



**Mutuku v John & 2 others (Civil Appeal 17 of 2020)
[2023] KEHC 19926 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 17 OF 2020
TM MATHEKA, J
JULY 10, 2023**

BETWEEN

EUNICE MUMBUA MUTUKU APPELLANT

AND

BERNARD KILONZO JOHN 1ST RESPONDENT

KEITH KILONZO ONGANDA 2ND RESPONDENT

TERCEZ LOGISTIC 3RD RESPONDENT

JUDGMENT

1. The only issues for determination in this appeal are set out in the submissions of the appellant:
 - i. Whether the ground of defence relied on by the trial court was pleaded by the respondents.
 - ii. Whether the trial court erred in law and fact and misdirected itself in failing to make an award for loss of earning capacity on the ground that the earnings were not proved yet the said award is a form of general damages.
2. The plaintiff/appellant filed Kilungu PMCC No 97 of 2014 against the respondent. The plaintiff described the defendant/respondents that at all material times the 1st defendant was the driver of the motor vehicle registration xxxx, the 2nd defendant was the beneficial owner of the said motor vehicle, the 3rd defendant was the registered owner.
3. According to the plaint, on May 19, 2013, the plaintiff was travelling as a passenger aboard motor vehicle registration no xxxx along Mombasa/Nairobi road at Kiongwani the driver attempted to overtake while it was not safe to do so. In the process, he rammmed into the rear tyre of motor vehicle registration No xxxx. The plaintiff sustained injuries to her spine, with paralysis of the lower limbs,



inability to walk to work-permanent disability was assessed at 50%. She also incurred special damages of Kshs 112,990/=. She sought general damages for pain and suffering, loss of earning capacity, the special damages, future medical expenses, cost of the suit and interest. She also sought lifelong medical expenses at Kshs 2,000,000/=.

4. There is a statement of defence for 1st and 2nd defendant – they put the plaintiff to strict proof of the claims she made with respect to the alleged accident. They also contended that if the plaintiff boarded the said motor vehicle she was on a frolic of her own, that the alleged injuries were as a result of poor first aid from those who rescued her, that in the alternative that the motor vehicle had a latent defect that there was no previous medical report to show that she did not have the injuries before the accident.
5. After the full hearing the learned trial magistrate vide a judgment dated June 22, 2016 found; on liability 100% against the 1st defendant, dismissed the case against the 2nd defendant and on damages – general damages at Kshs 2,000,000/= special damages 37,066; future medical expenses at 300,000/= total 2,337,066/= plus costs and interests.
6. On the 1st issue – the learned trial magistrate took guidance from *Alfarus Muli –vs- Lucy Lavuta & Another Civil Appeal No 47 of 1997* on the proposition that apportionment of liability is an exercise of the discretion of the Judge on the evidence before him - and where two motor vehicles had collided he was perfectly entitled to infer negligence on the part of one or the other. He pointed out that the defendant did not attribute any negligence on the part of the plaintiff – but on the driver of motor vehicle registration No xxxx. He pointed out correctly 'that the driver of the said motor vehicle was never sued in this case and the defendant did not bring him in as a 3rd party.'
7. I have looked at the record. The 1st defendant Benard Kilonzo told the court that on May 19, 2013 he was driving to Nairobi having been given a motor vehicle by one Keith Owino. At machinery he was stopped by two women who wanted a lift to Machakos junction. He gave them a lift. He states:

' I overtook a lorry and realized there was another oncoming vehicle. I returned to my lane and the other lorry which I overtook hit me and pushed me off the road. I do blame the lorry for the accident. I was hit on rear side. I admitted the charge owing to prompting by police officers.'
8. On cross examination he told the court that the lorry that hit him was headed to the same direction, Nairobi. That when he tried to get back to the lane the lorry hit him from behind and that pushed him off the road. He accepted that he had been charged with careless driving, admitted the charge and was convicted on his own plea of guilty.
9. He said that the owner of the motor vehicle had not authorized him to carry the passengers. He said he did not tell the passengers about his lack of authority to carry any passengers. He confirmed that the plaintiff sustained injuries.
10. The police officer No xxxx Inspector Joseph Nyasili the in charge traffic Salama police station had testified that he had proceeded to the scene of the accident on May 19, 2013 together with a PC Mwiti at Kiongwani area. The road traffic accident had happened around 1400hrs between motor vehicle registration xxxx trailer and motor vehicle registration xxxx. The officer testified that the driver of KBC tried to overtake the trailer – found it unsafe – and on trying to overturn to his lane, rammed the trailer causing his motor vehicle to spin and face the direction of Mombasa. He said that investigations found that the driver, Benard Kilonzo was to blame as he had rammed the lorry on the rear in the left lane. The driver was charged, pleaded guilty. On cross examination he confirmed that it was the trailer that was hit from the rear.



11. From this evidence – it is clear that the driver of motor vehicle reg no xxxx was to blame for the accident.
12. The question was whether the 2nd defendant/respondent was vicariously liable for the actions of the 1st defendant.
13. The learned trial magistrate relied on [*ORMROD –VS- CROSVILE MOTOR SERVICES LTD \(1952\) 2 ALL ER 753 AT 755*](#) where Kord Denning stated:

' the law puts a special responsibility on the owner of a motor vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly for party by the owner and purpose the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.'

