



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tsucho Capital (K) Limited & 3 others v Kinyanjui (Civil Appeal  
14 of 2021) [2023] KEHC 3131 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 14 OF 2021**

**SM GITHINJI, J  
APRIL 12, 2023**

**BETWEEN**

**TSUCHO CAPITAL (K) LIMITED ..... 1<sup>ST</sup> APPELLANT  
FRANCIS NJOGU NJIHIA ..... 2<sup>ND</sup> APPELLANT  
JUSTIN MWANIKI NJAGI ..... 3<sup>RD</sup> APPELLANT  
AFRICAN SPIRITS LIMITED ..... 4<sup>TH</sup> APPELLANT**

**AND**

**JANET GATHONI KINYANJUI ..... RESPONDENT**

*((Being an Appeal against the Judgment and decree of the Honourable D. S. Sitati,  
Resident Magistrate delivered on 18.01.2021 in CMCC No. 120 of 2018- Kilifi))*

**JUDGMENT**

- 1 The appeal before me is against the award of damages by the trial court in the sum of Kshs 1,979,310/= for general and special damages with liability at 100% against the defendants jointly and severally. The judgment was delivered on January 18, 2021. Aggrieved by the judgment, the Appellant filed a memorandum of appeal on the February 22, 2021. The appeal is mainly on the Trial Court's finding in respect of the general damages and the future medical expenses. The grounds of appeal are that:
1. The Learned Trial Magistrate erred in law and in fact in failing to properly frame the issues between the parties.
  2. The Learned Magistrate erred in law and in fact in failing to find an issue that the 3<sup>rd</sup> Appellant was not the driver, servant and/or employee of the 2<sup>nd</sup> Appellant.



3. The Learned Magistrate erred in law and misdirected himself by failing to properly consider whether the 3<sup>rd</sup> Appellant was the 1<sup>st</sup> and 2<sup>nd</sup> Appellant's authorized driver, servant and/or agent.
  4. The Learned Magistrate erred in law and in fact by failing to find that there was no connection between the 3<sup>rd</sup> Appellant and 1<sup>st</sup> and 2<sup>nd</sup> Appellant.
  5. The Learned Magistrate erred in law and in fact by failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> Appellant cannot be held liable for acts or omissions of the 3<sup>rd</sup> Appellant.
  6. The Learned Magistrate erred in law and in fact by failing to find that the Plaintiff has failed to prove her case against the 1<sup>st</sup> and 2<sup>nd</sup> Appellant to the required standard.
  7. The Learned Magistrate erred in law and in fact by awarding an inordinately high quantum of damages.
  8. The Learned Magistrate erred in considering irrelevant matters and/or in not considering relevant matters.
  9. The Learned Magistrate erred in law by awarding costs against the 2<sup>nd</sup> Appellant.
- 2 The Appellants in the end sought the following orders;
- a. That this Appeal be allowed.
  - b. Judgment of subordinate court on liability of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant be set aside and replaced with a finding in favour of the Appellants.
  - c. Costs of the Appeal.

### **Background**

- 3 Vide a Plaint dated March 26, 2018, the Respondent filed Kilifi RMCC No 120 of 2018, *Janet Gathoni Kinyanjui v Justine Mwaniki & 3 Others* seeking general and special damages arising from a road traffic accident involving Motor Vehicle Registration Number KBW 984K which occurred along Mombasa-Malindi Road on or about May 23, 2017 at Mtwapa area.
- 4 In the plaint its averred that the Plaintiff sustained a comminuted and displaced fracture of the left distal femur and a massive 30x 5cm degloving injury on the right leg.
- 5 All these was blamed on negligence of both Defendant's and/or her authorized agent, servant or employee as pleaded in paragraph 4 of the plaint.
- 6 The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered appearance on August 13, 2018 and filed a joint statement of defence. The 4<sup>th</sup> Defendant entered appearance on April 24, 2018 and filed his Defence on the May 8, 2018 denying liability of the accident. In particular, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied that the 1<sup>st</sup> Defendant was their authorized driver at the time of the accident. The Defendants alleged in their defence that the accident and if at all it occurred, was wholly caused by the negligence of the Plaintiff (Paragraph 6 of the Statement of Defence). This recital of pleadings formed the basis of the trial.

### **The Evidence**

- 7 PW1 No 4xxx7 Sergeant Joseph Langat based at Mtwapa Police Station told the court that an accident occurred on May 3, 2017 involving motor vehicle registration no KBW 984A Toyota Hilux pick up which was being driven by Austin Mwaniki Njagi. It was his testimony that the other party Janet



Gathoni Kinyanjui was also involved in the accident. The P3 Form was produced as Plaintiff Exhibit No 1 and the Police Abstract as Plaintiff Exhibit No 2.

