



**Macharia v Nyawira & another (Civil Appeal 9 of 2020)  
[2024] KEHC 16752 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 9 OF 2020  
NIO ADAGI, J  
OCTOBER 1, 2024**

**BETWEEN**

**MARY WANGECHI MACHARIA ..... APPELLANT**

**AND**

**JOSEPH MWAI NYAWIRA ..... 1<sup>ST</sup> RESPONDENT**

**NAOMI KILENGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. F. Muguongo,  
SRM in Nyeri CMCC No. 31 of 2019 delivered on 05/11/2020)*

**JUDGMENT**

**Factual background**

1. The Plaintiff (Appellant herein) filed a suit against the Defendants (Respondents herein) claiming General Damages for pain, suffering and loss of amenities and special damages of Kshs 134, 860/=.
2. The claim as per the Plaint was based on alleged road traffic accident of 30/3/2016 in which the Appellant alleged that following negligence of the Respondents in this Appeal she incurred loss and damages which he particularized as per the Plaint as Special Damages of Kshs.134,860/=.
3. The Appellant sought for the following prayers: -
  - a. General damages for pain, suffering and loss of amenities.
  - b. Special damages in the amount of Kshs 134,860.00/=
  - c. Costs in this suit
  - d. Interest on a), b) and c above at court rates



4. In the Complaint, the Appellant's case in brief is that on 30<sup>th</sup> March 2016, she was a lawful passenger in motor vehicle reg. No. KCA 894C travelling along Nyeri-Nanyuki road. Upon reaching a place known as "Kwa-Wahire" the 2<sup>nd</sup> Respondent so negligently drove managed and/or controlled motor vehicle registration No. KCA 894C causing an accident as a result of which the plaintiff suffered severe injuries. The Appellant blamed the 2<sup>nd</sup> Respondent for negligence and set out the particulars of negligence at paragraph 6 of the complaint.
5. The 1<sup>st</sup> Respondent is sued in her capacity as the registered owner of motor vehicle Registration No. KCA 894C hence vicariously liable for the negligent acts/omissions of her employee/agent/servant/driver, herein the 2<sup>nd</sup> Respondent who is sued in his capacity as the employee/agent/servant and duly authorized driver of the said motor vehicle at the material time of the accident.
6. The Appellant attributes the accident to the negligence of the 2<sup>nd</sup> Respondent, and now she prays for damages, for the pain, suffering and loss of amenities as well as special damages.
7. The Respondent did not enter appearance nor filed a defence within the stipulated statutory time despite service of summons upon them. Consequently, an interlocutory judgment was entered against both Respondents on 5th March 2019.
8. The trial court observed that even with an entry of interlocutory judgment which attributes liability to a Respondent at 100%, a claimant still has the legal burden and obligation of proving their case to the required legal standard.
9. On assessment of damages, the trial court looked at the Complaint and the Appellant did not plead or set out the particulars of the injuries sustained.
10. The only mention of the injuries is at paragraph 6 of the Complaint which is as follows:-

-That on or about the 30<sup>th</sup> day of March 2016, the Plaintiff was lawfully travelling as a passenger in motor vehicle reg. No. KCA 894C travelling along Nyeri-Nanyuki road. Upon reaching a place known as "Kwa-Wahire" the 2<sup>nd</sup> Respondent so negligently drove managed and/or controlled motor vehicle registration No. KCA 894 C causing an accident as a result of which the plaintiff suffered severe injuries.
11. The "severe injuries" alluded to are not pleaded.
12. In her testimony in court on 13/3/2019, the Appellant adopted her written statement dated 31/1/2019 as her evidence in chief. Equally her written statement the severe injuries are not mentioned, set out or particularized. The question the court grappled with was whether the court could go forth to access that which was not pleaded.
13. It is trite law that parties are bound by their pleadings. The trial court cited and referred to several cases.
14. In *Treadsetters Tyres Ltd V John Wekesa Wepukulu Civil Appeal No.57 of 2006 (2010) eKLR*, Justice M.K Ibrahim while addressing the issue raised in appeal that the Plaintiff in the suit did not plead or set out particulars of injuries, held as follows:-

"I have carefully considered the above. First, however much, the courts are courts of equity there are certain procedural law that cannot be overridden by principles of equity. Each party is bound by its pleadings. In cases of tortious claims based on negligence, injuries and special damages must be pleaded. They cannot be inferred. The courts road-map, are the pleadings on record. If a party alleges, he suffered an injury he must particularize the same so that the



Defendant can specifically respond to the claim. One must plead the nature and extent of injuries suffered. This is a mandatory requirement of the law. His omission cannot be cured by principles of equity or the principles envisaged in section 1A, 1B and 3A of the Civil Procedure Rules”. (emphasis mine)

15. Order 2 Rule 3 of the *Civil Procedure Act* states: -

3

(1) “Subject to the provisions of this rule, and rules 6, 7 and 8, every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits” (emphasis added)

16. From the express meaning of the wording of Order 2 Rule 3(1), the Appellant ought to have pleaded the particulars of the injuries upon which she bases her claim. This was not done. In the trial court’s view, this is a crucial requirement that is mandatory in nature. It is not enough that a medical report by Dr. Muchai was produced showing the nature of injuries sustained by the Appellant. That medical report only served as evidence and it ought to prove an allegation of fact that ought to have been pleaded and particularized in form of injuries. It is also not enough that these injuries were mentioned in the written submissions as submissions can never take the place of pleadings.

17. The trial court’s finding thus was, this being a suit where the substantial relief sought is general damages for pain, suffering and loss of amenities for severe injuries sustained out of a road traffic accident and which injuries are not pleaded, the claim is unsustainable.

18. The prayer for special damages equally stems from the substantive claim of general damages for injuries sustained, and similarly the claim could not hold.

19. He agreed with Justice M.K Ibrahim in Treadsetters case (supra) where he held:-

“I do hold that the particulars of injuries in a personal injury claim are material facts if not crucial. It is the core of the case and gives rise to the amount of the claim. It is a matter that must be in the claim as a matter of necessity”.

20. Parties are bound by their pleadings and the evidence they adduce only goes forth to prove the pleadings which contain allegations of fact.

21. It is immaterial that the Respondents did not enter appearance leading to the entry of interlocutory judgment. The court while applying the law could turn a blind eye to such a critical omission. The court then dismissed the Appellant’s claim with no order as to costs since it was undefended.

22. Being aggrieved by the said judgment, the Appellant filed the appeal herein by way of a Memorandum of Appeal dated 3/12/2020 raising the followings grounds:-

- a. That the learned Trial Magistrate erred in law and in fact in dismissing the Appellant's suit.
- b. That the Learned Trial Magistrate erred in law and in fact when she held that the trial Court could not in the circumstances be invited to make a finding on general damages based on evidence available to the Honourable Court.
- c. That the Learned Trial Magistrate erred in law and in fact in disregarding the submissions by the Appellant's Advocate.



23. The Appellant in her appeal seeks the following prayers: -
  - a. The appeal be allowed.
  - b. The judgment and consequent Decree delivered by the Hon. F. Muguongo on 5th day of November, 2020 in Nyeri Civil Suit No. 31 of 2019 be set aside in its entirety and the Plaintiff's suit be allowed as prayed in the Plaintiff.
  - c. The Appellants be awarded the costs of this Appeal and costs of the suit in the trial Court.
24. The Respondents filed a Notice of Appointment and oppose the Appeal through their submissions dated 24/5/2022.

### **Analysis and Determination**

25. This being the first appellate court, its role is settled; to subject the whole evidence to a fresh and exhaustive scrutiny and make its own conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witness first hand. (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384)
26. I have carefully considered the record of appeal, the evidence presented, the rival submissions and authorities cited by each counsel in this appeal.
27. The main issue that requires this court's determination is whether the judgment and consequent Decree delivered by the Hon. F. Muguongo on 5th day of November, 2020 in Nyeri Civil Suit No. 31 of 2019 ought to be set aside in its entirety and the Plaintiff's suit be allowed as prayed in the Plaintiff with costs.
28. Before I proceed further, I must pause here and say I have come across a significant issue that has been raised by the Appellant in her submission on the Respondents not entering appearance in the lower court or responding to the suit and only for them to appear in this appeal. The Appellant submits that guilt is evident on the part of the Respondents. I am grappling to understand what the Appellant exactly mean. What I have to answer is whether the Respondents' can oppose the appeal herein.
29. The Respondent filed a Notice of Appointment of advocates dated 20/9/2021 through the law firm of Muhoho Gichimu & Co. Advocates who have filed submissions dated 24/5/2022 to oppose the appeal.
30. The right to counsel is a constitutional unction in the 2010 Supreme law of Kenya. Of course, there are circumstances when an Advocate may be barred from appearing in a matter. But these are laid down in the law, particularly the *Advocates Act*, Chapter 16 of the Laws of Kenya and the Advocates (Practice) Rules 1966 as made pursuant to the Act, and the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, May 2017, Gazette Notice No. 5212. A party has a right to choose an Advocate of his own Choice.
31. There is procedure on how an advocate appointed by a Party is to file a Notice of Appointment and how an advocate can withdraw from representing a client in a case and how the advocate may be removed from representing a party in a case.
32. I do not see anything barring the Respondents from opposing the appeal through their duly appointed advocates,
33. Now turning to the main issue for determination in this appeal, in the Appellant's written statement before the trial Court filed together with the Plaintiff and which was adopted as her evidence the said statement just as per the Plaintiff does not make any reference to or specify any injuries she sustained.



