



REPUBLIC OF KENYA



KENYA LAW
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**Ngunzu v Maitha & another (Civil Case 973 of 2017)
[2024] KEMC 162 (KLR) (5 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 162 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE 973 OF 2017
PA NDEGE, SPM
SEPTEMBER 5, 2024**

BETWEEN

TOM MUTUKU NGUNZU PLAINTIFF

AND

BENARD MUSEMBI MAITHA 1ST DEFENDANT

AGILITY LOGISTICS LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case, Tom Mutuku Ngunzu, is praying for judgment against the Defendants, Benard Musembi Maitha and Agility Logistics Limited (hereinafter referred to as the 1st and 2nd Defendant respectively) for general and special damages of Kshs. 20,439/= emanating from a road traffic accident that occurred on or about 10.01.2015, as a consequence of which he sustained severe injuries. He brought this suit vide a Complaint dated 26.09.2017 and filed on 02.10.2017.
2. It is the plaintiff's case that he was an employee of the 2nd defendant's company at the 2nd defendant's premises. That it was an express and/or implied term of contract between him and the 2nd defendant and/or it was a duty of the 2nd defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon his work and not to expose him to a risk of damages or injury of which the said defendant, its agents and/or representatives, knows or ought to have known and to provide and maintain adequate and suitable plant appliances to enable the plaintiff to carry out his work in safety, to take all reasonable measures to ensure that the plaintiff's work was safe and to provide and maintain a safe and proper system of work. That on or about 10.01.2015, the plaintiff while in the course of his lawful duties as a turnboy on the instructions of the 2nd defendant, its agent and/or servants was provided with an unsafe system of transport while lawfully travelling as a passenger from Kisumu to Nairobi at Migaa area along Nakuru – Eldoret road in Motor Vehicle Registration Number KAY 476L/ZC 6524 Mitsubishi Trailer owned by the 2nd defendant, when the same was so negligently, recklessly and/or carelessly driven by the 1st defendant's driver, servant and/or agent



without any due care, regard and/or attention at a high speed that it lost control, veered off the road and caused a grisly road traffic accident whereby the plaintiff sustained serious injuries, loss and pain which he claims damages for as follows:¹: -

3. The plaintiff particularized his claim of negligence on the part of the defendants at Paragraph 9 of his plaint as follows: -

Particulars of Negligence/ Breach of contract or Statutory Duty on the part of the 2nd Defendant/ its Agent/ Servant

- a. Unsafe system of work
- b. Unsafe system transport
- c. Failure to provide a competent driver
- d. Failure to warn the plaintiff in time/ at all of the dangers
- e. Failure to introduce to the plaintiff to other safe means of transport designated to carrying passengers
- f. In the circumstances failure to provide and maintain safe system of transport
- g. Failing to ensure the safety of the plaintiff
- h. Exposing the plaintiff to danger it knows or ought to have known
- i. Failing to introduce to the plaintiff to other safe means of performing the said work
- j. Failure to provide safe working condition to the plaintiff
- k. In the circumstances failure to provide and maintain safe system of work
- l. Failure to properly train the plaintiff on how to carry out the said work.

Particulars of Negligence of The 1st Defendant's Driver, Employee, or its Servant or Agent

- m. Driving Motor Vehicle Registration Number KAY 476L/ZC 6524 Mitsubishi Trailer in a careless manner
- n. Driving in an excessive speed in the circumstances of the road
- o. Failure to slow down, brake, swerve or act in any other reasonable manner to avoid the said accident
- p. Failure to keep proper lookout to other road users or at all
- q. Driving in a zigzag manner in the circumstances
- r. Driving on the wrong side of the road
- s. Failure to take regard of other road users

¹ Refer to paragraph 11 of the Plaint

- a. Fractured left tibia
- b. Swollen painful tender left knee
- c. Further particulars of injuries to be furnished at the hearing hereof by way of medical report.



- t. Failure to prevent the said accident
 - u. Driving a defective Motor Vehicle Registration Number KAY 476L/ZC 66524 Mitsubishi Trailer
 - v. Driving without due care and attention
4. The 2nd Defendant has thus been sued vicariously for the acts/ and/or omissions of the 1st defendant. They entered appearance and filed their defense, vide a Memorandum of Appearance and Statement of Defense, both dated 30.10.2017 and filed on 02.11.2017; filed by the firm of Messrs. Nduati & Co advocates, wherein they mainly disavowed the alleged negligence attributed on them and/or their agent in control of the motor vehicle. Furthermore, the defendants attributed the accident to the negligence of the plaintiff; and particularized the same in their defense.
 5. The plaintiff testified and called a police officer, PW2, No.54424 SSGT David Mwangi, as his witness, while the defendant failed to present any witness or evidence in his case. The statement by the 1st defendant dated 05/01/2018, was however admitted by consent as DEXH. No. 1.
 6. Both parties were then able to file and serve their respective written submissions. At the close of the hearing and submissions, the accident and injuries have not been challenged. The remaining issues for determination are mainly as follows: -
 - a. Who is to blame for the accident?
 - b. Whether the plaintiff is entitled to the reliefs sought?

Basically, it is a determination on liability and quantum.

