



**Njiru v Kathangariri Tea Factory (Civil Appeal E026 of 2021)
[2022] KEHC 13042 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E026 OF 2021
LM NJUGUNA, J
SEPTEMBER 21, 2022**

BETWEEN

STEPHEN MURIMI NJIRU APPELLANT

AND

KATHANGARIRI TEA FACTORY RESPONDENT

JUDGMENT

1. The appellant instituted a suit against the respondents in the trial court being Embu CMCC No 72 of 2019 and wherein the appellant averred that at all material times, the respondent was the owner (registered, beneficial, insurable or otherwise) of motor vehicle registration number KBS 050K.
2. Further that, on or about December 8, 2017, the respondent's agent, servant, assignee, employee and/or driver so negligently drove, managed and/or controlled the respondent's motor vehicle that it caused or permitted the same to lose control and knock the appellant as a consequence of which the appellant suffered injury, loss and damage.
3. The respondent filed its statement of defence and wherein it denied the particulars of negligence as was pleaded in the plaint and further pleaded contributory negligence on the part of the appellant; the particulars whereof were pleaded in paragraph 4 of the statement of defence. The respondent denied that the appellant herein deserved any of the reliefs sought and stated that the suit ought to be dismissed with costs.
4. The appellant filed his reply to the respondent's defence and in doing so, joined issues with the respondent in the said defence and further denied the particulars of negligence as attributed to it in the said statement of defence.
5. The suit proceeded to hearing wherein the appellant testified as PW3. His testimony was that he got injured on December 8, 2017 when motor vehicle registration number KBS 050K owned by Kathangariri Tea Factory (as per his copy of records) was negligently driven and/or managed that it



lost control and knocked him as a consequence of which he suffered injury, loss and damage. That he was walking along the road when the vehicle approached him from behind at a descending gradient and hit him. It was his statement that the vehicle was over speeding though he could not tell the exact speed and that, being a casual worker, he can no longer do any work.

6. The respondent closed its case without calling any evidence.
7. The trial court in its judgment delivered on July 21, 2021 reached a determination that negligence was not established to the required standards and as such, liability could not attach in the circumstances.
8. The appellant herein being dissatisfied with the judgment of the trial court, filed an appeal which was instituted vide a memorandum of appeal dated August 2, 2021.
9. The appellant raised the following grounds of appeal to wit;
 - i) That the learned trial magistrate erred in fact and in law by taking into account an irrelevant factor to make a finding that the defendant was wrongly sued.
 - ii) That the learned trial magistrate erred in law and fact in failing to appreciate that the standard of proof in a civil matter is one of balance of probabilities and the appellant proved his case to those standards.
 - iii) That the learned trial magistrate erred in law and fact in failing to appreciate that the burden of disproving the facts as stated by the appellant had shifted to the respondent who did not call any evidence to discharge the proof/disproof.
 - iv) That the learned trial magistrate erred in law and fact in finding that the appellant only pleaded and proved special damages of Kshs 35,350/= that the invoice of Kshs 53,480/= failed the test as a special damage since payment had not been made.
10. The appellant prayed that the court finds the respondent was properly and sufficiently impleaded; that this court varies the trial court's finding on liability and find the respondent 100% liable for the accident that occurred on December 8, 2017, and further, this court finds that the respondent is liable to pay Kshs 53,480/= directly to Embu Level 5 Hospital on behalf of the appellant and costs of the appeal.
11. Parties took directions to canvass the appeal by way of written submissions and which directions both parties complied with.
12. The appellant submitted that the trial court confirmed that indeed an accident occurred on December 8, 2017 involving the appellant and motor vehicle registration number KBS 050K and as a result, he suffered injuries. That the appellant in paragraph 2 of the plaint described the respondent as a limited liability company, a fact that the respondent did not deny. The appellant submitted that the respondent at paragraphs 4 and 5 also conceded that indeed there was an accident as a result of the respondent's negligence and further that, the respondent never objected that it was erroneously sued. The appellant relied on the case of *Mohamed Abdikadir Mohammed v Sammy Kagiri and another* (2016) eKLR. That the trial court erred in failing to appreciate the evidence of the appellant and therefore proceeded to hold that since negligence was not established to the required standards, liability could not attach to the respondent in the circumstances. The appellant urged this court to find otherwise due to the fact that, the respondent never questioned its status as sued and therefore the court had no reason to come up with such issue for determination. This court was therefore urged to depart from the determination reached by the trial court.



13. On its part, the respondent submitted that the trial did not err by finding that it was wrongly sued in that, the determination was made based on the copy of records obtained from National Transport Safety Authority. That as at December 8, 2017, the owner of the suit motor vehicle was Kathangariri Tea Factory Company Limited and Cooperative Bank of Kenya Limited. The respondent submitted that liability cannot attach given that the person sued is not the same as the one listed as one of the owners of the subject motor vehicle. Reliance was made on section 116 of the *Evidence Act* to buttress the fact that the respondent and the owner of the subject motor vehicle are not the same. Further, the respondent submitted that the appellant did not prove its case to the required standards given that he did not prove that the driver of the motor vehicle was negligent and as a result of the negligence, the appellant suffered injuries. Reliance was placed on the cases of *Alfred Kioko Muteti v Timothy Miheso & Another* [2015] eKLR and *CMC Aviation Ltd v Cruis Air Ltd* (1) [1978] KLR 103.
14. It was also the respondent's case that the testimony of the police officer was of no value given that he was not the investigating officer and as such, could not authoritatively confirm whether the alleged accident was indeed caused by the negligence of the respondent's driver. The respondent relied on the case of *Bahari Parents Academy v LBZ (Minor suing through his father and next friend) BNZ* [2020] eKLR. That the burden of proof never shifted from the appellant to the respondent and as such, liability was never proven.
15. In reference to the special damages, the respondent submitted that it is trite that special damages must not only be pleaded, but also proved and as such, it is outright that the appellant never provided receipts as proof of payment and that the invoice provided could not act as a proof of payment. The respondent relied on the case of *Douglas Kalafa Ombewa v David Ngama* [2013] eKLR. In the end, this court was urged to dismiss the appeal herein.
16. As the first appellate court, it is now settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter [*> See Selle & Another v Associated Motor Boat Co Ltd* (1968) EA 123].
17. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. I have further evaluated the evidence as was presented before the trial court and in my view, the issue which this court is invited to determine is whether the instant appeal is merited.
18. On whether the learned trial magistrate erred in law in failing to appreciate that the standard of proof in a civil matter is one of balance of probabilities and the appellant proved his case to those standards; looking at the plaint, the appellant's cause of action was founded on the tort of negligence in that it is alleged that the respondent was negligent in the way its agent/driver controlled motor vehicle registration number KBS 050K as a result of which, it veered off the road and hit the appellant.
19. Negligence was defined in the case of *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done (See *Salmond and Houston on the Law of Torts* 9th Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are;
 - (a) there was a duty of care owed to the plaintiff,



- (b) the duty has been breached, and
 - (c) as a result of that breach the plaintiff has suffered loss and damage
- (See *Donoghue v Stevenson* [1932] AC 562)

20. As I have already indicated, the trial court in its judgment found that the appellant did not prove his case against the respondent for the reason that it did not prove that the respondent was the owner of motor vehicle registration number KBS 050K and thus failed in discharging the burden placed on him by virtue of section 107 and 109 of the *Evidence Act*.
21. The legal principle established by section 107 is that whoever asserts a fact is under an obligation to prove it in order to succeed (burden of proof). In civil cases, the degree of certainty with which a fact must be proved to satisfy the court of the fact (standard of proof) is that of balance of probabilities (See *Miller v Minister of Pensions* [1947] 2 All ER 372). Section 109 on the other hand captures the evidential burden. These two provisions were dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “As a general proposition under section 107(1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the *Act*.”
22. The suit being founded on the tort of negligence, the appellant had a duty to prove negligence and in doing so prove all the elements of negligence. In *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* [2010] eKLR Ibrahim J.(as he then was) stated that;
- “In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”
23. This is because there is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove negligence against the defendant where the claim is based on negligence. [See *Kiema Mutuku v Kenya Cargo Handling Services Ltd* [1991] 1kar 258, *Mount Elgon Hardware v Millers* CA No 19 of 1996 and *Mwaura Mwalo v Akamba Public Road Services Ltd* HCC No 5 of 1989].
24. So, did the appellant discharge the burden of proof and in doing so prove the elements of the tort of negligence?
25. In *Victor Mabachi & Another v Nurturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR, the court held that: “a company as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”



26. Article 260 of the [constitution](#) defines a person as;
- “Person” includes a company, association or other body of persons whether incorporated or unincorporated.”
27. The importance of parties in proceedings before a court of law cannot be gainsaid. This was buttressed in the case of [Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission](#) [2012] eKLR, the court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in [Goodwill and Trust Investment Ltd V Will and Bush Ltd](#) (2011) LCN B820 (SC) as follows:-
- “It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”
28. The appellant confirmed that he was hit from behind by the suit vehicle. Further, PW2 in support of the appellant’s case testified that he was not the investigating officer. That the driver of motor vehicle registration number KBS 050K was not charged with any traffic offence. Further, he testified that the police abstract did not show the person responsible for causing the accident. Having noted that the respondent herein is Kathangariri Tea Factory while from the search document, the owner of the suit motor vehicle is Kathangariri Tea Factory Company Limited, I humbly find that the trial court was within the law to make a finding that indeed the respondent herein is different from the party whose name appeared on the search document depicting the true owner of the suit motor vehicle; and as such, finding in favour of the appellant would be an affront to justice. [Also See [Salmon v Salmon](#) 1897 AC 22].
29. On whether the learned trial magistrate erred in law and fact in failing to appreciate that the burden of disproving the facts as stated by the appellant had shifted to the respondent who did not call any evidence to discharge the proof from the record, I agree with the appellant that the respondent never called any witnesses to substantiate its averments but proceeded to close its case without tendering any evidence. [See [Motex Knitwear Limited v Gopitex Knitwear Mills Limited](#) Nairobi (Milimani) HCCC No. 834 of 2002 also [Shaneebal Limited v County Government of Machakos](#) [2018] eKLR].
30. It is therefore clear from the above decisions and which I duly agree with, that, where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the opposing party against them is uncontroverted and therefore unchallenged. But of importance to note is that the legal burden never shifted to the respondent as the same rested on the appellant as per the provision/s of the law. It was his duty to prove that the suit motor vehicle was owned by the respondent which he failed to do. The search document showed otherwise.
31. In the case herein, the appellant failed to adduce evidence in proof of those particulars. It cannot then be said that the legal burden was on the respondent to disprove the ownership of motor vehicle KBS 050K.



32. On the ground that the learned trial magistrate erred in law and fact in finding that the appellant only pleaded and proved special damages of Kshs 35,350/= and that the invoice of Kshs 53,480/= failed the test as a special damage since payment had not been made, it is trite that special damages must not only be pleaded but also proved and further, as I have already pointed out elsewhere in this judgment, the burden is on the party who alleges, to prove his allegations on a balance of probabilities.
33. The appellant's appeal therefore ought to fail. As I have earlier noted, there is no liability without fault in the legal system in Kenya and a plaintiff must prove negligence against the defendant where the claim is based on negligence.
34. In view of the foregoing, I find and hold that the appeal has no merits and I hereby dismiss the same with costs to the respondent.
35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

