



REPUBLIC OF KENYA



**Kavoi v Tri-Clover Industries (K) Limited (Civil Appeal 130 of 2020)
[2023] KEHC 1350 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 130 OF 2020
TM MATHEKA, J
FEBRUARY 2, 2023**

BETWEEN

DANIEL KAKUTA KAVOI APPLICANT

AND

TRI-CLOVER INDUSTRIES (K) LIMITED RESPONDENT

*(Being an Appeal from the Judgment of the Honourable A. Mukenga Senior Resident
Magistrate in Molo Civil Case No.144 of 2019 delivered on the 4th June, 2020)*

JUDGMENT

Brief Facts Of The Case

1. On July 12, 2018 the appellant was travelling as a lawful passenger aboard the respondent's registered motor vehicle number KAD 428Q.
2. According to the appellant the motor vehicle was involved in a road traffic when it had a tyre burst at Nyanja bridge and consequently lost control, overturned and rolled several times as a result of which he suffered injuries, loss and damage.
3. The appellant brought a suit in the subordinate court by a plaint filed on July 2, 2019, seeking judgment against the respondent for damages.
4. The respondent through its statement of defence dated August 7, 2019 denied the entire claim and averred that if the accident occurred then the same was caused by or substantially contributed to by the negligence of the appellant, was inevitable and occurred despite the exercise of reasonable care on its part.
5. It was the evidence of PW1, PC Amran Mohammed Abdi, that the appellant was a passenger on board motor vehicle registration no KAD 428Q that was involved in an accident on July 12, 2018 along



Nakuru-Eldoret highway at Ngunyi. She testified that as per the police abstract no one was blamed for the accident.

6. On cross examination, she stated that she was not the investigating officer and did not have either the police file or the sketch map before court.
7. PW2 was the appellant himself. he testified that on July 12, 2018 he was seated on the left side of the vehicle and he could see the road clearly. He said the driver was not speeding but due to brake failure the motor vehicle veered off the road to the left. He said the brakes failure was an indication that the suit motor vehicle was un-roadworthy.
8. It was his testimony that as a result of the accident he was injured on the Left elbow, chest and neck and was taken to Molo hospital where he was treated and admitted for one day, then to MP Shah hospital and Avenue hospital where he was dressed and physiotherapy done. He stated that he had not fully healed as his hands and back still pained. It was his testimony that he couldn't do heavy work and that he was fired from work due to unproductivity after the accident.
9. He blamed the driver of the motor vehicle for brake failure and the company for failing to service the vehicle, and stated that the inspection of the motor vehicle was not done.
10. After the appellant's testimony his case was closed.
11. The respondent closed its case without adducing any evidence.
12. The trial court delivered its judgment on June 4, 2020 dismissing the appellant's suit against the Respondent on the grounds that the appellant:
 1. Sued a company, a juridical person and not a natural person and thus the particulars of negligence as couched could not appertain to it.
 2. Failed to prove negligence against the Respondent.
13. On quantum the trial court held that had the appellant proved his case against the respondent and being guided by the case of *Shem Shituyi v Rexon Shiyonga* [2014]eKLR it would have awarded him general damages of Kshs 350,000/= .
14. Aggrieved by the above judgment the appellant lodged this appeal on the grounds: -
 1. That the learned trial magistrate erred in law and in fact in taking into account irrelevant issues and arriving at a wrong conclusion.
 2. That the learned trial magistrate erred in law and in fact in canvassing issues not before the court and arriving at a wrong conclusion.
 3. That the learned trial magistrate erred in law and in fact in dismissing the appellant's claim on account of a legal technicality.
15. He sought orders that;
 1. That the judgment and decree of the principal magistrate's court at Molo written and delivered by Hon. A. Mukenga on June 4, 2020 in Molo SRMCC No 144 of 2019 be discharged and set aside.
 2. That the honourable court makes the appropriate judgment and finally determines the said suit.



