Fondo & another (Suing as administrators of the Estate of the Estate Alfred Ndegwa Fondo) v Hakima Transporters Limited & 2 others (Civil Appeal E039 of 2021) [2023] KECA 1087 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1087 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E039 OF 2021

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

SEPTEMBER 22, 2023

BETWEEN

NORMAN MGAZA FONDO ..... 1ST APPELLANT

NAOMI KUVUNA JOSEPH ..... 2ND APPELLANT

SUING AS ADMINISTRATORS OF THE ESTATE OF THE ESTATE ALFRED NDEGWA FONDO

AND

HAKIMA TRANSPORTERS LIMITED ..... 1ST RESPONDENT

JUMA KARISA ..... 2ND RESPONDENT

KOMEN MARK ..... 3RD RESPONDENT

(Being an appeal from the judgement of the Hon Lady Justice M. Thande delivered by Hon Justice Nyakundi on 25th May 2021 in Malindi Civil Appeal No. 21 of 2020)

Application of res ipsa loquitur and variance in pleadings when determining liability in fatal road accidents

The appeal arose from a road accident where the deceased, a passenger in a tuktuk, suffered fatal injuries in a collision with a motor vehicle owned by the 1st respondent. The appellants sued for damages, pleading res ipsa loquitur. The trial court dismissed the case due to a variance between pleadings and evidence, a decision upheld by the High Court. The Court of Appeal allowed the appeal, ruling that the variance was not fatal, res ipsa loquitur applied, and the respondents' failure to call evidence left the appellants' case uncontroverted. The court awarded damages and costs to the appellants.

Reported by John Ribia

Personal Injury Law *– fatal road accident – variance as to the cause of the accident – variance between the pleadings and the evidence - whether the variance between pleadings and the evidence, where the pleadings stated*

that the accident was caused by a head on collision while the evidence was to the effect that one of the vehicles was hit from behind, was fatal to an otherwise merited case – whether a court may base its decision on an un-pleaded issue if it appears from the course of the trial that the issue was left for the court's determination by the parties (odd jobs case principle) - whether a court could infer negligence from the mere occurrence of an accident, especially where the circumstances indicated that the defendant was in control of the situation - Civil Procedure Rules (cap 21 sub leg) Order 4 Rule 6; Evidence Act (Cap. 80) section 107(i).

Brief facts

The appeal arose from Mariakani Senior Resident Magistrate's Court Civil Suit No. 8 of 2017, where the appellants sued as administrators of the estate of Alfred Ndegwa Fondo. The suit sought damages under the Law Reform Act and the Fatal Accidents Act for the deceased, who suffered fatal injuries in a road accident on February 24, 2010.

The accident involved motor vehicle KTB 903/ZA 7448, owned by the 1st respondent and driven by the 3rd respondent. The 2nd respondent was driving a tuktuk, KTWA 654E, in which the deceased was a passenger. The appellants alleged that the respondents were vicariously liable and pleaded *res ipsa loquitor* (the thing speaks for itself), arguing that such an accident would not have occurred without negligence on the part of the respondents.

The trial court dismissed the case, citing a variance between the pleadings and the evidence regarding how the accident occurred. The High Court upheld the decision, finding that the contradiction negated liability. The appellants then filed this second appeal at the Court of Appeal, challenging the lower courts' interpretation of *res ipsa loquitor*, variance in evidence, and the effect of the respondents' failure to call witnesses.

In their second appeal, the appellants argued that: the variance was not fatal and did not prejudice the respondents; the trial court erred in failing to apply *res ipsa loquitur* since the deceased had no control over the accident; the respondents failed to call evidence, leaving the appellants' case uncontroverted; and the dismissal of the suit on technical grounds denied them substantive justice.

The appeal challenged the lower courts' findings on liability, the application of *res ipsa loquitur*, and the evidentiary burden.

