



**Kiptarus v Opilit (Civil Appeal E041 of 2022)
[2024] KEHC 10528 (KLR) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E041 OF 2022
WM MUSYOKA, J
SEPTEMBER 3, 2024**

BETWEEN

RISPER CHEMUTAI KIPTARUS APPELLANT

AND

PATRICK OMANYO OPILIT RESPONDENT

(An appeal arising from the judgment of Hon. EC Serem, Resident Magistrate, RM, adjudicator, delivered on 7th November 2022, in Busia CMCCC No. E363 of 2021)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for compensation, arising from a road traffic accident, which allegedly happened on 6th March 2021, along the Busia-Adungosi road, involving the appellant and motor vehicle registration mark and number KAZ 912G, allegedly owned or controlled by the respondent at the material time. The appellant, who was allegedly a pedestrian, was injured in the said accident, and she attributed it to negligence from the respondent. The respondent filed a defence, in which he denied liability, and everything else pleaded in the plaint. In the alternative, he attributed negligence on the appellant, and on the rider of the motorcycle, on which he alleged she was a pillion passenger.
2. A hearing was conducted. 2 witnesses testified for the appellant, and 1 for the respondent. Judgment was delivered on 7th November 2022. The suit was dismissed, on grounds that the appellant had failed to prove her case against the respondent, on a balance of probability. The trial court indicated that it would have awarded Kshs. 300,000.00 for pain and suffering, had it found in favour of the appellant.
3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 15th November 2022, revolve around the award of Kshs. 400,000.00, general damages, being inordinately low; the trial court not appreciating the evidence and the exhibits; the court disregarding the admission by the respondent that an accident occurred; the court not considering the severe injuries



- sustained by the appellant; and the trial court basing its decision on the variance between the pleadings and the oral evidence, and ignoring everything else.
4. Directions were given, on 11th December 2022, on the disposal of the appeal, by way of written submissions. Both sides have filed written submissions.
 5. The appellant has submitted largely on the admission allegedly made by the respondent, with respect to the occurrence of the accident. She submits that that admission should overshadow the pleading in the plaint, that the appellant was a pedestrian, rather than a pillion passenger on a motorcycle. No authorities are cited.
 6. The respondent submits on both liability and quantum. On liability, he submits that the appellant did not prove her case to the standard required under sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya. He relies on *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR (Ouko, Kiage, M’Inoti, JJA) and *Mrao Limited vs. First American Bank of Kenya Limited* [2003] eKLR (Kwach, Bosire & O’Kubasu, JJA). On quantum of general damages, he cites *Kemfro Africa Limited t/ a Meru Express Services (1976) & another vs. Lubia & another (No 2)* [1985] eKLR (Kneller, Nyarangi JJA & Chesoni Ag JA) and *Gitobu Imanyara & 2 others vs. Attorney-General* [2016] eKLR (Visram, Sichale & J. Mohammed, JJA), to argue that an appellate court should only interfere with the findings and holdings of the trial court, where it is established that the trial court proceeded on the wrong principle or misapprehended the evidence in some material respect, and, as a consequence, arrived at a figure which was either so inordinately high or low, as to present an entirely erroneous estimate. On special damages, he cites *Hahn vs. Singh* [1985] KLR (Kneller, Nyarangi JJA, & Chesoni, Ag JA), to make the point that special damage must not only be specifically pleaded, it must be specifically proved.
 7. The appeal herein should principally turn on whether the appellant proved the case that she had placed before the court for determination. The issue of damages is largely secondary.
 8. So what was this case that the appellant had placed before the trial court? According to the plaint filed at the trial court, on 30th August 2021, of even date, the appellant was a pedestrian who was knocked down by a motor vehicle allegedly belonging to the respondent. In her witness statement, dated 30th August 2021, she averred that the motor vehicle lost control and hit her. When she took to the witness stand, on 14th February 2022, she stated that she was a pillion passenger on a motorcycle, which was hit by the motor vehicle belonging to the respondent. Her witness, PW2, testified along similar lines. Clearly, the testimonies from the appellant and her witness were at variance with her pleadings, with respect to how the accident happened, on the question whether she was a pedestrian or a pillion passenger in that event.
 9. In the defence, dated 5th October 2021, the respondent denied the facts pleaded in the plaint, and put the appellant to strict proof. He also alluded to the appellant being a pillion passenger on some motorcycle, and attributed negligence on both the appellant and the rider of the alleged motorcycle. In the reply to that defence, dated 14th October 2021, the appellant neither denied nor admitted the allegation about the motorcycle, but merely pleaded that she was joining issues with the respondent. She did not amend her plaint either, to reflect that she was not a pedestrian, at the material time, but a pillion passenger.
 10. Parties are bound by their pleadings. The oral evidence that the parties adduce in court, through their testimonies, should be geared to proving the allegations made in their respective pleadings, and, therefore, their testimonies must be aligned to their pleadings. A party cannot plead one thing in their filings, and then testify to something different in her oral narrative in court. A variance between the pleadings and the oral evidence could be fatal to the case.



