



REPUBLIC OF KENYA



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Lucheveleli v Rentworks East Africa Limited & another (Civil Appeal E007 of 2020) [2023] KEHC 18018 (KLR) (8 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E007 OF 2020**

SM GITHINJI, J

MAY 8, 2023

BETWEEN

PHILIP LUCHEVELELI APPELLANT

AND

RENTWORKS EAST AFRICA LIMITED 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Appeal from the judgment and decree of Hon L.N Wasige (PM)
dated 6th October 2020 in Kaloleni PMCC No. 100 of 2019)*

JUDGMENT

Coram Hon Justice S.M.Githinji

Mr Kiragu for the Appellant

Mr Gor for the 1st Respondent

1. The Appellant sued the Respondent for damages following an accident caused by the 1st Respondent's motor vehicle Registration No. GKB 959R which was said to have been carelessly and negligently driven by the 2nd Respondent's driver causing the same to hit motor vehicle Registration No. KCQ 367B.
2. The 1st Respondent filed a defence admitting occurrence of the accident but denying negligence on the part of its driver. It attributed negligence to the owner of the Motor Vehicle Registration No. KCQ 367B and stated on a without prejudice, that the accident was substantially caused by the driver of the motor vehicle Registration No. KCQ 367B. The 1st Respondent denied each and every other allegation stated in the Plaintiff.



3. In its judgment dated 6th October 2020, the trial court found the appellant partially liable for the accident for agreeing to enter a vehicle with faulty brakes. The trial court observed that it would have apportioned liability to the owner or driver of motor vehicle Registration No. KCQ 367B had they been sued. In the end, the trial court dismissed the Appellant's case and stated that she would have awarded Kshs 300,000/- general damages and Kshs. 2,000/- special damages if the matter had succeeded.
4. The appellant was aggrieved with the judgment. He filed a memorandum of appeal dated 26th October 2020 and filed on 27th October 2020, raising the following grounds of appeal: -
 1. The learned trial magistrate erred in law and in fact in dismissing the Appellant suit and finding the Appellant did not prove his case on a balance of probability.
 2. That the Learned Trial Magistrate erred in law and fact in holding the Appellants liable for contributory negligence yet the same was never specifically pleaded.
 3. The Learned Trial Magistrate erred in both law and fact by inferring the defence of "volenti non fit injuria" and reversed the burden of proof by requiring the Appellant to disapprove a non-existent defence that was never pleaded.
 4. The Learned Trial Magistrate erred both in law and in fact by failing to consider findings in covering report that the accident was caused by faulty brakes, which raised a prima facie inference of negligence on the part of the 1st Respondent in failing to maintain the vehicle, which inference the 1st Respondent failed to displace.
 5. The Learned Trial Magistrate erred in law and in fact in failing to find that the 1st Respondent were duty bound to invoke order 1 rule 15 of the Civil Procedure Rules and enjoin motor vehicle registration No. KCQ 367B as third party as pleaded in their Defence.
 6. The Learned Trial Magistrate erred in law and in fact by taking position that motor vehicle registration no. KCQ 367B, who were not party to the suit, contributed to the accident and thereby disregarded Order 1 Rule 15 of the Civil Procedure Rules;
 7. The Learned Trial Magistrate erred in law and in fact and misdirected herself by dealing with issues of vicarious liability which was not in contention and failed to appreciate and or apply Order 2 Rule 11 (3) of the Civil Procedure Rules according to which failure to traverse the issue of vicarious liability amounted to an admission.
 8. The Learned Trial Magistrate erred in Law by failing to appreciate the doctrine of res ipsa loquitur and thereby reached a wrong decision.
 9. The Learned Trial Magistrate erred by wholly disregarding Appellant submissions and authorities cited and proceeded on her own views not pleaded nor backed by the law thus reaching an erroneous conclusion, thereby occasioning miscarriage of justice.
5. Parties agreed to canvass this appeal through written submissions.

Appellant's Submissions

6. The Appellant condensed the grounds of appeal into three issues. First, whether the trial court had jurisdiction to frame and determine issue in respect to the doctrine of volenti non fit injuria and contributory negligence that was not pleaded or raised in the proceedings through evidence



of submissions. The Appellant relied on the case of *Vyas Industries v Diocese of Meru* [1982] KLR where the court of appeal gave two instances when a court could base its decision on an un-pleaded issue. First, if it appears from the course followed at the trial that the issue had been left to court for decision, and second where an advocate led evidence and addressed the court on an issue. The Appellant also relied on the case of *Maina Kaniaru and Jane Wahito- v- Josephat Muriuki Wangondu Civil Appeal No. 14 of 1989*.

7. Second issue, on whether the trial court had jurisdiction to determine the issue of vicarious liability which was not in contention, the Appellant argued that the 1st Respondent's failure to traverse this issue amounted to an admission as provided under Order 2 Rule 11(3) of the Civil Procedure Rules. To buttress this point, he relied on the cases of *Margaret Wairimu Warima v Phylis Wanjiru Thairu and 2 others* [2017] eKLR; and *Paul Muthui Mwavu v Whitestone K Ltd* [2015] eKLR.
8. The final issue is on whether the trial court could shift blame to the driver of motor vehicle Registration No. vehicle KCQ 367B who was not a party to the proceedings and whom the 1st Respondent pleaded as third party. The Appellant argued that it was upon the 1st Respondent to institute third party proceedings against the said driver or owner under Order 1 Rule 15 of the Civil Procedure Rules as it was held in *Brian Muchiri Waihenya v Jubilee Haulier Ltd and 2 others* [2017] eKLR.
9. To the Appellant, the trial magistrate erred in suggesting that the Appellant should have enjoined the third party to the suit. He further relied on the case of *Pauline Wangare Mburu -v- Benedict Raymond Kutondo and another* [2005] eKLR.
10. The Appellant urged the court to allow the appeal and set aside the trial court's judgment.

1st Respondent's Submissions

11. Counsel for the 1st Respondent identified four issues for determination. First, on whether the trial court had the jurisdiction to frame and determine its own issues, counsel submitted that there were exceptions to the rule that a court could not base its decision on un-pleaded issues. Those exceptions he submitted, were noted by the court of appeal in *Nyaga Cottolengo Francis v Pius Mwaniki Karani* [2017] eKLR.
12. Counsel added that under Order 15 Rule 2 of the Civil Procedure Rules the trial court had the right to exercise discretion and frame its own issues as derived from the contents of the documents produced by parties.
13. Second issue was whether the trial magistrate properly framed and applied the principle of *volenti non fit injuria*. Counsel submitted that the trial magistrate was proper to apply the said principle as it was applied and explained in *United Millers Limited and another v John Mangoro Njogu* [2016] eKLR.
14. The third issue raised was whether the trial magistrate erred in law in finding that the 1st Respondent was not vicariously liable for the actions of the driver of motor vehicle registration number GK959R. Counsel argued that the issue of vicarious liability was in contention and the trial magistrate was right to address it, since the 1st Respondent expressly denied vicarious liability in the statement of defence.
15. Finally, counsel submitted that by laying blame on the driver of motor vehicle Registration No. KCQ 367B in his testimony, the Appellant framed an issue for the court to analyze. As



such the trial magistrate could not be faulted for finding that the said vehicle contributed to the occurrence of the accident.

16. This being a first appeal, it is the duty of this court as the first appellate court to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion, bearing in mind that it did not see the witnesses testify and give due allowance for that. See *PIL Kenya Limited v Oppong* [2009] KLR 442.
17. I note that at the hearing, the Appellant called three witnesses while none was called for the defence. Counsel for the 1st Respondent closed their case upon informing the court that parties had consented to production of the medical report by Dr. Sheth dated 1st September 2019 as DEXH-1.
18. The Appellant testified as PW1. He stated that on the material date he was the OCS Rabai and while on their way to court aboard the motor vehicle Registration No.GKB 959R Land cruiser Toyota, the driver, one Timothy, rammed into a lorry Registration No. KCQ 367B around Mwele area towards Kaloleni. The lorry was parked on the road, at a corner, with no safety hazards on and the driver could not swerve due to oncoming traffic. He sustained a fracture on his upper jaw, nose bridge, cuts on his mouth, bruises on his legs and one loose tooth which eventually fell off.
19. The Appellant added that upon inspection, it was established that the land cruiser's brake system had been damaged prior to the accident and had it been in good condition, the accident would have been avoided. He blamed the 1st Respondent for the accident since he had on various occasions asked them to service the vehicle to no success. The Appellant equally blamed the lorry for causing the accident.
20. On cross examination, the Appellant testified that he was seated at the front together with the driver, but they only noticed the lorry after the driver took the corner.
21. Darius Kiema-PW2, examined the Appellant on 5th July 2019. He confirmed that the injuries suffered by the Appellant were a fracture of the upper jaw, cut on the nose, bruises on the lips and both legs, blunt trauma to the chest and left forearm. As at the time of examination, the injuries had healed. He confirmed that he was paid Kshs. 2000/- to prepare a medical report and Kshs. 7000 to attend court.
22. PC Karen Baraza-PW3, the Investigating Officer, confirmed that the accident indeed occurred on the material date as testified by the Appellant. Upon investigations, they recommended an inquest. She produced the police abstract, P3 form and covering report as PEXH-3, 4 and 5 respectively. She added that according to the report, the land cruiser had brake failure. On cross examination, PW3 told the court that the police abstract did not blame any party for the accident.

Analysis and Determination

23. Having considered the memorandum of appeal, submissions filed by both parties, authorities cited and the record of appeal, I find the following issues for determination; -
 1. Whether the trial magistrate erred in finding that the Appellant was partially liable for the accident by relying on extraneous issues or issues not pleaded.
 2. Whether the 1st Respondent admitted vicarious liability.



3. What was the effect of failure to institute third party proceedings against the driver or owner of motor vehicle Registration No. KCQ 367B.
24. The learned trial magistrate relied on the unpleaded doctrine of *volenti non fit injuria*. On that issue, the learned trial magistrate had this to say in the judgment; -

“Upon consideration of the evidence on record before me, I am satisfied that the Plaintiff and the driver of the lorry all contributed to the occurrence of the accident.
25. Firstly, the Plaintiff confirmed that he was at the time of the accident the OCS of Rabai Police Station. It was his evidence that they had asked the 1st Defendant severally to service the land cruiser and repair the brakes but they failed to do so and let them continue using a faulty vehicle. By his own admission I find the Plaintiff was well aware that the land cruiser’s brakes were faulty prior to boarding the said vehicle on the material day. Thus the maxim of *volenti non fit injuria* applies herein.”
26. From the record, the doctrine of *volenti non-fit injuria* was evidently not pleaded. The situations where an issue, which is not pleaded, can be considered by the court were highlighted by the Court of Appeal in *Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others -v- Isabella Wanjiku Karanja & 2 others* [2017] eKLR that:

“The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly illustrated by the appellants. But there is an equally long line of authorities unequivocally asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in *Chalicha FCS Ltd vs. Odhiambo & 9 Others* [1987] KLR 182, that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”
27. The decision of *Odd Jobs vs. Mubia*, [1970] EA 476, may also apply where it was held that a court may base its decision on an unpleaded issue, if it appears during the trial that the issue was pursued and left for the court to determine.”
28. From the above reasoning, it is clear to me that three situations have to be satisfied before a court can base its decision on an unpleaded issue. Firstly, evidence has to be led on that issue during trial. Secondly, the issue has to be addressed and left for the court to determine. And finally in instances where the parties give consent. In the present case I am not satisfied that evidence was led at the hearing on the application of the doctrine of *volenti non fit injuria*. No questions on the same were asked during cross-examination. In my view therefore, the learned magistrate erred in applying the unpleaded doctrine of *volenti non fit injuria* in her decision.
29. Turning to the second issue, it was the Appellant’s submission that the 1st Respondent admitted to be vicariously liable in the statement of defence, and therefore the trial magistrate misdirected herself in framing the same as an issue for determination. I find no basis in this



allegation or ground. I say so because a cursory perusal of the statement of defence dated 19th August 2019, at paragraph 3 thereon, the 1st Respondent expressly averred as follows.

“... The first Defendant also denies that it is vicariously liable.”

30. On the final issue, I have this to say; Order 1 Rule 15 (1) of the Civil Procedure Rules stipulates that:
- (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...
31. In its statement of defence, the 1st Respondent indicated its intention to institute third party proceedings against the owner and driver of motor vehicle Registration No. KCQ 367B, but for some reason, it failed to do so. It must be noted that the duty to institute third party proceedings is always on the defendant claiming contributory negligence or indemnity against the third party. In *Oceanfreight (EA) Ltd -v- Technomatic Ltd & Another* [2010] eKLR, the Court held that; -
- “It is, in my opinion professionally expedient that the defendant should seek to enjoin the applicant herein, as a third party. This is because of the perceived connection between the applicant’s role in the said contract and the cause of action...”
32. Similarly, in *Kenya Commercial Bank -v- Suntra Investment Bank Ltd* (2015) eKLR, the Court held that;
- “In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”
33. The learned trial magistrate seemed to have been of the opinion that it was upon the Appellant to sue the owner of the lorry Registration No. KCQ 367B. With all due respect to the trial magistrate, this was an erroneous approach. I associate myself with the position adopted by



Okwany, J in James Gikonyo Mwangi –v- D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR that:

“... the suggestion or contention by the appellant that the respondent should have sued the third party owner of the unregistered motor vehicle [is] erroneous and misguided. This is so because passengers have no contract with third party vehicles on the road. The contract is with the owner and/or driver of the vehicle they are travelling in to drive them safely to their destinations. It is the appellant who had a contract with 3rd party vehicles on the road in respect to safe-driving and if the third party acted to his detriment, then I reiterated that the appellant should have called him to account through the third party proceedings.”

34. It was therefore incumbent upon the 1st Respondent to take out third party proceedings and failure to do so, liability that would have otherwise been borne by the third party should be borne by the 1st Respondent. This is so because it would be moot to apportion liability to a person not a party to the suit.
35. Having said so, I will now consider the issue of liability and to resolve it, the question we need to ask is whether the appellant, based on the evidence presented before the trial court proved his case. The legal burden of proof is always on the party that desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya. However, this burden may shift depending on the circumstances of a case, as stipulated under Section 109 and 112 of the *Evidence Act*.
36. In this case, an accident clearly occurred involving the aforementioned vehicles. It is also proven that the Appellant was a passenger in the land cruiser Registration No. GKB 959R. The facts as to how the accident occurred were undisputed. From the evidence, one can only conclude that the accident occurred mainly due to brakes failure. According to the Appellant’s testimony, it seems to me that the 1st Respondent was responsible for maintenance and repairs of the land cruiser. That the 1st Respondent had been asked severally to repair the brake system but had failed to do so. The 1st Respondent did not controvert this evidence. In Titus Kamau Gachanga –v- Wahogo Edward & another [2019] eKLR Odunga J explained; -

“37. It is clear that vehicles do not ordinarily develop brake failures and without any reasonable explanation, mere brake failure cannot exonerate the driver of the vehicle.

38. In Chinga Tea Factory Company Ltd vs. Miugu General Transport Co Ltd [1987] KLR 590, Aluoch, J (as she then was) found that since the accident in question was caused by the braking system of the vehicle coupled with defective tyres these two factors showed negligence on the part of defendant in not keeping the vehicle in a good working order.

39. In David Nandwa vs. Kenya Kazi [1988] KLR 488, the court pronounced itself as hereunder:

“A motor vehicle which has its steering gear, by reason of wear, in imperfect condition that the driver is liable to lose control of the steering, is a thing which on a highway is necessarily dangerous to persons using the highway, and



cause it to be driven on a highway amounts to negligence even in the absence of knowledge of the defect...The application of the doctrine of res judicata, which was no more than a rule of evidence affecting the onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but although it was the duty of the appellants to give an adequate explanation, if the facts were sufficiently known the question reached to be one of where the facts speak for themselves, and the solution must be found by determining whether or not on the established facts negligence is to be inferred...In any case, the owner of the motor vehicle will be found negligent where the defective vehicle is found on the road and the defendant will have to displace the allegations and all the facts proved...In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgement at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants... On the evidence a prima facie case of mechanical failure had been set up, because that is what the plaintiff said was the situation before the accident occurred. He was in hospital after the accident. He was not in a position to get the vehicle examined and indeed there was no examination. He relied on his experience at the accident, and that was the best evidence he could provide...The result was that the plaintiff made out a case of mechanical failure, which was not met by the defence. It was the duty of the defendant company to keep its vehicle in good mechanical repair under the Road [Traffic Act](#). It was also under a duty of care to the plaintiff to provide a safe system of working and not to expose him to risk. The defendant may have had a system of inspection of vehicles but it did not cover the eventuality in this case and consequently, the defendant was liable to the plaintiff.”



40. In this case the appellant was not the one in control of the vehicle and as was held in *Boniface Waiti & Another vs. Michael Kariuki Kamau* [2007] eKLR:

“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.”

41. In this case the evidential burden clearly shifted to the Respondents to prove that in the circumstances, the failure in the braking system was unavoidable. They could have proved this by for example showing the steps taken by them in maintaining the said vehicle. Having failed to do so, the Respondents could not escape liability.”

37. Given the above explanation I am satisfied that the Appellant proved his case against the 1st Respondent on a balance of probability. As already established, the 1st Respondent failed to institute third party proceedings and never at any point blamed the Appellant for the accident. In the circumstances, the 1st Respondent shall bear 100 percent liability.

38. The quantum of general damages was not challenged. The learned trial magistrate and rightly in my view assessed the damages she would have awarded, and considering the seriousness of the injury suffered, I hereby find that the Appellant is entitled to an award of Kshs. 300,000/- as general damages and Kshs 2,000/- proved special damages. To the said extent, the appeal succeeds with costs to the appellant.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF MAY, 2023.

.....

S.M. GITHINJI

JUDGE

In the absence of; -

1. The parties
2. They be notified and served with copies.

