBN 617K and in the absence of any evidence to exonerate any of the Defendants, since they were all sued jointly and severally in the amended Plaint and it was not possible for the Trial Court with evidence presented to determine ownership of the vehicle and hold the owner vicariously liable for the driver's negligence that caused the accident, it is only logical and reasonable to hold ALL defendants liable for the accident that caused harm/injury to the Plaintiff.

#### **Disposition**

1. Appeal allowed, on liability remains at 100% against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants who failed to enter appearance and now include the 1<sup>st</sup> Defendant and they are held jointly liable at 100%.
2. Costs of the Appeal to the Appellant.

**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 31/10/2023. (VIRTUAL/PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

In The Presence Of:

Mr. Muema H/B for Mwalimu - For the Appellant

Mr. Kimondo Gachoka Adv -For the Respondent – Absent

Patrick - Court Assistant