34. I have analyzed the pleadings and reevaluated the evidence and the judgment before the trial Court. The injuries sustained by the Appellant as per the Plaintiff are unknown and any recourse that the Appellant may try to resort to by referring to the medical report as a documentary exhibit must be stopped on its tracks as that is evidence that does not support the Plaintiff. I agree with the Trial Court when she stated that:-

“it is not enough that a medical report by Dr Muchai was produced showing the nature of the injuries sustained by the Plaintiff. That medical Report only served as evidence and it sought to have proved an allegation of fact that ought to have been pleaded and particularized”

35. The Appellant in her submissions dated 25/4/2019 before the trial court, attempted to state the injuries she sustained which were segmented fractures of the left femur, fractures to the left distal radius and scapula process. The Appellant also submits in her written submissions that she specified the particulars of the injuries invoking the general damages in her submissions and the medical report. The Appellant cited the case of *David Githuu Kuria v Equity Bank (Kenya) Ltd & 2 others (2019) eKLR* and *Isaac K. Chemjor & Another v Laban Kiptoo (2019) eKLR* which I have considered.

36. This leads me to answer the question as to whether the submissions can take the place of pleadings or submissions can come in to rectify an omission in the pleadings. There are quite a number of decisions that answer this question.

37. In *Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007: Mwera, J (as he then was)* held that, in legal proceedings, evidence ought not to be introduced by way of submissions as follows:.

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

38. The same Judge in *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993* expressed himself as follows:

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case.”

39. Similarly, in *Ngang’a & Another vs. Owiti & Another [2008] 1KLR (EP) 749*, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis



of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

40. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

41. The Court of Appeal in *Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in *Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another* Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

42. With the above cited cases, I now reflect back to the cases cited by the Appellant in her submissions.

43. In the case of *David Githuu Kuria v Equity Bank (Kenya)Limited & 2 others* [2019] eKLR Judge Aburili’s conclusion was,

“..the Parties’ submissions on the injuries sustained by the plaintiff did amend the plaint and filled the void of the non-pleaded injuries.

44. The above cases clearly show that the Plaint was amended to the void non-pleaded injuries filled unlike in the instant case.

45. The second case of *Isaac K. Chemjor & another v Laban Kiptoo* [2019] eKLR concluded that,

“As observed in *Bullen & Leake & Jacob’s Precedents of Pleadings* 15th ed. (2004) Vol. 1 p.10, “Lord Hoffman [in *Barclays Bank v. Boulter* [1999] 1 WLR 1919 at 1923, [199]4 ALL ER 513, 517] summarized the basic function of pleading as being: ‘the purpose of pleadings is to define the issues and give the other party fair notice of the case which he has to meet.

46. This case too cannot support the Appellant’s situation. The Appellant failed to plead the specific injuries which were critical to his claim and thus did not give the Respondents fair notice and only did that in her final submissions.

47. On the foregoing the Appellant failed to discharge her burden of proof in the lower Court to the required standard based on the case law cited hereabove.

48. The Appellant has not demonstrated that the findings of Learned Trial Magistrate were based on no evidence or the said Trial Magistrate acted on the wrong principle in reaching the finding it did.

49. The Appellant has not demonstrated that there was no evidence supporting the findings of the Trial Court or even demonstrated that the decision of the trial court was plainly wrong.



50. In fact, the trial court did give cogent and lawful reason why the claim was dismissed. The Judgment dated 5/11/2020 reveals that it was clearly supported by both statutory and case law which the trial court cited very succinctly.

51. Accordingly, the appeal is dismissed with each party bearing their own costs.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 1<sup>ST</sup> DAY OF OCTOBER 2024**

**NOEL I. ADAGI**

**JUDGE**

