



REPUBLIC OF KENYA



**Mutinda v Nzenga & 2 others (Civil Appeal E196 of 2021)  
[2023] KEHC 24497 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24497 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E196 OF 2021  
MW MUIGAI, J  
OCTOBER 31, 2023**

**BETWEEN**

**RICHARD KIOKO MUTINDA ..... 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 delivered by K. Kenei  
(SRM) on 11th day of November, 2021 Civil Suit 614 of 2017)*

**JUDGMENT**

**Background**

**Proceedings In The Trial Court**

**The Plaintiff.**

1. By Further Amended Plaintiff dated 14<sup>th</sup> November, 2019 against the Defendant/ Respondent in which the Plaintiff/Appellant claimed that at all material times relevant to the suit, the Defendant/ Respondent was the registered owner of motor vehicle registration number KBN 617K.
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) 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 him. Particulars of the injuries to Appellant/Plaintiff were:



- a. Blunt head injury
  - b. Traumatic brain injury
  - c. Loss of one tooth (left lower first incisor)
  - d. Cut wound on upper lip
  - e. Multiple scalp wounds on forehead
  - f. Bruises left hand
  - g. Bruises on the left leg
3. Plaintiff/ Appellant averred that he incurred expenses as a result of the said accident claimed damages. Particulars special damages were:
- a. Filling of P3 form- Kshs. 1,550
  - b. Medico-legal report- Kshs. 3,000
  - c. Treatment expenses- Kshs. 6,944
  - d. Cost of search at motor vehicle registry- Kshs. 550
  - e. Future medical expenses- 50,000
- Total Kshs. 62,044
4. 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. 62,044
  - c. Costs and interest of the suit.

### **The Defence**

5. The Defendant/Respondent in his defense dated 7<sup>th</sup> February,2020 opposed the Respondent's claims denied being the registered owner of Motor vehicle registration number KBN 617K as alleged in the plaint.
6. The Defendant/Respondent further denied that an accident occurred on the said date and place involving the said motor vehicle as alleged in the Plaint. Defendant/Respondent denied all the particulars of negligence as enumerated in the plaint.
7. 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 and averred further that if indeed the alleged accident occurred the same was beyond the control of the Defendant/Respondent herein.
8. The Defendant/Respondent denied in entirety the contents of the plaint 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

9. In reply to the defense dated 24<sup>th</sup> August, 2020 the Plaintiff/Appellant, averred that he reiterates the contents of the plaint in their entirety and put the Defendant/Respondent to strict proof of any such allegations on the contrary. Plaintiff/Appellant maintained that the Defendant/Respondent was liable for the injuries sustained.
10. Whereof, the Plaintiff/Appellant prayed that the Defendant/Respondent defense be dismissed with costs and his further amended plaint be allowed.