- 8 On Cross examination, he stated that as per the record, the owner of the motor vehicle was Africa Spirits Limited. It was his testimony that he did not do a sketch plan since the vehicle took the victim to hospital. It was also his testimony that the victim had been given a lift and upon alighting, the driver drove off before she had fully and safely alighted.
- 9 PW2 Janet Gathoni Kinyanjui told the court that she recorded a statement dated February 20, 2018 which was adopted as her evidence in chief. She further told the court that she had sued Justin Njagi who used to be her distributor. That he was driving Motor Vehicle Registration Number KBW 984K and that the accident occurred on May 23, 2017. That on the day of the accident, she boarded the Defendants' motor vehicle and requested him to stop along the way to hand keys to a mechanic. According to her, Justine stopped on the side, she stepped out with the left leg and the vehicle moved and she was dragged under the vehicle on the tarmac road for a distance of about 300 metres. She further informed the court that she did not know why he started moving and she had not fully alighted. That he moved while the vehicle door was still open.
- 10 She told the court that she broke her left leg as a result of the accident and that she had a metal plate and the other leg had its flesh injured. That after the accident she was taken to Swiss Cottage for treatment and later to Coast General Hospital. That she was admitted for 2 weeks and the metal plate ought to be removed at a cost of Kshs 80,000/-. She produced a bundle of receipts for Kshs 198,138/- as Plaintiff Exhibit No 4. The treatment notes as Plaintiff Exhibit No 5. It is her testimony that she was a business woman prior to the accident as she used to sell wines and spirits. Documents items No 15-24 were produced as Plaintiff Exhibit No 9. It is her further evidence that she made a profit of Kshs 1,500/- to Kshs 1,700/- per day from her business but as a result of the accident, her business collapsed as she was unable to continue with it. She told the court that the accident occurred on May 23, 2017 and up to April 27, 2018 she lost earnings for the said period. That she is not fully recovered as she is still using crutches.
- 11 Upon cross examination, she informed the court that on the day of the accident, her car had trouble starting and that Justin agreed to give him a lift on his motor vehicle. That at the time of the accident Justin was working for Africa Wine & Spirits who were the owners of the motor vehicle. She narrated that when she removed her left leg and the motor vehicle started moving. She further told the court that she was trapped and the luggage injured her as it fell on her. Her testimony is that she stopped working as the business had collapsed since she used the business money to pay hospital bills.
- 12 The Medical Report prepared by Doctor Ndegwa dated February 16, 2018 was produced by consent of the parties as Plaintiff Exhibit No 6 and the receipt thereto as Plaintiff Exhibit No12. The subsequent Medical Report by Doctor Ndegwa dated April 24, 2019 was produced as Plaintiff Exhibit No 7.
- 13 The Defence did not call any witnesses but by consent of the parties, the witness statement by the 4<sup>th</sup> Defendant recorded on 8<sup>th</sup> July, 2020 was admitted as his evidence. Further, the Medical Report by Dr. Udayan Sheth was produced as Defence Exhibit No 1 while the Motor Vehicle Hire Agreement filed on July 23, 2019 was produced as Defence Exhibit No 2.

### **The trial court's judgment**

- 14 The trial court made a determination that the Plaintiff had sufficiently proved that the accident had indeed occurred as pleaded in the Plaintiff. The trial court was further persuaded by the undisputed evidence of the Plaintiff that the motor vehicle was at the material time, in the actual control of the 2<sup>nd</sup> Defendant but registered in the joint names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The trial court also held



- that the 4<sup>th</sup> Defendant attempted but failed to prove that he had hired out the motor vehicle to the 2<sup>nd</sup> Defendant at the time. In the end, the court held that the motor vehicle was driven by the 1<sup>st</sup> Defendant whose negligence the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are vicariously liable, jointly and severally.
- 15 On the issue of General damages, the trial court awarded a sum of Kshs 1,200,000.00 relying on the case *Tononoka Rolling Mills Ltd v James To Boso Were* (2015) eKLR where the Learned Judge gave an award of Kshs 850,000/- for degloving injury to the left thigh, compound comminuted fracture mid-thrid left femur and soft injuries. On loss of earning capacity, the trial court awarded a global sum of Kshs 600,000/-, Kshs 50,000/- for future medical costs and Kshs 129,310/- for medical expenses.
- 16 The appellant preferred an appeal against the said judgment on the grounds that the Learned Trial Magistrate erred and misdirected himself by finding that the 3<sup>rd</sup> appellant was the driver, servant, and/or employee of the 2<sup>nd</sup> appellant, that the Learned Trial Magistrate erred in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> appellants cannot be held vicariously liable for acts and omissions of the 3<sup>rd</sup> appellant and awarding an inordinately high quantum of damages.