Issues

i. Whether the variance between pleadings and the evidence, where the pleadings stated that an accident was caused by a head-on collision while the evidence was to the effect that one of the vehicles was hit from behind, was fatal to an otherwise merited case.

ii. Whether a court could infer negligence from the mere occurrence of an accident, especially where the circumstances indicated that the defendant was in control of the situation.

iii. Whether a court could base its decision on an un-pleaded issue if it appears from the course of the trial that the issue was left for the court's determination by the parties (odd jobs case principle).

Held

1. The appellants had the duty of proving the facts constituting negligence on the part of the respondent even if the respondent chose to remain silent.
2. Neither the trial court nor the first appellate court made any factual finding as to how the accident occurred. The case was simply determined based on the variance between the pleadings and the evidence. The two courts seemed to have been of the view that had there been no such variance they would not have had any difficulty in finding for the appellants.
3. The plaint pleaded that the accident was caused by a collision between the motor vehicle and the tuktuk. The variance was only as regards whether the collision was a head-on collision or that the collision was behind the tuktuk.

4. The manner in which the collision occurred was not made an issue at the trial. The parties left the issue for determination by the court. While the second appeal court's jurisdiction was limited to matters of law; determination of what was a matter of law included:
    1. the technical element: involving the interpretation of a constitutional or statutory provision;
    2. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record; and
    3. the evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record.
5. Upon application of the law to the facts of the instant case, the two courts below erred.

Appeal allowed.

Orders

i. *The Judgement of the High Court in Malindi High Court Civil Appeal No. 21 of 2020 dismissing the said appeal was set aside and substituted with an order allowing the appeal.*
ii. *The judgement in Mariakani SRM's Court Civil Suit No. 8 of 2017 was set aside.*
iii. *Judgement entered for the appellants jointly and severally against the respondents and award the appellants Kshs 40,000/- as damages for pain and suffering; Kshs 100,000/- for loss of expectation of life; and Kshs 2,663,904/- for loss of dependency as assessed by the trial court.*
iv. *Costs before the trial court, the High Court and in the instant appeal awarded to the appellants.*

Citations

Cases

1. Abdul Shakoor Sheikh v Abdul Najeid Sheikh (Civil Appeal No. 161 of 1991 (ur)) — Applied
2. Crown Petroleum Kenya Limited,Anderson Sumata Saoli,Ephraim Karianjahi & Peter Kamau Nderi v Anderson Sumata Saoli,Ephraim Karianjahi,Peter Kamau Nderi,Crown Petroleum Kenya Limited,Ephraim Karianjahi,Peter Kamau Nderi,Anderson Sumata Saoli & Crown Petroleum Kenya Limited (Civil Appeal 18, 20 & 21 of 2018; [2019] KEHC 5409 (KLR))
3. David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo (Civil Appeal 91 of 2018; [2019] KECA 434 (KLR))
4. Evans Otieno Nyakwana v Cleophas Bwana Ongaro (Civil Appeal 7 of 2014; [2015] KEHC 8440 (KLR)) — Applied
5. Farrah v Kenya Ports Authority (Civil Appeal 138 of 1991; [1992] KECA 33 (KLR)) — Applied
6. Farrah v Kenya Ports Authority (Civil Appeal 138 of 1991; [1992] KECA 33 (KLR)) — Applied
7. Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others
8. IEBC & another v Stephen Mutinda Mule & 3 others ((2014) eKLR) — Explained
9. Kenya Meat Commission v Richard Ambogo Raden (Civil Appeal 40 of 1989; [1990] KECA 57 (KLR)) — Applied
10. Kenya Meat Commission v Richard Ambogo Raden (Civil Appeal 40 of 1989; [1990] KECA 57 (KLR)) — Applied
11. Mary Ayo Wanyama & 2 Others v Nairobi City Council, (Civil Appeal 252 of 1998 (unreported)) — Applied
12. Mary Kitsao Ngowa & 36 Others v Krystalline Limited (Civil Appeal 21 of 2015; [2015] KECA 286 (KLR)) — Applied
13. NORTH KISII CENTRAL FARMERS CO. V JEREMIAH MAYAKA & 4 OTHERS (Civil Case 176 of 2000; [2006] KEHC 2813 (KLR)) — Applied
14. North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui, Patrick Ondieki Onchoke,Leonard Nyabando, Priscillah Sigara Omariba & Askah Tunangi (Civil Appeal 84 of 2006; [2014] KECA 586 (KLR)) — Applied

15. Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions (Civil Appeal 127 of 2005; [2015] KECA 616 (KLR)) — Applied
16. Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions (Civil Appeal 127 of 2005; [2015] KECA 616 (KLR)) — Applied
17. Raphael Ochieng Otieno (Adika) & 2 others (Sued as the Registered Trustees of Legion Maria of Africa Church Mission v Romanus Joseph Ongombe & 2 others (Civil Suit 1 of 2018; [2019] KEHC 251 (KLR)) — Applied
18. Republic v Evans Onsongo Nyakweba (Criminal Case 80 of 2013; [2015] KEHC 1779 (KLR)) — Applied
19. Stephen Muriungi and another v Republic ((1982-88) 1 KAR 360, Chesoni, Acting JA (as he then was) said at page 366)
20. Galaxy Paints Co. Limited v Falcon Guards Limited ([2000] 2EA 385) — Applied
21. Gandy v Caspair ([1956] EACA 139) — Applied
22. Lake Motors Limited v Overseas Motor Transport (T) Limited ([1959] EA 603) — Applied
23. Odd Jobs Mubia ([1970] EA 476) — Applied
24. Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) (1983 ICR 511) — Mentioned
25. Miller Vs Minister of Pensions ((1947) 2 ALL ER 372) — Applied

Statutes

1. Civil Procedure Rules (cap 21 sub leg) — order 4 Rule 6 — Cited
2. Evidence Act (CAP. 80) — section 107(i) — Cited
3. Fatal Accidents Act (cap 32) — Cited
4. Law Reform Act (cap 26) — Cited

Advocates

Mr Bwire for Appellants
Mr Isaac Onyango for 1st Respondent

JUDGMENT

1. This is a second appeal from the decision the High Court sitting in its appellate jurisdiction in Malindi High Court Civil Appeal No 21 of 2020. The said appeal arose from the decision of Mariakani Senior Resident Magistrate's Court Civil in Suit No 8 of 2017 the primary suit). The said suit was brought by the appellants herein, in their capacity as the administrators of the estate the deceased, Alfred Ndegwa Fondo, against the respondents. The said suit was seeking damages under the *Law Reform Act* and the *Fatal Accidents Act* in respect of a road traffic accident which occurred on February 24, 2010 and in which the deceased, sustained fatal injuries.

2. It was pleaded that the accident was as a result of a collision between motor vehicle registration No KTB 903/ZA 7448 (owned by the 1st respondent and being driven by the 3rd respondent) and a Trike, also known as tuktuk, Reg No KTWA 654E being driven by the 2nd respondent and in which the deceased was being carried. The respondents were stated to be vicariously liable and the appellants pleaded *res ipsa loquitor*.

3. The 1st respondent, which was sued in a vicarious capacity, denied the accident and pleaded that the accident was as a result of the negligence of the deceased and of the 2nd respondent. The 2nd and 3rd respondents, however, filed no defence and the appellants sought interlocutory judgement against them.

4. After hearing the case, the trial magistrate vide judgement delivered on April 30, 2020 noted that there was variance in the pleadings and the evidence at trial as to the cause of the accident; that whereas it was pleaded that there was a head on collision between the suit vehicles, PW3 testified that the 1st respondent hit the 3rd respondent's tri-cycle from behind while they were headed towards the same direction. It was concluded that the appellants failed to prove their case to the required standard and the suit was dismissed. The court declined to confirm interlocutory judgement against the 2nd and 3rd respondents. On the quantum, it was found that the appellants would have been awarded Kshs 40,000/- as damages for pain and suffering; Kshs 100,000/- for loss of expectation of life; and Kshs 2,663, 904/- for loss of dependency based on the multiplier of 26 years, a dependency ratio of 2/3 and the salary as per the payslip of Kshs 12,663/-.