11. The case that the appellant filed in court was that the vehicle driven by the respondent lost control and hit her when she was on the road, as a pedestrian. That is the case she should have presented in her oral evidence. In such a case, negligence would be attributed to a motorist who loses control of their vehicle and hits a pedestrian. The respondent filed a defence, which pointed to the appellant being a pillion passenger on a motorcycle, arguing that the collision, if there was one, must have been between the respondent's vehicle and the motorcycle on which the appellant was a pillion passenger. In such a case, liability would have to be apportioned, largely, between the driver of the motor vehicle and the rider of the motorcycle, and not between the driver of the motor vehicle and the pillion passenger. Furthermore, the pillion passenger would look up, largely, to the rider of the motorcycle on which she was a passenger, for that would be the person owing a direct duty of care to her. So that where the rider is in collision with another road user, the passenger would be expected to go after the rider, who should then bring the other road user into the suit.
12. To the extent that the appellant did not establish, according to her pleadings, that she was a pedestrian, when the accident happened, and testified that she was a pillion passenger on a motorcycle, which was not pleaded or averred in any of her filings, meant that the case presented in her pleadings varied from what she told the court. She could not possibly prove negligence, in the manner pleaded in her pleadings, by presenting material orally in court which departed from what was pleaded. The appellant gave the court 2 versions of how the accident happened, in one version, she was a pedestrian, in the other she was a pillion passenger. One version is in the pleadings, the other is in the oral testimony. Pleadings carry the day, for parties are bound by their pleadings, and their oral testimonies must be aligned to their pleadings, as they are meant to prove that which is pleaded. Departing from the pleadings would mean that the party would be orally presenting a case before the court, which is different from that pleaded, which would be unacceptable. A party who presents oral evidence, which varies from the pleaded case, no doubt, loses the case.
13. The appellant is hanging on the case presented by the respondent, by arguing that the variance between her pleadings and her oral evidence was somewhat remedied by the defence pleading that the accident did happen, but not in the manner pleaded in the pleadings, in that the appellant was a pillion passenger, and not a pedestrian. Well, the case before the trial court was filed by the appellant. The evidential burden initially rested on the appellant, to establish that which she had alleged in her pleadings, that she was a pedestrian, when the accident happened, and the burden could only shift to the respondent thereafter. She did not prove that she was a pedestrian when the accident happened, and she did not amend her pleadings, to conform to the oral testimony given in court. Both the legal and evidential burdens were not discharged, and the trial court was justified to dismiss the case. The appellant was, no doubt, reckless and casual, in the manner that she approached the suit that was before the trial court. She should not have expected or waited for the opposing side to plug the gaps in her own case.
14. I believe it would be academic to decide on whether the trial court properly assessed the quantum of damages it would have awarded, were it to find in favour of the appellant. I shall, accordingly, not tax my mind on that matter.
15. In the end, I find and hold that the appeal herein has no merit, and is available only for dismissal. I, accordingly, dismiss it. The appellant shall have the costs. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3RD DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE



Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Jumba, instructed by Balongo & Company, Advocates for the appellant.

Mr. Omeri, instructed by Omeri & Associates, Advocates for the respondent.