3. That this appeal be allowed with costs to the appellant.
16. The appeal was canvassed through written submissions.

Appellant's Submissions

17. On liability – the appellant submitted that he had only sued the respondent as it was to solely blame for the accident since it allowed an un-roadworthy Motor vehicle on the road. That doing so risked the safety of other road users and amounted to negligence. He argued that the issue of the accident being solely caused by brake failure was uncontroverted and that the failure by the respondent to file a certificate of inspection which is expected to be in its possession was fatal to its case.
18. It was the appellant's submissions that the trial court erred in holding that particulars of negligence could not appertain to a limited liability company as it was never disputed that the respondent was the legal and beneficial owner of the subject motor vehicle and therefore this was clearly a legal technicality that was never raised or addressed by the respondent. The appellant cited the case of *James Mangeli Musoo v Ezeetec Limited* [2014] eKLR where the court defined regard to undue technicalities as;

“undue regard to technicalities therefore means that the court should not deal or direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing and determination or conclusion of the issues in dispute”.
19. In view of the above, the appellant submitted that trial magistrate was duty bound to give life to the oxygen principle and ensure that substantive justice was not trounced by form.
20. It was the appellant submissions that the respondent did not show how he was to blame for the accident. To bolster this position, the appellant cited the case of *Boniface Waiti & another v Michael Kariuki Kamau* [2007] eKLR where the court held that it is now trite law that a passenger has no control over the manner of driving of a vehicle in which they are conveyed and they cannot be penalized for the poor workmanship of the control of the vehicle.
21. The appellant submitted that in *Kimatu Mbuvi v Benson Nguli* [2010] eKLR the judge stated that “liability cannot be challenged where a party calls no evidence to rebut the allegations of negligence”
22. He argued that failure by the respondent to adduce evidence meant that his evidence in regard to its culpability for negligence remained unchallenged, uncontroverted and unrebutted. For this proposition he relied on the cases of North End Trading Company Limited (carrying on the business under the ... *Refuse Handlers Limited v City Council of Nairobi* [2019] eKLR; *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997, *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002 & *Karuru Munyororo v Joseph Ndumia Murage* [1988] eKLR.
23. The appellant submitted that he had proved on a balance of probability that the Respondent was wholly to blame for the accident.
24. On quantum- the appellant submitted that the sum of Kshs 650, 000/= as general damages for pain, suffering and loss of amenities would suffice. In support of this position he relied on the cases of:-



1. Mariam Athumani and Salama Rashid A Minor Suing through her mother and next friend Mariam Athumani v Obuya Express & Philip Kipkemoi Checule. Nakuru HCCC No 477 of 1998, where the court awarded the 1st plaintiff Ksh. 600,000/= for ; Head injury – had brain concussion and lost consciousness for several hours, bruises and lacerations on the lips; Extensive lacerations on the upper back with foreign body pieces of glass embedded in the skin; Bruises and lacerations on the upper limbs. Deep cut wound on the posterior aspect of the left arm above the elbow joint; Extensive bruises on the left leg and foot with foreign bodies (broken pieces of glass); Bruises on the right leg; Bruises on the left gluteal region and lacerations and foreign body on the right gluteal region.
2. [*Shem Shituyi v Rexon Shiyonga*](#) [2014] eKLR where the claimant sustained blunt injury to the back and lacerations to both elbows, was admitted at the Kakamega provincial general hospital from the date of accident June 28, 2011 and discharged on the July 21, 2011 and skin traction was done according to doctor Andai the respondent suffered 20% physical disablement and could suffer lumber spine complication in future. The court reduced the lower court’s award of Kshs 500,000/= as general damages to Kshs 400,000/=
3. [*Francis Ochieng & another v Alice Kajimba*](#) [2015] eKLR where an award of Kshs 500, 000/= was reduced to Kshs 350, 000/=in the year 2015 for multiple soft tissue injuries without any fractures.