5. Dissatisfied with this finding the appellants lodged an appeal where they challenged the failure to apply the doctrine of res ipsa loquitor and the dismissal of the suit on the grounds of variance between the evidence and pleadings.

6. The learned Judge of the High Court guided by the case of *IEBC & another v Stephen Mutinda Mule & 3 others* (2014) eKLR, agreed with the trial magistrate that the evidence of causation was in conflict with the pleadings, and therefore the change of direction limited the issues that the court could pronounce itself on. On the issue of *res ipsa loquitor*, the court found that given the dispute as to the cause of the accident, the trial magistrate correctly disregarded the doctrine of *res ipsa loquitor*. The appeal was dismissed for want of merit. It was that decision that provoked the current appeal in which we are being invited to determine the following questions: whether the learned judge misinterpreted and misapplied the doctrine of *res ipsa loquitor*; the legal effect of the respondents' failure to call witnesses or adduce evidence; and how to handle evidence that is at variance with the pleadings. We were urged, upon determining the said questions, to set aside the two judgements below and allow the appeal.

7. We heard this appeal on this court's virtual platform on March 29, 2023 on which day learned counsel Mr Bwire appeared for the appellants while Mr Isaac Onyango appeared for the 1st respondent. There was no appearance by the 2nd and 3rd respondents who have never participated in the proceedings. At the hearing, learned counsel relied on their written submissions which they briefly highlighted.

8. On behalf of the appellants it was submitted that the evidence of the police officer as to the cause of the accident was an expression of opinion since he was an eye witness and therefore the discrepancy between his evidence and the pleadings ought not to have been taken against the appellants. This submission was based on the case of *Crown Petroleum Limited & 3 others v Anderson Sumata Saoli & 7 others* [2019] eKLR. It was urged that since it was undisputed that the deceased died as a result of the accident, the respondents cannot go scot free just because of conflicting versions of the cause of the accident. The two courts below were assailed for failing to determine who was at fault and this submission was based on the case of *Farrah v KPA* [1992] eKLR for the proposition that the variance between pleadings and evidence is immaterial and it would be unjust to "deprive an injured plaintiff of his remedy due to niceties of pleading."

9. Based on *David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoingo* [2019] eKLR, it was submitted that the doctrine of *res ipsa loquitor*, ought to have been applied since the deceased was a fare paying passenger who had no role to play in the operation of the suit vehicles. In addition, it was contended that the failure of the respondents to call evidence meant that the appellants' evidence remained uncontroverted and therefore there was proof that the respondents are jointly liable for the death of the deceased.

10. On quantum of damages, it was urged that the proposed Kshs 40,000/- as damages for pain and suffering be adjusted to Kshs 100,000/-; the proposed Kshs 100,000/- for loss of expectation of life be adjusted to Kshs 150,000/-; and the proposed Kshs 2,663. 904/- for loss of dependency after using the multiplier of 26 years, a dependency ratio of 2/3 and the multiplicand as per the payslip of Kshs 12,663/- be adjusted to Kshs 3,307.200/- after applying a multiplicand of Kshs 15,900/-. On special damages, it was urged that the claimed amount of Kshs 235,000/- be awarded.

11. In opposition to the appeal it was submitted on behalf of the Respondent that this being a second appeal this court ought not to interfere with the concurrent findings of facts by the two courts below. This contention was based on the case of *Lake Motors Limited v Overseas Motor Transport (T) Limited* [1959] EA 603. It was urged that failure to plead material facts led to dismissal of the appellants' suit and appeal; that the judgement ought to be confined to the pleaded issues based on the case of *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR; that the doctrine of *res ipsa loquitor* was not available and in any case that issue being one of fact is beyond the ambit of a second appeal. Cited was the case of *Mary Ayo Wanyama & 2 others v Nairobi City Council,* Civil Appeal 252 of 1998 (unreported).

