

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. HCCA E118 OF 2024

KENNETH WAWERU.....
APPELLANT

VERSUS

DAVID GACHERU WAMBURU.....
.....RESPONDENT

(Being an appeal against the judgement and decree of the Honourable magistrate DIANA ORAGO delivered on the 17th day of May,2024 in the chief magistrate's court in MCCC NO. E210/2023)

JUDGEMENT

- 1.** The instant appeal emanates from a road traffic accident claim where the Respondent had sued the appellant for compensation following an accident that occurred on 22nd May 2020 at Kahawa Barracks Footbridge.
- 2.** By a Plaint dated 18th May 2023, the Respondent averred that he was lawfully driving motor vehicle registration number KCL 324L when the Appellant's authorized driver, servant and or agent so negligently drove, managed and or controlled motor vehicle registration no KBR 473U and caused it to crash into motor vehicle registration number KCL 324N.
- 3.** It was averred that the Appellant's authorized driver drove the subject motor vehicle at an excessive speed without due care and attention to other road users particularly the Respondent's motor vehicle registration number KCL 324 N. As a result, the Respondent suffered loss and damage which was undertaken by ICEA lion general insurance co. Ltd under the policy of insurance in force at the material time. Therefore, the Respondent prayed for special

damages for repair and investigations by Counterstrike Limited all totalling to Ksh. 113,996.00 under the doctrine of subrogation in insurance law and the said insurance policy.

- 4.** The Appellant denied the claim alleging that the accident was wholly caused or substantially contributed to by the negligent conduct of the driver of motor vehicle registration numbers KCL 924 N and KCT 959K after having had an earlier accident at the same scene of the accident.
- 5.** The particulars of negligence were that the Respondent remained on the road without warning to other road users after the accident with KCT 958K and that he failed to place any warning on the road to warn other motorists hence causing obstruction after having had an earlier accident at the same place of the accident.
- 6.** Accordingly, it was further averred that any alleged damage to the Respondent's vehicle KCL 324N was wholly caused by the negligent conduct of motor vehicle KCT 958K which had knocked KCL 924N from the rear in an earlier accident at the same spot. Consequently, the Appellant raised a third-party notice to the owner of motor vehicle KCT 958K.
- 7.** During the trial, the Respondent, PW1 testified that no criminal charges were ever preferred against anyone for the accident. He further stated that his vehicle was in the inner most lane of the superhighway facing Nairobi direction and stationary as he was assisting his friend, the driver of KCT 958 K to move goods from his vehicle as the same had stalled. It is at that point that the appellant rammed into the rear of KCT and in turn the rear of his motor vehicle. The police visited the scene and motor

vehicle registration KBR was blamed for causing the accident.

- 8.** PW2 NO. 79874 PC Maurice Okoth, a police officer stationed at Kahawa Sukari produced the police abstract in respect to motor vehicle registration number KCL 324 N which was driven by the Respondent. The road traffic accident involved motor vehicles registration KCL and KBR on 22nd May 2020 at around 2040hrs. The officers who visited the scene were on transfer. Motor vehicle registration no. KBR was blamed for the accident.
- 9.** The Appellant testified that he was driving his motor vehicle registration KBR 473Y and just after the barracks there is a footbridge towards Githurai where a couple of vehicles had hit each other and oil spilled on the road. He hit a white Prado on the rear and his vehicle swerved and turned facing the side he had come from. He maintained that the vehicle that the Respondent had sued was not his vehicle. The vehicle that he hit was a Prado registration KBN 900G. He denied hitting either KCL or KCT. He provided D Exhibit 3 which stated that he hit KBN 900G then KBR swerved and hit a stationery motor vehicle KCT 958K Noah. The owner of KBN reached out to him and he referred him to his insurance Genminia Insurance. He sued KCT 958K which had hit KCL and they didn't enter appearance. Judgement was entered in his favour. His speed at the time was 50-60 km/h. He is not the owner of KBR 473U his vehicle is KBR 473Y and that the accident occurred at 1900 hrs and not 2040hrs.
- 10.** On liability, the trial court found the Respondent 100% liable. It was contended that the mix up in registration number KBR473U instead of KBR 473Y was a typographical error. Further, the court observed that had the vehicle in questioned not belonged to the Appellant, he would not have bothered to enter appearance. Relying

on HCCA NO. 154 of 2005 **Nkuene Dairy Farmers Cooperative Society Ltd v Ngacha Ndeiya (2010) eKLR**, the trial court awarded the Respondent the special damages as pleaded.