## Hearing In The Trial Court

### The Plaintiff's Case

11. As per the Trial Court proceedings, PW1's statement as was stated in Civil Suit 612 of 2017 was adopted as evidence in this case.
12. PW2 was Richard Kioko Mutinda. He testified that on 26/6/2019 he was at Kaani Shopping Centre talking to his wife who had called a motor cycle. According to PW2, motor vehicle KBN 617K was overtaking, it hit bump, lost control and hit them at the stage. He stated that he recorded his statement and prayed it be adopted. PW2 testified that he got injured back of the leg, face, lost a tooth, lip and cut on leg. He stated he was admitted 2 weeks at Machakos Level 5 Hospital and that he filed his list of documents, P exhibit 1-P3 Form, P MFI-3 Medical report, P exhibit 4- Discharge summary/treatment notes, P exhibit 5- Copy of records, P exhibit 6- Car sale agreement and P exhibit 7- Bundle of receipts- 2,044/-. According to PW2, to replace his tooth will cost Kshs. 50,000/=. he blamed driver of motor vehicle and that Stephen Mutuku Nzenga was the owner of the vehicle. He prayed damages and costs.
13. In cross-examination, it was PW2's testimony that he was treated at Machakos Level 5 Hospital. PW2 was injured back of head, on his face, lost tooth, upper lip, knees and left leg cut. According to him, he lost the tooth when he got injured. It is on the paper and that he sought Kshs 50,000/= in future medical. He claimed that he filed his receipts for hospital and the 50,000/- is included in special damages claim. He told the trial court that he is now healed but still suffer from memory losses and is still recovering. Testifying that the driver of the motor vehicle was not sued as he disappeared. He sued owner of the vehicle. He claimed that he was talking to his wife and motor cycle rider was tying luggage.
14. In re-examination, PW2 told trial court that loss of tooth was indicated in P3 Form and medical report and that he lost his tooth in accident.
15. PW3 was Dr. John Mutunga. He testified that he is attached at Machakos Level 5 Hospital. He claimed that he holds BsCh Medicine and Surgery U.O.N class 1993. He testified that he knew Dr. Judy Kimuyu and that he is familiar with her handwriting and signature. He had worked with her for 6 years and was attending seminar in Mombasa. PW3 claimed that he had report of Richard Kioko aged 33 years who was examined 28/9/2016 and he relied on discharge summary MISH, CTS Scan Machakos imaging Centre, P3 Form. He testified that history given Richard involved in accident 26/6/2016 along Machakos- Kitui Road, he sustained blunt head injury, traumatic brain injury, loss one tooth, cut wound upper lip, multiple scratches on head bruises (left hand and left leg).
16. He was treated as IP X- ray taken and CT Scan, he was given tetanus, pain killers after observation he was discharged home; that at the time of examination he complained of global dull headache and complained difficulties in breathing. He had healed scars on face and upper limbs. Missing (left lower incisor tooth). PW3 testified that the lost tooth would require replacement at estimated cost of Kshs.



- 50,000/-. Headache managed by pain killers. According to PW3 report was signed on 28/9/2016 which PW3 produced in trial court as P exhibit 3 Medical report.
17. In cross-examination, PW3 testified that in filling P3 form, treatment notes relied upon for OP, IP discharge summary and ID card also physical examination. According to PW3 report indicated that on tooth lost, physical examination and history given by patient. He testified that he noted P3 Form loss of one tooth was captured. That P3 Form was filled on 27/9/2016 and stamped on 28/9/2016. Accident was 26/6/2016 about 3 months past.
  18. It was PW3's testimony that Plaintiff was admitted at Machakos Level 5 Hospital and that discharge summary does not capture loss of tooth and that no other history was availed to clinician hence loss of tooth was as a result of accident. PW3 did not see the plaintiff after the accident. He was not in a position to confirm exactly when tooth was lost. PW3 told trial court that Dr. Kimuyu is a general physician. PW3 confirmed that Kshs. 50,000/- was for future medical expenses as per mission Hospital and in private Kshs. 100,000/= in public hospital slightly lower and depends on where the plaintiff would choose to go. PW3 claimed that in rough estimate at public hospital was Kshs. 40,000/=. PW3 testified he had worked in the hospital for over 20 years. According to PW3, other injuries must have recovered apart from tooth loss.
  19. In re-examination, PW3 told trial court that in his experience all injuries are never captured when patient arrives at emergency unit. Most doctors concentrate on confirming life threatening injuries and PW3 confirmed that plaintiff suffered head injuries on that date.

### **The Defence Case**

20. DW1 was Dr. Ruth Ichamwenga. She testified that she graduated with a degree in medicine and surgery from U.O.N. she told trial court that she had the Plaintiff's 2<sup>nd</sup> medical report dated 2/3/2021. He was involved in an accident on 26/6/2016 treated at Machakos Level 5 Hospital. He sustained soft tissue injuries. He complained of pain on and off. Had scars on lower limbs. He was well oriented and memory intact. Dental exam showed one missing lower tooth. Dr. Kimuyu report indicated claimant lost tooth not mentioned in treatment notes from Machakos Level 5 Hospital. I noted missing tooth. He sustained head injury and soft tissue injury. She relied on claimant history and medical records. DW1 testified that she examined plaintiff. The loss of tooth could not have been missed at time of treatment as he was admitted for about 1 week. According to DW1, the injuries on tooth being incisor could not be missed.
21. In cross-examination, it was DW1's testimony that she confirmed in her re-exam was about 3-4 years after the accident. DWI confirmed that he had head injury and soft tissue injuries and he alleged to have loss of memory on and off. DWI testified that she had worked in casualty department and that doctors in casualty deal with life threatening conditions first. She claimed that during admission the patient is properly examined. DWI confirmed that its true a tooth can be loose and come off later. DW1 could not state how he lost the tooth.
22. In re-examination, DW1 testified that any doctor not only dentist can make observation of missing tooth and that the initial treatment notes showed injuries sustained.
23. The matter was canvassed in trial court by written submissions.