Respondent’s Submissions

25. On grounds one and two of the appeal and whether the trial magistrate erred in failing to consider the evidence of the plaintiff which would have made her arrive at a different conclusion, the respondent submitted that it is true that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. For this proposition reliance was placed on the case of [*David Sironga Ole Tukai v Francis Arap Muge & 2 others*](#) [2014] eKLR & [*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*](#) [2017] eKLR as cited in [*Daniel Otiemo Migore v South Nyanza Sugar Co. Ltd*](#) [2018] eKLR at paragraph 12.
26. The respondent submitted that the appellant evidence tendered during trial did not support his pleadings as he blamed the driver who was a stranger to this suit for the accident. That this was a new issue introduced during the hearing.
27. The respondent also argued that the particulars of negligence against it were unproven by the appellant.
28. On whether the learned magistrate erred in law and misdirected herself in finding that the appellant had not proved his case to the required standard, the respondent submitted that it is trite that liability must always follow fault and that it was incumbent upon the appellant to show that it was indeed liable. It argued that as per section 107-109 of the [*Evidence Act*](#) the burden of proof lay with the appellant.
29. The respondent referred this court to [*Halsbury’s Laws Of England*](#), 4th Edition at paragraph 662 at page 476 with respect to proof in negligence action where it was stated: -

“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. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established.”



30. The respondent also referred this court to *Grace Kanini Muthini v Kenya Bus Services & another* where Justice Ringera held that:
- “It is a common position that where a plaintiff has not proven negligence against the defendant on a balance of probabilities then the court cannot find fault without evidence; that the court cannot decide the matter by adopting one or the other probability without supporting evidence.”
31. The respondent further placed reliance on *East Produce (K) Limited v Christopher Astiado Osiro* Civil Appeal No 43 of 2001 & *Statpack Industries Ltd. v James Mbithi Munyao*, Nbi. HCCA No 152 of 2003 where the above principles were reiterated and submitted that based on evidence tendered the appellant did not prove any of particulars of negligence against it for the court to ascertain that it was culpable for the accident.
32. On the assertion by the appellant that it did not contradict his case, the respondent submitted that it was the duty of the appellant to prove his case on a balance of probability against it but he failed to do so. To support this, reliance was placed on *Douglas Odhiambo Apel & Anor v Telkom Kenya Ltd* CA No115 of 2006 as quoted in the case of *Catherine Wambui Njogu v Jacob Mash Shake & another* [2019] eKLR where the court stated that even where there is no rebuttal in matter that requires proof, section 107 of the *Evidence Act* applies and *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR where the court opined that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case upon a balance of probability whether the evidence is unchallenged or not.
33. The respondent also relied on *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* [2016] eKLR; *Nandwa v Kenya Kazi Ltd* 1988 KLR 488 & *Regina Wangechi v Eldoret Express Company Ltd* [2008] eKLR which reiterated the same principles.
34. On whether the trial court erred in failing to award damages and dismissing the appellant’s case, the respondent submitted that the appellant was not entitled to damages as he failed to prove his case.
35. It was the respondent’s submissions that had the appellant proved his case against it, an award of Kshs 100, 000/= would have been sufficient. In support of this position, the respondent relied on the following cases: -
1. *George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi* [2016] eKLR where the trial court’s award of Kshs 650,000/= for tenderness on the posterior neck, chest, lumbar sacral spine, left shoulder and knee was reduced on appeal to Kshs 120,000/=.
 2. *PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & another* [2018] eKLR where the claimant sustained Cut wound to the forehead; Multiple small abrasions to the face; Blunt injury to the head leading to loss of consciousness for some time; abrasions to the back; Abrasion wounds to the dorsum of the right hand;& cut wound to the right leg and the trial’s court award of Kshs 50,000/- as general damages was set aside and substituted with an award of Kshs 100,000/=.
36. On costs the respondent prayed for costs pursuant to section 27 of the *Civil Procedure Act*.



Analysis And Determination

37. This is a first appeal. The duty of a first appellate court was explained in the case of *Kiruga v Kiruga & another* [1988] KLR 348 where the Court of Appeal observed that: -

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.” See also *Selle & another v Associated Motor Boat Co Ltd and others* [1968] EA 123.

38. The questions for determination in this appeal are –

1. Whether the appellant proved his case against the respondent on a balance of probabilities.
2. If the answer to the above is in the affirmative, what damages should be awarded to the appellant?