14. Persuaded by this decision the learned trial magistrate found that the 1st defendant was lent a car by the 2nd defendant – the 1st defendant gave a lift to the plaintiff and another. The 2nd defendant had no interest/concern in the 1st defendant's action of giving a lift to strangers, hence the 2nd defendant could not be held liable for the 1st defendant's action. He dismissed the case against the 2nd defendant.
15. It is submitted by counsel for the appellant that the defendant did not plead that the 2nd defendant did not authorize the 1st defendant to carry passengers, and therefore any evidence to that effect, ought to have been rejected. Citing [*IEBC & Anor –vs Stephen Mutinda Mule & 3 Others \(2014\) eKLR*](#) where the Supreme Court cited the Supreme Court of Nigeria Adetoun [*Oladeji \(NIG\) v Nigeria Breweries PLC SC 91/2002*](#) on the importance and place of pleadings:

' It is now trite principle in 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 pleadings goes to no issue 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.'

16. The appellant relies on several other authorities on same issue:-
[*Raila Amolo Odinga & Another –vs- IEBC & 3 Others \(2017\) eKLR*](#), ; [*Joseph Mbuta Nziu –vs Kenya orient Insurance Company Ltd \(2015\) eKLR*](#) and *Bullen Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet and Maxwell (The Common Law Library No 5)*

' The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases upon which the court will be recalled upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposition party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial'.

17. The respondents on their part while conceding that indeed parties are bound by their pleadings argue that the appellant did not lead any evidence to show that the 2nd respondent was liable for the accident. They urged the court to find that 'Negligence is a question of fact which must be proved by evidence'



as was held in *Afro Apin Limited –vs- George Mangaa Maganya (2005) (unreported)* that the plaintiff had not proved any negligence on the part of the 2nd defendant.

18. I have looked at the pleadings very carefully. The plaintiff describes the 2nd defendant as the beneficial owner of the said motor vehicle – period. Then proceeds at paragraph 7 to lay down 'particulars of negligence on the part of the 1st defendant, the driver servant and/or agent of the 2nd and 3rd defendants. The plaintiff also averred that she would rely on 'the doctrine of Res Ipsa Loquitur and vicarious liability'. All these were denied by the defendants and the plaintiff was put to strict proof thereof. Nowhere in the record has the plaintiff led any evidence to establish any connection between the 1st and 2nd defendant at all. All the evidence laid out by the plaintiff was that the 1st defendant was to blame for the accident. It was not pleaded that the 2nd defendant was vicariously liable for the accident and the 3rd defendant was not mentioned in the evidence given on the part of the plaintiff. The record bears no evidence with respect to the 2nd and 3rd defendants – bearing any responsibility for the accident. The learned trial magistrate was entitled to draw his conclusion with respect to liability in the circumstance, and in my view – the pleadings support his position.
19. On the 2nd issue – relying on the Court of Appeal in *Mumias Sugar Company Limited vs Francis Wanalo (2007) eKLR* on the principles to apply in awarding damages for loss of earning capacity – the appellant seeks that general damages for this be calculated at kshs 18000 x 12 x 20 = 4,320,000/=.
20. For the respondents, it was argued that the appellant sought loss of earnings. She indicated that she was an ECD teacher earning Kshs 18,000/= per month – but never placed the evidence before the trial court. The respondents cited *Douglas Kalafa Ombeva –vs- David Ngama (2013) eKLR* where the court stated: 'loss of earnings is a special damage claim and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages the court will not act in a vacuum or whimsically.'
21. There is a difference between loss of earning capacity and loss of future earnings. The court of Appeal in *SJ –vs- Francesco Di Nello & Anor (2015) eKLR* – stated:

' Claims under the heads of loss of future earning and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual on the loss is loss of future earnings. Loss of earning capacity may be defined as the diminution of earning capacity loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated on *Fairley –vs- John Thomson Ltd (1973) 2 Lloyd's Law Reports 40* at page 14 where Lord Denning MR said as follows:

'It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages'.
22. From the submissions by counsel, on the specifics of earning Kshs 18,000 per month counsel was submitting for loss of earnings – this is a special damage that must be pleaded and specifically proved. Be that as it may the learned trial magistrate did note that loss of earning power is awarded as part of general damages. The learned trial magistrate in making the award of Kshs 2,000,000/= stated that it was adequate 'compensation for the injuries herein as well as loss of amenities'. In arriving at this decision the learned trial magistrate was well aware of the impact the road traffic accident had on the appellant – he stated 'the life of the plaintiff was completely shuttered (sic) and her injuries were indeed grievous the proposed figure of Kshs 3,000,000/= is relatively high. From this – it is evident to me that



the learned trial magistrate having seen and heard the appellant assessed the general damages and going by the authorities herein above – it appears to me that the trial court applied the correct principles.

23. In the circumstance, I find that the appeal is not merited. The same is dismissed with costs.

Dated, signed and delivered virtually this 10th July 2023

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MUMBUA T. MATHEKA

JUDGE

O.N Makau & Mulei advocate for appellant

Wangari Muchemi & co advocates for Respondent