Analysis and Determination

12. We have considered the written and oral submissions by counsel and the authorities cited.

13. The law on second appeals was restated in *Kenya Breweries Ltd v Geofrey Odoyo* (2010) eKLR where it was held that:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Stephen Muriungi and another v Republic* (1982-88) 1 KAR 360, Chesoni, Acting JA (as he then was) said at page 366:-
>
> "We would agree with the view expressed in the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law..."

14. In this appeal, it is clear that its determination revolves around the question whether the appellants proved their case on the balance of probabilities, a burden which squarely lay on them. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was therefore held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the *Evidence Act*, chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as

section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

15. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & another [2015] eKLR, this Court held that:

> " Denning J in *Miller v Minister of Pensions* (1947) 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

16. Therefore, as a general rule, the appellants had the duty of proving the facts constituting negligence on the part of the respondent even if the respondent chose to remain silent. in this case, the appellants" case, as pleaded, was that on the material date, the respondents' authorised driver, as a result of the negligence, caused the same to collide head on with the *tuktuk*. The particulars of negligence were then set out. At the hearing, three witnesses were called by the appellants. PW1 was the pathologist whose evidence was limited to the cause of death and how long the deceased took before he died. PW2 was the deceased's brother who was not at the scene and his evidence was based on the information supplied to him. PW3 was the police constable who, though not the investigating officer, visited the site of the accident. According to his evidence, the motor vehicle rammed into the rear of the *tutktuk* after which the driver of the vehicle fled. According to the investigations, the accident was caused by the negligence of the driver of the motor vehicle.

17. Although the appellants submitted that the evidence of PW3 as to how the accident occurred ought not to have determined the outcome of the case in light of the fact that it was in tandem with the pleadings, if that evidence is ignored, then no other evidence is available as to how the accident occurred. In the trial court's judgement, the fact that what was pleaded was a head-on collision while the evidence of PW3 was to the effect that the *tuktuk* was hit by the motor vehicle from behind, the two vehicles travelling in the same direction revealed a conflict between the pleadings and the evidence hence a different case on causation and a trial by ambush.

18. However, instead of dismissing the case against the 1st respondent, the trial court also declined to "confirm the interlocutory judgement against the 2nd and 3rd respondents".

19. The High Court, sitting as the first appellate court, found that the appellants had not proved their case as pleaded. The learned judge distinguished this case from that of *Kenya Meat Commission v Richard Ambogo Raden* [1990] eKLR, and found that while in the latter case no objection was taken to the evidence that was at variance with the particulars of negligence, in the former case, the 1st respondent challenged the variance at the hearing, having traversed, in its defence, the manner in which the accident occurred. The learned judge further found that had there been no variance between the pleadings and the evidence as to causation, the doctrine of *res ipsa loquitor* would have applied and a finding made for the appellants.

20. In the appeal before us, neither the trial court nor the first appellate court made any factual finding as to how the accident occurred. The case was simply determined based on the variance between the pleadings and the evidence. The two courts seem to have been of the view that had there been no such

variance they would not have had any difficulty in finding for the appellants. The question that this court has to determine is whether a pleading to the effect that an accident was caused by a head on collision while the evidence is to the effect that one of the vehicles was hit from behind is fatal to an otherwise merited case. This court in case of *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 Others* [2014] eKLR held as follows:

> " Order 4 rule 6 *Civil Procedure Rules* states that every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court deems just. One of the issues for determination on appeal in the case o*f Abdul Shakoor Sheikh v Abdul Najeid Sheikh* Civil Appeal No 161 of 1991 (ur) was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief that had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric *Nature of Pleadings*:-
>
> > "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before 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."
>
> It was held in the case of *Galaxy Paints Co Limited v Falcon Guards Limited* [2000] 2EA 385 that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of *Gandy v Caspair* [1956] EACA 139 where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.
>
> In a judgement delivered recently by this court on 1February 4, 2014 in *Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others* (Kisumu) Civil Appeal No 20 of 2011 (ur) it was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This court proceeded in that case to remit the matter to the High Court for retrial.
>
> The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that

event be entitled to make a necessary finding - See *Odd Jobs Mubia* [1970] EA 476 where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision." (Underlining added)

