



REPUBLIC OF KENYA



**Mutune v Nzenga & 2 others (Civil Appeal 198 of 2021)  
[2023] KEHC 24477 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24477 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 198 OF 2021  
MW MUIGAI, J  
OCTOBER 31, 2023**

**BETWEEN**

**JOEL NTHUKU MUTUNE ..... 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 judgement and order of the Senior Resident Magistrate K. Kenei sitting in Machakos Chief Magistrate Civil Suit No. 612 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 1st Defendant/ Respondent in which the Plaintiff/Appellant claimed that at all material times relevant to the suit, the 1st Defendant/ Respondent was the registered owner of motor vehicle registration number KBN 617K whilst the 2nd and the 3rd 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) awaiting for a passenger to board his 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 him and extensively damaging his said motor cycle. Particulars of the injuries to Appellant/Plaintiff were:

- a. Blunt injury right shoulder
  - b. Bruises right knee
  - c. Bruises left knee
3. Plaintiff/ Appellant averred that he incurred expenses as a result of the said accident and claimed damages. Particulars special damages were:
- a. Filing of P3 form Kshs. 1,550
  - b. Medico-legal Report Kshs. 3,000
  - c. Treatment expenses Kshs. 950
  - d. Cost of search at Motor Vehicle registry Kshs. 550
- Total Kshs. 6,050
4. The Plaintiff/Appellant prayed for judgment to be entered against the Defendants/ Respondents jointly and severally for:
- a. General damages for pain, suffering and loss of amenities.
  - b. Special damages in the sum of Kshs. 6,050/-
  - c. Costs and interest of the suit.

### **The Defence**

5. 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.
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 plaintiff. Defendant/Respondent denied all the particulars of negligence as enumerated in the plaintiff.
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 own negligence 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 contended that the Plaintiff did not disclose any reasonable cause of action against them.
9. Save for the jurisdiction of the court the Defendant/Respondent denied each and every allegation contained in the plaintiff.
10. The Defendant/Respondent prayed that the Plaintiff's/Appellant's suit against him be dismissed with costs.



## Reply to the Defence

11. In reply to the defence dated 24th 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 1st Defendant/Respondent was liable for the injuries sustained.
12. 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

13. PW1 was No 66495 PC Daniel Chachu. He testified that he had OB/6/26/6/2016 made at 11:45 pm and stated that unknown driver of KBN 617K Toyota Matatu from Kitui- Machakos at Kaani Shopping Centre driver lost control after hitting bump he hit KMDQ 810T Skygo motorcycle ridden by Joel Nthuku. The rider sustained injuries with two pillion passengers Richard Kioko and Justina. Testifying that police visited the scene and commenced investigations; that driver of the Matatu was to blame. According to PW1 police abstract and P3 form were issued. (P EX. 2- Police Abstract CMCC 613/2017, P. EX. 2-Police Abstract and P. EX. 2- Post Abstract CMCC 614/2017).
14. In cross-examination. He told court that from record motor cycle was being ridden from the opposite direction and that it was not parked. Testifying that investigating Officer was CPL Munene; that Abstract shows the case pending investigations. PW1 did not have police file and initial investigations as per OB, driver was to blame. He claimed that driver had not been charged during issuance of abstract and he was not the investigating officer. PW1 did not know if the driver was traced and that Joel Nthuku was the rider and two pillion passengers were Richard and Justina Kioko. According to PW1 report was made by an anonymous caller. PW1 told court that James Mutinda was erroneously recorded as rider after investigations OB 5/19/7/2016 recorded rider was Joel Nthuku and not James Mutinda.
15. In re-examination, PW1 testified that report was initially made by James Mutinda and after investigations, rider was Joel Nthuku who confirmed and visited the station.
16. PW2 was Joel Nthuku Mutune. He testified that he recalls on 26/7/2016 it was heading to 7:00pm. PW2 was beside the road putting luggage of passengers on the motorcycle, when motor vehicle KBN 617K lost control and hit him. PW2 recorded his witness statement which he wished to be adopted by court as evidence. The court adopted the said statement as examination in chief. PW1 was injured on his shoulders and both legs and that he was re-examined by defense doctor. He produced P. EX. 1- P3 form, PMFI 3- Medical Report, P. EX. 4- Treatment notes and discharge summary, 5- copy of records, 6 motor cycle sale agreement and 7- bundle of receipts Kshs. 6,150/= . Testifying that the vehicle was overtaking at speed and he was beside the road with passengers. PW2 prayed for costs and damages
17. In cross-examination, it was PW2's testimony that he was tying luggage when the accident occurred. He only heard the vehicle there he did not see it and it was at a speed. Testifying that he only saw the vehicle appear and driver had no time to brake. PW2 did not see the driver as the latter ran away after the accident. According to PW2 he was beside the road, not ridding; he was parked. PW2 claimed that the initial report made was that he was ridding the motor cycle which according to him is not true. He testified further that driver James Mburu Kinuthia made report at the station that he was James Mutinda and was riding motorcycle. PW2 did not know James Mutinda and that he reported to police