11. Aggrieved and dissatisfied with the decision of the trial court, the Appellant lodged the instant appeal vide a memorandum of appeal dated 6th June 2024 on the grounds that:

- a. *The learned magistrate erred in both law and facts by arriving at a conclusion that was not based on the law;*
- b. *The learned magistrate erred in law and in fact by holding that the motor vehicle KBR 473U as sued belonged to the appellant notwithstanding the overwhelming evidence before the court that the same did not belong to the appellant;*
- c. *The learned magistrate erred in law and fact by ignoring the denial of ownership of motor vehicle KBR 473U in the defence hence arriving at a conclusion not based on any law when by her own motion substituted the subject vehicle KBR 473U with KBR 473Y without any application to amend the plaint formally or orally by the respondent;*
- d. *The learned magistrate erred in law and fact by setting aside and/or overturning the interlocutory judgement entering against the 3rd party without any application by the 3rd party and further making a finding that the 3rd party was not to blame without any rebuttal from the 3rd party;*
- e. *The learned trial magistrate erred in both law and fact by holding the appellant liable for hitting the 3rd party vehicle KCT 958K then the respondent's vehicle KCL 324N without any pleading in the plaint to the effect whereas parties are bound by their pleadings and that was the case before the trial court as per the filed pleadings;*

- f. That the trial magistrate erred in both law and fact by totally ignoring the appellant's submissions and the application of the law therein;*
- g. The learned magistrate erred in law and fact by making a finding that the appellant should not have entered appearance if the vehicle sued KBR 473U was not his hence misinterpreting the law on service of summons to enter appearance;*

12. In light of the foregoing, the Appellant prayed that, the appeal be allowed and the judgement and decree of the subordinate court be set aside and/or be varied as this honourable high court deems fit and just.

13. The appeal was disposed through written submissions.

14. It was submitted that without any amendment to the plaint or proof of collision between KCL 324N and KBR 473Y, the trial court made a finding that the said KBR 473Y was to blame for the accident when in fact the suit had been instituted against motor vehicle registration number KBR 473U. Accordingly, failure to amend the Plaint on registration number of the actual vehicle that hit the Respondent's vehicle adversely affected the Appellant as he was not able to plead his defence effectively. The learned trial magistrate thus erred in failing to address the established legal principle that parties are bound by their pleadings.

15. Further, it was submitted that any party sued must enter appearance and defend the claim, therefore, the trial courts assertion that attached liability on the Appellant for merely entering appearance and defending the claim is contrary to well established legal principles. The fact that the Appellant denied being the owner of motor vehicle registration number KBR 473U should have prompted the Respondent to amend his pleadings, having failed to do so

till the end of the trial, he was bound by his pleadings. ***David Sironga Ole Tukia vs Fransis Arap Muge 2 others [2014]eKLR.***

16. It was submitted that pleading the correct vehicle that was on trial by the Respondent was an integral part of the Plaint. Also, the fact that the registration number in question was a typo was brought out for the first time during submissions. Therefore, the same is inconsequential as submissions are not evidence. See ***Daniel Toroitich Arap Moi v Mangi Stephen Muriithi & another [2014] eKLR.***

17. It was further urged that, failure to plead the correct vehicle cannot be cured by Article 50, 159 (3) (d) as observed in ***Said Sweilem Gheithan Saanum vs Commissioner of law Malindi Court of Appeal [2015]*** where the court observed that the oxygene principle is not a panacea which heals every sore in litigation, neither is it a license to parties to ignore or contravene the law and rules of procedure. Therefore, it was a serious error for the trial court to find the Appellant liable for an accident in which it denied ownership of the vehicle in the absence of any amendment to the plaint.

