



**Obala v Okello & 2 others (Civil Appeal E022 of 2022)  
[2022] KEHC 15762 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15762 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E022 OF 2022  
RE ABURILI, J  
NOVEMBER 22, 2022**

**BETWEEN**

**BRIDGET LYNETTE ACHIENG OBALA ..... APPELLANT**

**AND**

**DOMINIC ONGANY OKELLO ..... 1<sup>ST</sup> RESPONDENT**

**KASWA ENTERPRISES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**GODFREY PAWA ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal arising out of the judgement and decree of the Honourable  
JP Nandi in the Principal Magistrate's Court at Bondo delivered  
on the 18th February 2022 in Bondo PMCC No 120 of 2017)*

**JUDGMENT**

**Introduction**

1. This judgment shall also apply to HCCA E018, E019, E020 and E021 all of 2022 as parties agreed that this is the lead file since the cause of action arose from the same road traffic accident and the appeal only challenges the trial court's finding on liability. With regard to the other four appeals whose common denominator is the appellant and the second and third respondents, this judgment applies with necessary modifications as to the plaintiff/ 1<sup>st</sup> respondent and the awards of general damages awarded to each claimant as their injuries varied. The cases in the lower court were also not consolidated hence this judgment shall apply to each and individual cases with necessary modifications as to the respective lower court case files.
2. The appellant herein Bridget Lynnette Achieng was sued by the 1<sup>st</sup> respondent Dominic Ongany Okello vide a plaint dated November 20, 2017 in which the 1<sup>st</sup> respondent sought general damages and costs of the suit for injuries sustained in a road traffic accident that occurred on the November 4,



2017. The appellant denied the respondent's allegations vide her defence dated January 10, 2018 and attributed and set out particulars of against the plaintiff now 1<sup>st</sup> respondent herein and also pleading and setting out particulars of negligence against the driver/owner of mv KBJ 581 Y and urging the lower court to dismiss the plaintiff's case against her with costs.
3. The trial court found the appellant 100% liable for the accident and awarded him Kshs 150,000 as general damages as well as costs and interest of the suit.
  4. The appellant being aggrieved by the judgment of the trial court on liability, filed a memorandum of appeal dated October 26, 2019 raising the following grounds of appeal;
    - i. That the learned trial magistrate erred in law and in fact in holding that the plaintiff/1<sup>st</sup> respondent had proved her case on a balance of probability as against the defendant/appellant merely because he was a passenger in the defendant/appellant's motor vehicle and he did not contribute to the occurrence of the subject accident.
    - ii. That the learned trial magistrate erred in fact and in law by holding that the defendant/appellant to pay the decretal sum to the plaintiff/1<sup>st</sup> respondent despite holding the third parties/2<sup>nd</sup> and 3<sup>rd</sup> respondents 100% liable for causing the subject accident.
    - iii. That the trial magistrate erred in fact and in law in failing to dismiss the suit against the defendant/appellant when the plaintiff/1<sup>st</sup> respondent failed to establish a case against her.
    - iv. That the learned trial magistrate erred in fact and in law in failing to consider the defendant/appellant's submissions and authorities and therefore failed to dismiss the suit against the defendant/appellant.
  5. The appellant prayed to this court to set aside the trial magistrate's judgment and dismiss the suit against the appellant with costs.
  6. The appeal herein was canvassed by way of written submissions.

### **The Appellants' Submissions**

7. On liability, the appellant submitted that from the evidence on record and specifically that of the police officer DW2, who availed the police file in court showing that investigations were concluded, the party liable for the accident was the driver of Toyota probox registration No KBJ 541 Y.
8. The appellant submitted that the 1<sup>st</sup> respondent did not discharge his burden of proof to the required standard that is, on a balance of probability, and that this court ought not to find negligence or liability unless there is material evidence in proof. The appellant further submitted that the 1<sup>st</sup> respondent cannot rely on the presumption that the accident was caused by the carelessness of the appellant and or her driver merely on account of the fact that an accident occurred which resulted in injuries to the respondent on account that the 1<sup>st</sup> respondent was a passenger in the appellant's motor vehicle registration No KBC 734C.
9. The appellant relied on the case of *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* (2016) eKLR, where it was stated that the burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible.
10. The appellant further submitted that the 1<sup>st</sup> respondent failed to call a single eye witness to corroborate allegations of negligence on the part of the appellant. Reliance was placed on the case of *Daniel Kimani Njoroge v James K Kihara & another* [2011] eKLR, where the superior court while upholding the



learned magistrate's finding of dismissing the plaintiff's case (appellant in the appeal) on the issue of failure by the plaintiff to avail an eye witness and/or any other evidence and hence had not proved negligence on a balance of probability.

11. It was submitted by the appellant that the trial court's opinion that since the 1<sup>st</sup> respondent was a passenger aboard the appellant's motor vehicle registration number KBC 734 C and an accident occurred, then the appellant was automatically liable for the occurrence of the said accident was erroneous based on the evidence adduced before the trial court.
12. It was submitted that the trial magistrate failed to consider the appellant's evidence on record as is evident from the award made that did not tally with the evidence adduced during the trial on the issue of liability. The appellant submitted that the trial magistrate failed to consider that the 1<sup>st</sup> respondent failed to advance any evidence as to the negligence acts/omission on the part of the appellant and that the trial court having found the 2<sup>nd</sup> and 3<sup>rd</sup> respondents 100% liable had no other option but to dismiss the suit against the appellant.
13. The appellant submitted that it was the duty of the 1<sup>st</sup> respondent to sue the correct party who was to blame for the accident. Reliance was placed on the findings of the Court of Appeal in the case of *Sammy Ngigi Mwaura v John Mbugua Kagai & another* [2006] eKLR in which an appellant's appeal was dismissed on the ground that he had sued a wrong party who was not to blame for the accident.
14. On costs, the appellant submitted that costs follow the event and thus on appeal being allowed they should be granted costs of the appeal and in the trial court.

#### **The 1<sup>st</sup> Respondent's Submissions**

15. As to whether the 1<sup>st</sup> respondent proved his case on a balance of probability, it was submitted that the 1<sup>st</sup> respondent was a passenger in the appellant's motor vehicle hence he did not have control over the motor vehicle registration number KBC 734C. Reliance was placed on the case of *John Kibicho Thirima v Emmanuel Parsmei Mkoitiko* [2017] eKLR where the appellate court held inter alia that the plaintiff being a mere passenger, he had no control of the motor vehicles hence he had proved his case against the defendant on a balance of probabilities.
16. As to whether the 3<sup>rd</sup> party was enjoined in the suit, the 1<sup>st</sup> respondent submitted that there was no such application seeking to enjoin a third party as provided by the law as these matters were ordered for retrial in 2021, long after the test suit had been dismissed for want of prosecution.
17. The 1<sup>st</sup> respondent submitted that the mere listing of particulars of negligence on the part of driver of motor vehicle registration number KBJ 581Y did not automatically bring the third party on board unless order 1 rule 15 of the *Civil Procedure Rules, 2010* was complied with, which it was submitted was never done. Reliance was placed on the case of *James Gikonyo Mwangi v DM (Suing through his Mother and Next Friend, IMO)* (2016) eKLR where Okwany J held that:

“It is worthy to note that it was the appellant who has introduced the aspect of a third party in this proceeding and I find that under those circumstances it was incumbent upon the appellant, if his case was that a third party was to blame for the accident, to enjoin the said third party as he had already alluded to in his own pleadings (defence) at paragraphs 5 and 7.”
18. It was submitted that having proved that the third party proceedings were never filed in this matter, the appellant ought to be held liable 100% for the said accident, and if the appellant lays blame on another party, she ought to have brought that party to the proceedings failure of which the appellant should



be held liable and thereafter can seek recourse from the alleged third party whom she says caused the accident.

19. The 1<sup>st</sup> respondent submitted that a court cannot issue an order against a party who is not before it. He submitted that the third party was never enjoined and it follows that the court cannot issue an order against non-parties. Reliance was placed on the case of *Stella Nasimiyu Wangila & another v Raphael Oduro Wanyama* (2016) eKLR where the court held that:

“The owner and driver of the said pick-up registration No KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See order 1 rules 15 of the Civil Procedure Rules. He did not do so. A court cannot adjudicate on issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequence.”

20. The 1<sup>st</sup> respondent thus submitted that the appeal was unmerited and ought to be dismissed with costs.

### **Analysis and Determination**

21. I have considered the grounds of appeal, the submissions and authorities as cited. I note that the entire appeal revolves around the question of liability, that is; whether the 1<sup>st</sup> respondent proved his case against the appellant on a balance of probabilities or whether a third party was solely to blame for the accident in question and whether the trial court was justified in making an award of Kshs 150,000 general damages to the 1<sup>st</sup> respondent in the absence of proof of liability against the appellant.
22. To elucidate the above issues, this court is duty-bound, as a first appellate court, to reevaluate the entire evidence adduced before the trial court in order to come to its own independent findings over the same while bearing in mind the fact that it neither heard nor saw the witnesses testify.
23. In this appeal, it has not been disputed that an accident occurred on November 4, 2017 involving a collision between the appellant’s suit motor vehicle registration number KBC 734C and Toyota probox registration number KBJ 541Y. It is further not in dispute that the 1<sup>st</sup> respondent who was a fare paying passenger in the appellant’s said motor vehicle sustained injuries in the said accident.
24. What is in contention however, is who, between the owners of the two motor vehicles was responsible/liable for the said accident or further, whether the 1<sup>st</sup> respondent was responsible for his own misfortune.
25. The appellant has argued in her grounds of appeal and submissions that the owner of the Toyota probox registration number KBJ 541Y, or simply put, the third party motor vehicle was wholly to blame for the said accident. To this end, the appellant relied on the evidence of DW1, the driver of the appellant’s motor vehicle registration number KBC 734C who testified that he was driving on his lane when the driver of the oncoming Toyota probox in an attempt to overtake a lorry that was ahead of him came on to the appellant’s driver’s lane and they both swerved and ended up colliding.
26. The appellant further called DW2, the investigating officer who investigated the accident. DW2 testified that the driver of the Toyota probox was blamed for causing the accident and that the driver of the said vehicle could not be charged as he had died.
27. On his part, the 1<sup>st</sup> respondent testified that on the said date, he was travelling aboard the appellant’s motor vehicle along the Bondo –Kisumu road when at Kajulu, the driver of the appellant’s motor vehicle drove it carelessly so as to cause it to collide with the Toyota probox which was coming from