7. On liability, the plaintiff testified, and adopted his undated statement, that he was a lawful travelling passenger in the motor vehicle herein which belongs to the 2nd defendant where he was employed as a turn man. That on the material day, they were coming from Kisumu, heading to Nairobi. That upon reaching Migaa Area along Nakuru -Eldoret road, the said vehicle was so carelessly driven at a high speed that it ended up hitting 2 other vehicles which were ahead of them. He blames the driver of the motor vehicle herein for driving negligently, carelessly, at high speed without proper lookout of other road users thereby causing the accident herein. He also blames the 2nd defendant for providing him with a faulty motor vehicle which resulted in the accident. As a consequence of the accident he sustained the severe injuries. It is his testimony that the defendants are wholly to blame.
8. In cross-examination, he admitted that they did not file or produce the document to prove that he was employed by the 2nd defendant as claimed. He however still went ahead to insist that he was authorized to be in the vehicle herein at the time of the accident herein; but that he had no evidence to prove that he was so authorized. That he told the driver to reduce the speed but that he ignored him. That the driver remarked at the time of the accident that the vehicles had failed. They thus realized the defect or fault while on their way, but that despite that, the driver continued with the journey. He further confirmed that he has fully healed, except that he experiences occasional pain whenever it is cold.
9. The police officer, PW2, No.54424 SSGT David Mwangi, from traffic section, Salgaa, referred to the police abstract herein and confirmed the occurrence of the accident involving the vehicle herein, being driven by the 1st defendant, and that the 1st defendant was charged for driving without due care and attention. He produced the Police Abstract as PEXH. No. 5.
10. In cross-examination, he confirmed that he was not the investigating officer, and neither did he visit the scene. That he does not know the circumstances surrounding or leading to the occurrence of the



accident. That the circumstances are however as per the police abstract which blamed the 1st defendant. That the 1st defendant was accordingly charged, convicted and fined.

11. In a bid to determine and or apportion liability herein, I have gone through the submissions by the learned counsel herein. In an action for negligence, the burden of proof falls on the plaintiff alleging to establish each element of the tort, hence it is for the plaintiff herein to adduce evidence of facts on which he bases his claim. There has to be a duty of care which was breached resulting to loss and damage to the plaintiff. The plaintiff herein therefore has a duty to prove his case on a balance of probabilities that the defendant was so negligent so as to occasion the accident that led to the plaintiff's injuries. However, once the legal burden of proof is discharged by the plaintiff, the evidential burden might shift to the defendant to prove his claim of plaintiff's sole or contributory negligence as pleaded.

12. The provisions of sections 107 and 108 of the Evidence Act are relevant and provide as follows:

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.

13. In the case of *Muruingu Kanoru Jeremiah Vrs Stephen Ungu M'mwarabua*[2015] eKLR the superior court held as follows with regard to the burden of proof:

....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.

14. I also refer to *The Halsbury's Laws Of England*, 4th Edition, Volume 17, at paras 13 and 14: which describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

15. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the plaintiff, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side



during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

16. In this case, I find that the plaintiff has proved that the defendants herein were liable for the accident by reason of negligence. That the 1st defendant was driving at a high speed when the vehicle's brakes failed. That fact was well corroborated by DEXH. No. 1.
17. The police officer produced a police abstract which clarifies what appears to be a final conclusion as to blameworthiness herein. The defendants are to be blamed. The evidence of the plaintiff has thus been further corroborated by the evidence of the police officer and the police abstract that the defendant's driver is to be blamed 100% for the accident herein. He drove a defective vehicle carelessly at a high speed. The defendants ought to have discharged their evidential burden as to their averments concerning plaintiff's negligence.
15. On quantum, I also do find that the medical evidence adduced herein to be uncontroverted that the plaintiff sustained the injuries pleaded. There was however no relevant authority submitted to aid me reach a guided opinion as to quantum. The authorities submitted by both counsel herein have underwhelmed given that the injuries contained therein are not almost similar to the ones sustained by the plaintiff herein. That notwithstanding, I find an amount of Kshs. 500,000/- as sufficient compensation for pain and suffering mainly because of the fracture sustained by the plaintiff herein.
16. Turning to special damages, I do find that the plaintiff failed to produce the receipt for the medical report herein. The same is therefore not awardable herein. It is not one of the documents that the plaintiff adapted and/or produced as exhibit during his testimony. As held by Odunga, J (as he then was) in Robert Ngande Kathathi Vrs Francis Kivuva Kitonde[2020] eKLR, documents filed with pleadings do not ipso facto amount to evidence since such documents are not introduced by consent or on oath. For that reason I do dismiss the claim for Kshs. 3000, special damages for being unproved. The claim for Kshs. 550/- being cost of the motor vehicle search is also hereby dismissed for similar reason. As for medical expenses, PEXH. No. 7 proves Kshs. 15,832.00, which I do hereby grant. Thus, the total damages awardable herein is hereby assessed at 515, 832/-.
17. In conclusion, judgment is hereby entered in favor of the plaintiff, against the defendant at Kshs 515, 832/=, costs and interests at court's rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 05TH, DAY OF SEPTMEBER 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: n/a

Defense Counsel: n/a

Plaintiff: n/a

1st Defendant: n/a