and they recorded his details in his statement. PW2 blamed the driver as he was hit beside the road. As per PW2 the driver overtook badly and it was too close to him to react. He claimed that driver ran away and that he has sued the owner of the vehicle.

18. In re-examination, he told court that he went to police and they took his statement and recorded. PW2 was hit and not James Mutinda. He testified that the driver hit him and was to blame. PW2 sued owner of the said motor vehicle.
19. PW3 was Dr. John Mutunga. He testified that he is stationed at Machakos level 5 Hospital and qualified in BCH Medical and surgery Nairobi university Class 1993. He told court that he knows Dr. Kimuyu by virtue of working with her for 3 three years. PW3 knows her handwriting and signature. Testifying that the said Dr. was attending seminar in Mombasa. PW3 had a medical report of Joel Nthuku Mutune aged 29 years examined on 28/9/2019. He testified that the Dr. relied on duly filed P3 form, treatment notes from Machakos Level 5 Hospital. It was his testimony that Joel Nthuku Mutune was involved in a road traffic accident along Machakos- Kitui Road on 26/6/2016 in which he sustained blunt injury right shoulder joint, bruises right knee, bruises left knee. He was treated as outpatient and given painkillers and antibiotics. Bruises cleaned and given tetanus shot and allowed to go home. on examination he complained of pain on right shoulder joint. He was clinically stable. Right shoulder joint was painful to touch. As a result, the plaintiff suffered soft tissue injuries and had not fully recovered and was on pain killers. It was recommended he attended physiotherapy to improve right shoulder movement. The Report was signed 28/9/2016. PW3 produced the said report as P. EX.3- Medical Report.
20. In cross-examination, PW3 testified that he confirmed Plaintiff sustained soft tissue injuries and that he had not examined Plaintiff of late it's been four years. He expects he has healed.
21. Trial Court issued 14 days to each party to file and serve their written submissions.

### **Trial Court Judgment**

22. Vide a judgment dated 11th November,2021, the trial court found that the Appellant herein proved his case against the Respondents herein on the balance of probabilities and made the following awards:
  - a. General damages Kshs. 90,000
  - b. Special damages Kshs. 6,050Total Kshs. 96,050
23. 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.
24. The Trial Court dismissed the suit against the 1st Defendant and judgment was entered against the 2nd and 3rd Defendants.

### **The Appeal**

25. 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 11th November,2021 absolving the 1<sup>st</sup> Respondent from liability be set aside and be substituted with an order allowing the Appellant's case against the 1<sup>st</sup> Respondent as it was done against the other Defendants.
  2. This appeal be allowed with costs.



26. 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 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 1<sup>st</sup> Respondent is liable as testified by the Appellant.
27. The Appeal was canvassed by way of written submissions.

## **Submissions**

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

28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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.
34. 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**

35. 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 Karenga [2021] eKLR, to substantiate his point that he who alleges must prove.

36. 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.
37. 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.
38. 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.
39. 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.
40. Counsel urged the court to dismiss the Appeal entirely and that he be awarded costs of this Appeal.

#### **Determination/Analysis**

41. 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.
42. 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 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.
43. The Motor vehicle Copy of Records attached during the Trial show 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 Museu 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.



44. 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).
45. 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.”
46. 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.”
47. In the case of *Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No.834 of 2002, Lesit, J. (as 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.”
48. J Spry, V P in *Lakhamshi v Attorney General*, (1971) E A 118, 120 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.
49. 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 on 27/9/2019, 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 been involved in a road accident and had a pending case under investigation out of the accident that occurred on 26/6/2016 at 6.30 pm where the driver 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 PW1 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 medical report on behalf of the doctor who conducted examination on the Plaintiff. This evidence was not controverted by any other evidence by the Defense 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 whether 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 Plaintiff 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 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

Patrick - Court Assistant