### **Trial Court Judgment**

24. Vide judgment dated 11th November,2021, the Trial Court found that the Appellant herein proved his case against the Respondent herein on the balance of probability and made the following awards:



- a. General damages Kshs 300,000
  - b. Special damages Kshs 11,494  
Total Kshs 311,494
25. 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.
26. The trial court dismissed the suit against the 1<sup>st</sup> Defendant and found 2<sup>nd</sup> & 3<sup>rd</sup> Defendants liable with costs.

### **The Appeal**

27. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 8th December,2021 and file in court on 9<sup>th</sup> December,2021 sought orders that:
- a. 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.
  - b. This appeal be allowed with costs.
28. 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 1<sup>st</sup> Respondent was not to blame for the accident contrary to the evidence tendered in court by the Appellant and his 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 1<sup>st</sup> Respondent from liability, then the Respondent is liable as testified by the Appellant.
29. The Appeal was canvassed by way of written submissions.

### **Submissions**

#### **The Appellant's Submissions**

30. The Appellants in his submissions dated 3<sup>rd</sup> February,2023 and filed in court on 6<sup>th</sup> 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 3<sup>rd</sup> 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.
31. 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.
32. 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.



33. 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.
34. 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.
35. 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.
36. 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**

37. 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.
38. 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.
39. 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.
40. Counsel averred 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, then it is only fair that there be equal apportionment of liability between the Appellant and the Respondent. To buttress this point counsel relied 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.
41. 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.
42. Counsel urged the court to dismiss the Appeal entirely and that he be awarded costs of this Appeal.

### **Determination/Analysis**

43. The Court considered the pleadings, appeal and written submissions by parties' through Counsel and the matter/issue for determination is whether the 1st defendant should be found liable as the 2nd & 3rd Defendants or not.



44. The evidence on record as per the Trial Court's 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 2nd Defendant was listed as the current owner whereas the 1st Defendant was listed as current owner. The Sale Agreement PW Exh 6 shows the 3rd Defendant sold subject vehicle to the Defendant on 1/11/2017. Therefore, the 1st Defendant acquired the subject motor vehicle after the accident and cannot be held liable. What is not clear is when the 3rd Defendant acquired the subject vehicle from the 2nd Defendant. Having failed to enter appearance or file defenses the 2nd & 3rd Defendants were held liable.'

45. 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.

46. 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).

47. 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."

48. 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.'



49. In the case of Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. (s she then was ) 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 1st 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.’”

50. J Spry, V P in *Lakhamshi 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.

51. 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 Plaintiff filed on 15/11/2019, the Plaintiff sued jointly Stephen Mutuku Nzenga , James Mburu Kinuthia and Joseph Musee Mua as Defendants.
52. 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/-.
53. 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.
54. 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 produced the Report by the doctor who conducted examination on the Plaintiff. This evidence was not controverted by any other evidence at the Trial.
55. The only challenge to medical report was by DW1 who conducted 3-4 years later and observed missing incisor tooth and took the view that it was not possible to leave out such observation if it happened from the accident. The Trial Court in the judgment of 11/11/2021 omitted/left out the damages for lost tooth as it was not proved.
56. 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?

57. On appeal, in light of variant Sale Agreement(s) and Copy of Records over ownership of the subject vehicle Reg KBN 617K at the time due to 2 parallel sale and/or transfer of the vehicle, and in the absence of any evidence to exonerate any of the Defendants, since they were all sued jointly and severally in the amended Plaintiff and it was not possible for the Trial Court with evidence presented to determine ownership conclusively of the vehicle at the time, 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 1st 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