18. On the issue of absolving the 3rd party from liability, it was submitted that the trial magistrate erred in overturning the interlocutory judgment against the 3rd party without the 3rd party entering appearance. There was therefore no legal basis for exonerating the 3rd party, KCT 958K, when there was already an interlocutory judgment against the 3rd party. The court could not *suo moto* set aside the interlocutory judgment against the 3rd party.

19. The Respondent maintained that a typographical error resulted in him suing KBR 473U and not KBR 473Y.

Therefore, in the spirit of Article 159, the said technicality should not grind the wheels of justice. It was submitted that KBR 473Y hit KBN 900G which then hit KCT 958K and in turn hit KCL924N. Therefore, the typographical error that was extensively explained falls within the exception to the rule that parties are bound by their pleadings.

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

21. In the case of **Mbogo and Another vs. Shah [1968] EA 93** the Court stated:

'...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'

22. The duty of the first appellate Court was settled in case of **Selle and another Vs Associated Motor Board Company and Others [1968] EA 123**, where it was held by as follows;

'this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the

impression of demeanour of a witness is inconsistent with the evidence generally.”

23. The appeal herein is against liability.

24. Liability is an issue of evidence. In this cause, both the Appellant and the Respondent testified on how the accident occurred. The Respondent testified that, he stopped his vehicle KCL 324N along Thika superhighway at Kahawa Barracks to assist his friend, the owner of motor vehicle registration number KCT 958K which had stalled on the road, when motor vehicle registration number KBR rammed into KCT 958K and subsequently his vehicle was hit by the said KCT.

25. This version is denied by the appellant, who while admitting having been involved in an accident on the 22nd May 2020, maintains that he hit motor vehicle registration number KBN 900G and not the Respondent's motor vehicle. The appellant also testified that by the time the accident involving his vehicle and KBN 900G occurred, there was already an accident that had occurred along the said road leading to spillage of oil. The appellant further contended that it is KBR 473U and not his vehicle KBR 473Y that had been sued by the Respondent for causing the accident.

26. It is not disputed that there was a multiple accident at the scene on the day in question. The main issue of contention is on whether it is the appellant's motor vehicle that was responsible for the accident in question and what weight, if any, should be attached to the allegation of a typographical error by the Respondent.

27. A perusal of the record shows that there was no clarity on the exact vehicle that caused the accident in question. To begin with, as admitted by the Respondent, the vehicle

that he had sued was KBR 473U. The Respondent's witness statement, which is quite disjointed and unclear, that he adopted in evidence is reproduced herein below:

On 22nd May 2020 I was lawfully driving motor vehicle registration number KCL 324N along Thika superhighway at Kahawa Barracks area when suddenly motor vehicle registration no. KBR 473 U. As a result, motor vehicle registration number KCL 324N was extensively damaged. I blame the driver of MV registration No. KBR 473U for driving a faulty motor vehicle in a public road. I reported the matter at Kahawa Sukari Station where upon investigation the police blamed the driver of motor vehicle registration number KBR 473M for causing the accident.

There was a multiple accident at the scene. I had stopped at the innermost lane at the highway my car was stationery at the highway. I had parked in front of KCT. KBR hit me. Both KCL and KCT were stationary. KBR hit both motor vehicles.

We reported the accident to our insurer ICEA Lion General insurance co. ltd by submitting a completed claim form.

28. A perusal of this witness statement demonstrates confusion and lack of clarity as to exactly what happened on the day of the incident. There is also a mix up on the registration number of the motor vehicle that was to be blamed. Is it KBR 473 U or KBR 473M. Notably, the Respondent also, merely stated the registration numbers of the vehicles involved as KCT, KCL and KBR without mentioning the entire registration or make of the said vehicles.

29. Similarly, the police officer who testified as PW2, on behalf of the investigating officers who had visited the scene, failed to clarify the exact vehicles that were

involved in the accident. In his testimony before court, he stated that,

The road traffic accident involved motor vehicles registration KCL and KBR on 22nd May 2020 at around 2040hrs. The officers who visited the scene were on transfer. Motor vehicle registration no. KBR was blamed for the accident.