### **Analysis and determination**

- 17 I have considered the appeal and the history of the suit before the trial court. On appeal both counsels argued their respective positions by way of written submissions which this court has duly considered. On the scope and duty of an appellate court, I am guided by the principles in *Selle v Associated, Motor Boat Co* 1968 EA 123. As regards the standard of proof in a case of this nature, it is trite that the respondent must prove the case on a balance of probabilities required of civil cases which she filed before the trial court. In essence, I must ask myself whether the record bears sufficient evidence to sustain the findings in the Judgment of the Learned trial Magistrate.
- 18 In my view what is for determination in this appeal is whether the 3<sup>rd</sup> appellant was the authorized driver, servant and/or employee of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants; whether the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants are therefore vicariously liable for the accident and whether the award of damages as assessed by the trial court was inordinately high.
- 19 Having well interacted with the record, what is of essence is the issue of ownership of the motor vehicle at the time of the accident. The 2<sup>nd</sup> Appellant recorded a statement dated July 8, 2020, he stated that he was the registered owner of Motor vehicle KBW 984K which he claims to have hired to the 4<sup>th</sup> Appellant and to that effect, he attached the said agreement. He has since distanced himself for the acts of the 3<sup>rd</sup> appellant herein. The 2<sup>nd</sup> appellant placed reliance on the motor vehicle hire agreement submitting that the Respondent did not lead evidence to prove that the 3<sup>rd</sup> appellant was the authorized driver, servant and/or employee of the 1<sup>st</sup> and 2<sup>nd</sup> appellants. The 2<sup>nd</sup> appellant admitted that he was the registered owner of the motor vehicle KBW 984K and I have also had an opportunity to peruse the agreement between the 2<sup>nd</sup> and 4<sup>th</sup> Appellants. Apart from noting that the agreement was executed on 1<sup>st</sup> January, 2014 and was due for renewal on January 1, 2015, I could not make much of the document. The appellants were clearly not keen on revealing the full contents of the said document. From this document, it is not clear whether the agreement was in force at the time of the accident. Therefore, this piece of evidence did not shift the burden of ownership from the 1<sup>st</sup> and the 2<sup>nd</sup> appellants who are the registered owners of the said motor vehicle.
- 20 As deduced from the trial court record, this was an accident which occurred on May 23, 2017 along Mombasa – Malindi road. PW2 recounted how the 1<sup>st</sup> Defendant being the driver of motor vehicle registration Number KBW 984K owned by the 1<sup>st</sup> and 2<sup>nd</sup> appellants stopped on the side for her to alight from the vehicle. She stepped out with the left leg and the vehicle moved on. She was dragged



under it on the tarmac road for a distance of around 300 metres. She further informed the court that she did not know why he started moving and she had not fully alighted. That he moved while the door was still open. She told the court that she broke her left leg as a result of the accident and that a metal plate was fixed and the other leg had its flesh injured. According to her, the 3<sup>rd</sup> appellant was employed by the 4<sup>th</sup> appellant.

21 Having found that the 3<sup>rd</sup> appellant was fully liable for the accident based on the evidence of PW2, the other appellants cannot escape from being vicariously liable. Further I note from the record that the 1<sup>st</sup> appellant at submission stage alleged that it was merely a financier in the transaction but it did not present any evidence to prove it. The fact that the appellant's elected not to call any evidence in rebuttal to the evidence given by the respondent, conclusively set in motion for a prima facie case in favor of the respondent. The court generally does not conduct its own search for evidence concerning a matter before it; - it must rely on the evidence the parties presents for evaluation and scrutiny.

22 In comparative jurisprudence the court in *Rain Barrarra v Gurru Charran* (1970) All EKRL 749 observed; -

“ Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence, that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of servant or agency on the part of the driver being ultimately a question of fact. Additionally, the onus of displacing the presumption is on the registered owner and if he fails to discharge, that this, the prima facie case remains and the plaintiff succeeds against him.”

23 The appellants have asserted that the respondent was under an obligation to prove that the driver, the 3<sup>rd</sup> appellant drove the motor vehicle on the instructions of the 1<sup>st</sup> and 2<sup>nd</sup> appellants but in my view, this was not one of the obligations placed on the respondent. The Respondent only told the court what she knew and as such, her only obligation was to find out under whose names the motor vehicle was registered under and who was driving the same on the day of the accident. As was rightly held by the trial court, the accident motor vehicle was registered in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> appellants but in the actual use by the 4<sup>th</sup> appellant. To this end, I cannot vary the findings on liability arrived at by the Learned trial Court without credible and cogent evidence to the contrary.

24 I have re-evaluated the evidence and entire Judgment by the Learned trial Magistrate. The observations I make is that the circumstances surrounding the award of damages under the various heads was properly thought out by the trial Magistrate and most particularly I am in agreement with the finding in the decisions that were quoted by the trial court on the headings of pain, suffering and loss of amenities; *Tononoka Rolling Mills Ltd vs James To Boso Were* (2015) eKLR *General damages for loss of earning capacity*; *Benuel Bosire v Lydia Kemunto Mokora* (2019) eKLR which I have found useful in the above analysis. Based on the evidence, the award on the general damages for pain and suffering, loss of earning capacity as well as the future medical costs were within acceptable limits. I find no grounds to interfere with the decision of the trial court as it is sound, in reference to liability and the award for the damages; it is accordingly affirmed.

25 For the above reasons, the appeal is hereby dismissed with costs to the Respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12<sup>TH</sup> DAY OF APRIL, 2023.**

.....



**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Ms Julius holding brief for Mr Jengo for the Respondent
2. Mr Okello for the Appellant