39. What amounts to proof on a balance of probabilities? Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

40. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the judges of appeal held that:

“Denning J in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

41. The appellant had the duty of proving the facts constituting negligence on the part of the respondent even if the respondent chose not to rebut his case. In *Machindranath Kermath Kersar v D S Mylarappa & others*, Civil Appeal No 3041 of 2008, SB Sinha, J writing for the Supreme Court of India stated on the meaning of negligence:

“A suit for damages arises out of a tortious action. For the purpose of such action, although there is no statutory definition of negligence, ordinarily, it would mean omission of duty



caused either by omission to do something which a reasonable man guided upon those considerations, ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a reasonable or prudent man would not.” (see also *Municipal Corporation of Greater Bombay v Laxman Iyer* 2003 SCC 731, SCC P. 736 par a 6)

42. In *Mary Wambui Kabugu v Kenya Bus Services Ltd.* Civil Appeal No 195 of 1995:

“The age long principle of law is that he who alleges must prove. The appellant’s case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent’s driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed.”

43. The appellant set out the particulars of negligence of the defendant to include driving at an excessive speed, driving without due regard to other road users, failure to brake swerve etc., to avoid the accident, driving on the wrong side of the road recklessly and dangerously, driving an roadworthy motor vehicle.
44. These aspects of negligence were made against the defendant described at paragraph 2 of the plaint as a Limited Liability Company incorporated under the *Company Act* cap 486 of the laws of Kenya. The plaintiff alleged that the company had employed him as a turn boy.
45. In the plaint he describes the cause of the accident to be a tyre burst which led to the motor vehicle losing control, overturning and rolling several times. In his testimony he told the court on oath that he blamed the driver because the brakes of the motor vehicle failed and the company for failing to service its motor vehicle. On cross examination he stated that the motor vehicle’s brakes failed, the motor vehicle veered off the road. The driver was not speeding and the brakes failed. That an inspection was done and the motor vehicle was ok. On re-examination he told the court that he was not given the inspection report, that the motor vehicle was not inspected, that the accident was due to mechanical failure, that he blamed the company.
46. First on the particulars of negligence, it is clear that the company/ the defendant was not driving the motor vehicle. It could not have been driving the motor vehicle. All those particulars of negligence could only have been proven against the driver, whom the plaintiff was not blaming for anything. Yet, all the faults of negligence were predicated on the act of driving the motor vehicle.
47. Secondly his story changed, from a tyre burst to brake failure leaving the question as to what exactly caused the accident if at all. If indeed the cause was negligence on the part of the defendant nothing would have been easier than to set out the particulars of negligence against the defendant. The defendant could not be found vicariously liable for a person who was not to blame for the accident.
48. Thirdly he now blamed the company wholly for the accident yet nowhere in the Plaint did he set out any particulars of negligence against the company. If he had done so then his testimony against the company would have had a pleading to stand on. A party is bound by its own pleadings. Yes, the



defendant could have been found vicariously liable for the actions of its driver but in this case there was no driver against whom the acts of negligence set out could be proved against. For the evidence of his own witness PW1 the police officer, no one was to blame for the accident according to the police abstract. She did not have any other details with respect to the accident. However, it is clear why the appellant decided to sue the defendant without the driver. Because the driver was not to blame yet, his Plaintiff laid charges of negligence against the same driver.

49. The fact that the respondent who was the defendant in the subordinate court did not call any witness does not automatically amount to proof of the appellant's case. The appellant was still bound to prove his case on a balance of probabilities. His testimony could not hold against the defendant without any pleadings. That is not a matter of technicality. It is a matter of law.
50. I have considered the authorities cited for the appellant on this issue. Clearly where the plaintiff lays evidence before the court that would require the defendant to respond and the same is uncontroverted the plaintiff's claim would stand unchallenged. But the plaintiff's case herein falls short of all the principles set out in those authorities.
51. Ultimately I find no merit in the appeal and no reason to disturb the findings of the learned trial magistrate.
52. The appeal is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF FEBRUARY 2023.

MUMBUA T MATHEKA

JUDGE

CA Jenniffer

Ms. Odhiambo for respondent Present

N/A for Ngigi Njuguna for appellant

