



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAKURU

CIVIL SUIT NO E1245 OF 2019

P.A NDEGE SPM

GEOFFREY MAINA KIHORO-----PLAINTIFF

VERSUS

WAKIINAMA LTD-----1ST

DEFENDANT

DAVID KIMANI-----2ND

DEFENDANT

JUDGEMENT

1. The plaintiff in this case, **Geoffrey Maina Kihoro**, is a minor suing through the aunt and next Friend, **Christine Nduta**. He is seeking for judgement against the defendants herein for general damage, special damages of Kshs 10,865 plus 16% VAT, costs and interests thereof emanating from an accident that occurred on or about 24/10/2019, as a consequence of which he sustained

injuries and damages for which he holds the defendants liable. He brought the suit vide a plaint dated 30/11/2019 and filed on 4/12/2019.

2. The plaintiff's case is that he was a fare-paying passenger travelling aboard motor vehicle registration number KCP 509T when along Nakuru-Ravine road near Lake Oil Petrol Station, the defendants' authorized driver, servant or agent so carelessly and/or negligently drove and/or controlled motor vehicle registration number KCB 135J, as a result of which an accident occurred in which the plaintiff sustained very serious injuries and has suffered loss and damages as outlined in paragraph 8 of the plaint. Further, the plaintiff specified his claim of negligence on the part of the defendants' authorized servant, driver and/or agent at paragraph 5 of the plaint on record.

3. The defendants entered appearance on the 04/06/2020 through a Memorandum of Appearance dated 27/03/2020; and filed their statement of defence on the same date, by the firm of **Githiru & Co. Advocates**, wherein the 2<sup>nd</sup> defendants denies being the driver, beneficial owner and/or registered owner of motor vehicle registration number KCB 135J. He thus pleads that he is wrongly joined in this suit. Jointly, the defendants deny the particulars of negligence as itemized in (a) to (i) under paragraph 5 of the plaint thus attributing the accident to the negligence of the plaintiff and the driver of

motor vehicle registration number KCP 509T and particularized the same in their statement of defence at paragraphs 8 and 6 respectively.

4. The plaintiff testified while the defendant failed to present any witnesses or evidence in support of its case. The plaintiff submitted several documentary evidences which include: plaintiff's witness statement, a copy of demand notice, treatment card from Nakuru Provincial General Hospital, Dr Omuyoma's Medical Report and receipt thereof, P3 form, Police abstract, Certificate of Ownership of motor vehicle and receipt/ invoice thereof.
5. At the close of hearing and submissions, the accident and liability have not been challenged. The remaining issues for determination are:
  - a. Whether the plaintiff has proved the injuries he sustained
  - b. If the answer in (a) above is in the affirmative, whether he is entitled to the reliefs sought
6. On injuries, the court is confounded to note that the injuries pleaded in the plaint are at variance with the evidence adduced. The injuries in the **outpatient cad**, produced herein as **PEXH. No. 3**, and the **P3 form**, produced as **PEXH. No. 4** are obviously more immediate than those contained in the **medical examination report, PEXH. NO. 8**. They do not confirm that the

plaintiff herein sustained and was diagnosed and treated for the injuries pleaded as a result of the accident herein. Thus the medical evidence of the injuries herein are from the outset contradictory.

7. It is imperative at this time to point out that parties are bound by their pleadings. Parties must plead their case before proceeding to proof them. In ***Daniel Otieno Migori Vrs South Nyanza Sugar Co. Ltd [2018] eKLR***, Justice A C Mrima stated as doth:

***It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -***

***"....it is now (settled) 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 the***

***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."***

8. I thus find that the plaintiff has failed to prove his case on pain and suffering as the injuries pleaded as the foundation of his claim herein are not the injuries that he has proved. Thus the injuries for which he was treated and incurred the expenses herein might have been occasioned elsewhere and not necessarily in the accident as pleaded herein. On a balance of probabilities, this case or claim fails for want of proof.
9. Now onto the second issue as to whether the plaintiff is entitled to the reliefs sought, I do find that due to the fact that the plaintiff has failed to prove his case, I decline to grant any relief sought and I do find that this case or claim was unnecessary in the circumstances and is therefore a candidate for dismissal with costs.
10. However, had the plaintiff succeeded in proving the injuries, or generally his case herein, I would have agreed with his learned counsel's proposal and awarded him Kshs. 350,000/- as general damages for pain and suffering. This case is however hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED ON...13<sup>TH</sup>... DAY OF.....MAY..... 2025.

Hon P.A Ndege

**SENIOR PRINCIPAL MAGISTRATE**

*In the presence of:*

**Plaintiff counsel: N/A**

**Defendant counsel: N/A**

**Plaintiff: N/A**

**1<sup>st</sup> Defendant: N/A**

**2<sup>nd</sup> Defendant: N/A**