the opposite direction resulting in the motor vehicles bursting into flames. He testified that as a result of the accident, he sustained injuries. The plaintiff was not cross-examined.

28. Before going any further, I'd like to point out at this juncture that the 1<sup>st</sup> respondent's evidence remained uncontroverted since from the record of court proceedings of the lower court shows that he was not cross-examined.
29. Counsel for the appellant submitted that there was no evidence adduced before the trial court to prove liability. From the record however, I find that the evidence of PW1 was consistent and candid.
30. It is also worth noting that it was the appellant who introduced the aspect of a third party in the proceedings and therefore, under those circumstances, it was incumbent upon the appellant, if her case was that a third party was to blame for the accident, to enjoin the said third party as she had already alluded to in her own pleadings.
31. Order 1 rule 15 provides for an elaborate procedure to be followed by a defendant claiming against a person not already a party to the suit. Order 1 rule 15 provides as follows:

- “ 15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
- (a) that he is entitled to contribution or indemnity; or
  - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
  - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice(hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

32. In the instant case, the said test suit on the issue of liability and on joinder of the third party was dismissed for non-attendance on the September 14, 2020. It is the appellant's case that by consent of the parties, she amended her defence to include negligence on the part of the third party.
33. The question is whether a third party can be enjoined through amendment of a defence. It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.
34. In the case of the *James Muchori Maina vs Kenya Power & Lighting Company Ltd* [2005] eKLR the court stated *inter alia*:

“Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were



considered by the Court of Appeal in the case of Kenya Commercial Bank Ltd =vs= Benjoh Amalgamated Ltd – Nairobi Civil Appeal No 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of Flora Wasike –vs- Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal.”

35. In this case however, the consent recorded affected or involved a party that was not party to the case between the 1<sup>st</sup> respondent and the appellant. From the case of *James Muchori Maina supra*, a consent is a form of contract. Accordingly, it cannot bind a party that is not privy to it.

36. The Court of Appeal in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* (2015) eKLR rendered itself as follows:

“ In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

37. For the above reason, I find that in the instant case, the consent order amending the appellant’s defence to include the third party was void ab initio as the purported third party was not party to that consent.

38. I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party, following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.

39. In the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR, it was held that:

“ In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under order 1 rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out.”

40. Grounded on the above established legal principles, I find that in the instant case, the suggestion or assertion by the appellant that the 1<sup>st</sup> respondent should have sued the third party owner of the Toyota probox registration number KBJ 581Y is an erroneous and misguided suggestion. This is so because, passengers have no contract with third party vehicles on the road. The contract is with the owner and/



or driver of the vehicle they are travelling in to drive them safely to their destinations. It is the appellant who had a contract with the 3<sup>rd</sup> party vehicles on the road in respect to safe-driving and if the third party acted to her detriment, then I reiterate that the appellant should have called him to account through the third party proceedings. (See *Boniface Klaiti & another v Michael Kariuki Kamau* [2007] eKLR).

41. The appellant failed to pursue the third party proceedings and cannot be allowed to evade her responsibilities towards her passengers. The process for enjoining a third party is clearly laid out in order 1 rule 15 of the *Civil Procedure Rules* and the appellant could not go around it by merely amending of her defence.
42. I therefore find that the trial court was justified in holding that the appellant was 100% to blame for the material accident.
43. As the appellant's memorandum of appeal and submissions before this court were anchored on the issue of liability, I find no reason to venture further into issues of quantum of damages which remain undisturbed.
44. In the end, I find this appeal to be devoid of merit. I uphold the judgment and decree of the trial court and dismiss the appeal with costs to the 1<sup>st</sup> respondent who shall also have costs of the lower court and interest as prayed and awarded by the lower court.
45. This appeal was similar and was the lead file in a series of appeals by the various appellants and as the issues for determination were common in all the five appeal files, the resultant appeals being Civil Appeals E018, E019, E020 and E021 of 2022 be and are hereby all dismissed with costs to the 1<sup>st</sup> respondents in the respective appeal files.
46. File closed. I so order.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2022.**

**R.E. ABURILI**

**JUDGE**