30. Although the police abstract in question shows that motor vehicle registration number KBR 473 Y was to blame for the accident, the pleadings, a police abstract in and of itself is not proof of liability for an accident. It merely shows that an accident that allegedly occurred was reported to the police station. In the absence of any other evidence, one cannot be held liable for causing an accident on the basis that the police abstract finds him liable.

31. While the appellant maintains that the accident he was involved in occurred at 1930hrs, the Respondent states that the accident in question occurred at 2040hrs. Considering that the scene in question involved multiple accidents, due care and attention was required of the parties to ensure that the correct registration number of the vehicles involved is captured for clarity. I am afraid that the pleadings on record do not speak with clarity as to enable a court of law, properly guided, to make a determination on liability for the accident.

32. It is an established principle of law that parties are bound by their pleadings. The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in ***Gandy V Caspar Air Charters Ltd [1956] 23 EACA, 139:***

[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full

information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given

33. Later in ***Galaxy Paints Co Ltd V Falcon Guards Ltd [2000] 2 EA 385***, the Court of Appeal reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

34. It has further been the subject of judicial consideration where the import of proper pleadings was highlighted by the Court of appeal in ***David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] KECA 155 (KLR)*** thus:

'In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.'

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

35. The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Hence in ***Odd Jobs V Mubia [1970] EA 476***, Law, JA; speaking for the predecessor of this Court stated that:

[A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.

36. In this appeal the Respondents never amended the pleadings to reflect the fact that he had sued the wrong vehicle, nor was there any evidence on record that the issue was left for the determination of the court. It is trite that submissions are not evidence, and therefore the fact that the allegation of typographical error by the Respondent just popped up in the judgment. I am satisfied that the trial court erred in basing a determination on an issue that had not been pleaded.

37. Notwithstanding the above, I note that PW1 clearly stated that he alighted from his motor vehicle which was

in the innermost lane to assist his friend, driver of motor vehicle registration number KCT 958K, which had stalled in the middle of the road. It is while he was assisting his friend that the subject motor vehicle rammed into his vehicle.

38. This admission by the Respondent falls squarely into the particulars of contributory negligence pleaded by the appellant in his statement of defence. Considering that the accident occurred at night, the Respondent made no mention of the fact that he had placed any life saver or anything that would warn other motorists that he had stopped or stalled to assist his friend. It is therefore true, that his act of stopping in the middle of the road without any warnings endangered not only his life but also the rights of other road users.

39. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR*** found and held as follows in respect to the essence of pleadings:-

'In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to

frame an issue not arising on the pleadings.....”

40. The appellant admitted to have been involved in an accident but not with the Respondent’s motor vehicle. He further added that if per chance the accident involved the Respondent’s motor vehicle, it is because the Respondent caused it by stopping in the middle of the road, at night, without any warning to other motorists. This proposition has been affirmed by the Respondent in his testimony during the trial.

41. Flowing from the above, to the extent that the appellant’s version on how the Respondent contributed to the accident have not been disputed, the appellant successfully discharged his burden of proof under Section 109 of the Evidence Act. On the other hand, other than relying on the assertions in the police abstract, the Respondent failed to discharge the burden of proof on the fact that it was the appellant who caused the accident.

42. The burden of proof under **Section 107 - 109** is on the Evidence Act was on the Respondent. It provides as follows: -

“Part 1 - Burden of Proof 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to

believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

43. I therefore find that the trial court erred in apportioning 100% liability for the accident on the appellant when the Respondent by his own admission stopped his vehicle in the innermost lane of the highway to assist his friend whose car had stalled.

44. From the foregoing, I do not deem it necessary to address myself on the other issues raised in the appeal.

45. *I have come to the conclusion that this appeal has considerable merit. I allow the same, set aside the judgment and decree of the trial court dated 17th May 2024 and substitute therefore with an order allowing the appellant’s suit with costs. The appellant will also have costs of this appeal.*

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 9TH OCTOBER, 2025.

**HON. T. W. Ouya
JUDGE**