21. There is no doubt that the plaint pleaded that the accident was caused by a collision between the motor vehicle and the *tuktuk*. The variance was only as regards whether the collision was a head-on collision or that the collision was behind the *tuktuk*. The question that arises is whether the *Odd Jobs* Case principle may be invoked in those circumstances. At the trial, the cross-examination of PW3 was restricted to three questions which PW3 answered as follows:

> "I wasn't the Investigating Officer but was among the officers who visited the scene. We visited the scene shortly after the incident immediately after the accident. The *tuk tuk* wasn't following the road or overlapping according to the investigations."

22. From the questions put to PW3 it is clear that the issue of how the collision took place was not made an issue at the trial. This court in *Mohamed Farrah v Kenya Ports Authority* [1988-92] 2 KAR 283; [1990-1994] EA 83 cited the case of Kenya Meat Commission v Richard Ambogo Raden [1990] eKLR, and held that:

> "The variance between the pleading and the evidence in this case is circumstantial and immaterial. The real test in such matters is whether there was any unfairness as regards the defendants in knowing what case they had to meet...Thus tested the plaint in this case did not in any way seem to mislead or cause injustice or unfairness to the respondent. It would be unfortunate if the plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading. The function of pleadings is to give fair notice of the case, which has to be met so that the opposing party may direct his evidence to the issue disclosed by them."

23. In *Kenya Meat Commission v Richard Ambogo Raden* (*supra*) the court expressed itself as hereunder:

> "The object of pleading is to give to the opponent fair notice of the case he has to meet so that he may direct his evidence to that issue...In this case I do not think there was any unfairness as regards the defendants knowing what case they had to meet. The plaintiff said straightaway in his evidence that he was injured due to writhing and jerking of the animal. I think the defendants should thereupon have objected, if they wished to take the point, that the evidence was at variance with the pleaded particulars of negligence. They should not wait until the end of the case, or on appeal, and then, as it were, huff the other side for not having led evidence in accordance with the plaint. I consider it would be most unfortunate, in a case of personal injury, if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading...It would be unjust to hold the plaintiff to be non-suited because, while the general allegation is correct, the particular way in which the accident happened is at variance with the paragraph, when there are indeed other allegations in the other paragraphs which make it perfectly clear that the accident happened at work in circumstances which established on the balance of probabilities that the defendants failed in the duty of care they owed to the plaintiff."

24. Having regard to the questions put to PW3 in cross- examination, we find that the manner in which the collision occurred was not made an issue at the trial and that the parties left the issue for determination by the court. While we appreciate that this being a second appeal, this court's jurisdiction is restricted

to matters of law, the Supreme Court therefore clarified what constitutes "matters of law" in relation to this court's jurisdiction as the second appellate court, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR where the three elements of the phrase "matters of law" were identified thus:

> "(a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record; and
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record."

25. In case we find that upon application of the law to the facts of this case, the two courts below erred. Accordingly, we allow the appeal, set aside the Judgement of the High Court in Malindi High Court Civil Appeal No 21 of 2020 dismissing the said appeal, substitute therefor an order allowing the appeal, set aside the judgement in Mariakani SRM's Court Civil Suit No 8 of 2017 and enter judgement therein for the appellants jointly and severally against the respondents and award the appellants Kshs 40,000/- as damages for pain and suffering; Kshs 100,000/- for loss of expectation of life; and Kshs 2,663,904/- for loss of dependency as assessed by the trial court . We award the costs before the trial court, the High Court and in this appeal to the appellants.

26. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR