



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kensilver Express Limited & another v Gatumo (Civil Appeal  
E028 of 2021) [2023] KEHC 869 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 869 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E028 OF 2021  
TW CHERERE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**KENSILVER EXPRESS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DOUGLAS NTAMBURA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JUDY NJOKI GATUMO ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Maua CMCC  
189 OF 2013 by Hon. C.K. Obara (SPM) on 08th February, 2021)*

**JUDGMENT**

1. On November 6, 2010, respondent was injured while travelling as a fare paying passenger in 1<sup>st</sup> appellant's motor vehicle KAW 097K which was being driven by 2<sup>nd</sup> appellant.
2. After the hearing, the trial court by a judgment dated February 8, 2021 found appellant liable at 100% and awarded the respondent an all-inclusive sum of Kes 5,500,000/-.

**The Appeal**

3. The appellant being dissatisfied with the lower court's decision preferred this appeal and set out 19 grounds which were summarized into four as follows:
  1. Whether respondent's suit had abated
  2. Respondent was a passenger in the accident motor vehicle
  3. Whether the defence was considered
  4. Whether the general damages were excessive



## Analysis and Determination

4. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v Sunday Post Limited* (1958) EA at Pg 424).
5. I have considered the appeal in the light of the grounds of appeal and submission filed by both parties. In determining this appeal, I shall consider the 4 grounds of appeal as follows;

## Whether Respondent's Suit Had Abated

6. This issue was not pleaded. In *IEBC & another v Stephen Mutinda Mule & 3 others* CA 219/2013 (2014) eKLR, Majanja J in a persuasive decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladej Ltd v Nigeria Breweries PLC* 91 of 2002 where Pius Adereji, JSC expressed himself 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 issues and must be disregarded.... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

7. From the foregoing, I find that the appellants' attempt to raise a new matter on appeal is mischievous and this ground is rejected.

## Whether Respondent Was A Passenger In The Accident Motor Vehicle

8. Appellants do not deny that an accident occurred on the material date and that several passengers were injured but denied that respondent was one of the said passengers.
9. The police abstract form tendered in evidence before the trial court was not challenged. It is therefore not open to the appellants to raise an objection on appeal whereas they had an opportunity to raise it during the trial. A reading of the trial court's judgment reveals that judgment on liability was agreed in a test suit Maua CMCC 182 of 2013 which is binding on the appellants in this case.

## Whether The Defence Was Considered

10. Appellants did not tender any evidence. That averments in pleadings are not evidence was appreciated in *Francis Otile v Uganda Motors Kampala* HCCS No 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute thereof. Before that, the then East African Court of Appeal held in *Mohammed & another v Haidara* [1972] EA 166 that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter* civil appeal No 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence.



In *CMC Aviation Ltd v Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

11. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Babra and another v Raju Govindji*, HCCC No 548 of 1998 appreciated that:

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”

12. Again in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR Lesiit, J (as she then was) citing the same decision stated that it is trite 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.
13. From the foregoing, I find that there was no defence to be considered and this ground too must fail.

#### **Whether The General Damages Were Excessive**

14. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor v Lubia & Anor, No 2* [1987] KLR 30).
15. Dr Koome’s report dated February 6, 2019 reveals that respondent suffered the following injuries:
- i. Brain concussion with loss of consciousness for 30 minutes
  - ii. Laceration on right zygomatic area of face
  - iii. Multiple lacerations on upper limbs
  - iv. Muscle contusion of the neck
  - v. Degloving injury left leg
  - vi. Fracture of left humerous
  - vii. Spinal injury wedge fracture of L1, L2 and L3



- viii. Fractures of superior and inferior pubic rami
16. In arriving at the figure of Kes 2,000,000/-, the trial court relied on comparable cases. It has not been demonstrated that the court's decision is wrong or that the court misdirected itself or acted on matters on which it should not have acted or failed to take into consideration matters which it should have taken into consideration thereby arriving at a wrong conclusion. The appellants' contention that Kes 1,500,000/- suffices under this heading is therefore rejected.
17. Concerning loss earnings, the trial court considered that respondent was rendered 40 % permanently incapacitated and therefore her earning capacity was diminished. The court found she was 30 years when the accident occurred and 40 years when she testified. Considering the cited cases. I find that the sum of Kes 2,000,000/- awarded under this heading was reasonable.
18. Special damages were not disputed and remain as awarded by the trial court.
19. For the reasons given on the foregoing analysis, I have come to the conclusion that the appeal has no merit and it is dismissed with costs to the respondent.

**DATED AT MERU THIS 09<sup>TH</sup> DAY OF FEBRUARY 2023**

**T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Morris Kinoti**

For Applicants - Mr. Chebii for M.K.Chebii & Co. Advocates

For Respondent - Mr. Njindo for Michael Ngunjiri & Kimathi & Co. Advocates

