



**Mbugua & 4 others v M.O.M Al Amin Transporters Ltd & another (Civil Appeal 9 & 10 of 2020 (Consolidated)) [2022] KECA 636 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 636 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 9 & 10 OF 2020 (CONSOLIDATED)  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JULY 8, 2022**

**BETWEEN**

**ALEXANDER NDUNG’U MBUGUA ..... 1<sup>ST</sup> APPELLANT  
EUNICE WAMBUI WANJIKU ..... 2<sup>ND</sup> APPELLANT  
MBUGUA BORO KIHUYU (SUNG AS THE ADMINISTRATOR OF THE  
ESTATE OF OBADIAH KARIUKI MBUGUA) ..... 3<sup>RD</sup> APPELLANT**

**AND**

**M.O.M AL AMIN TRANSPORTERS LTD ..... 1<sup>ST</sup> RESPONDENT  
MARIAM AMIN BAHU ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL 10 OF 2020**

**BETWEEN**

**NJENGA GACHANJA ..... 1<sup>ST</sup> APPELLANT  
HANNAH RINDI THUMBI ..... 2<sup>ND</sup> APPELLANT  
SUNG AS THE ADMINISTRATORS OF THE ESTATE OF WILSON  
GACHANJA NJENGA**

**AND**

**M.O.M AL AMIN TRANSPORTERS LTD ..... 1<sup>ST</sup> RESPONDENT  
MARIAM AMIN BAHU ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Voi (Farah S. M. Amin J.) dated 27th June 2019 in High Court Civil Appeal No 1 of 2017)*



## JUDGMENT

1. The consolidated appeals herein arise from a judgment delivered on 27<sup>th</sup> June 2019 by the High Court at Voi (Farah S. M. Amin J.) in High Court Civil Appeals No. 1 and 2 of 2017, dismissing the Appellants appeals against a judgment delivered by the Senior Principal Magistrate Court at Voi (hereinafter the trial Court) in Civil Cases 182 and 183 of 2014. The first set of Appellants herein, Alexander Ndungu Mbugua, Eunice Wanjiku and Mbugua Boro Kihuyu, (the Appellants in Civil Appeal 9 of 2020 and who were also the appellants in High Court Civil Appeal No. 1 of 2017 administrators of the estate of Obadiah Kariuki Mbugua), and the second set of Appellants, Njenga Gachanja and Hannah Rindi Thumbi (the Appellants in Civil Appeal 10 of 2020 and who were also the appellants in High Court Civil Appeal No. 2 of 2017 and administrators of the estate of Wilson Gachanja Njenga), had all sued the Respondents, M. O. M Al Amin Transporters Ltd and Mariam Amin Bahi in the trial Court.
2. The Appellants brought the suits in the trial Court as a result of road traffic accident that took place on 10<sup>th</sup> December 2011, where they faulted the Respondents, being the registered owners of motor vehicle registration number KAU 502 V, for causing an accident with motor vehicle registration number KBP 261V in which the two deceased persons, namely Obadiah Kariuki Mbugua and Wilson Gachanja Njenga sustained fatal injuries. Obadiah Kariuki Mbugua was the driver, and Wilson Gachanja Njenga was a passenger in motor vehicle registration number KBP 261V. The Appellants stated that as a result of the Respondents' negligence, which particulars they detailed, the estate of the deceased persons suffered loss and damages, and sought special damages totalling to Kshs 121,220/- for the estate of the Late Obadiah Kariuki Mbugua and Kshs 107,500/- for the estate of Wilson Gachanja Njenga. They also prayed for general damages, costs of the suit and interest at Court's Rates.
3. The trial Magistrate found that the Respondents were 100% liable for the said accident and awarded damages under various heads totalling to Kshs 1,773,159/= to the Appellants in Civil Appeal No 9 of 2020, and Kshs 1,834,688/= to the Appellants in Civil Appeal No 10 of 2020. The Respondents were dissatisfied with the judgment in the trial court and appealed to the High Court. They raised five grounds of appeal in their memorandum of appeal in the High Court in both appeals dated 30<sup>th</sup> January 2017, where they faulted the trial Magistrate for; holding the Respondents 100% liable in negligence despite the evidence adduced before Court; wholly disregarding the Respondents' submissions and the authorities submitted and proceeded to rely on her views not backed by law; adopting the wrong principles in awarding loss of dependency under the *Fatal Accidents Act* and loss of expectancy and pain and suffering under the *Law Reform Act*; making awards of Kshs 1,773,159/- and Kshs 1,834,688/- which were manifestly excessive in the circumstances and finally, for failing to analyse and synthesize the evidence before her and arrived at a completely erroneous and excessive finding.
4. The High Court in its judgments on the appeals delivered on 27<sup>th</sup> June 2016 held that the trial Magistrate found and held that the Deceased were employed; assessed the level of income they were earning; the proportion of income they would have used on their respective families, and made a finding on vicarious liability without any evidence or based on hearsay evidence, and misunderstood the law and/or the facts. The High Court also took judicial notice of the fact that the trial Magistrate was also the Head of Station in Voi and therefore it was within her power to call for the inquest file and the police file in order to ensure that each side had a fair trial and did not, and that in the circumstances, the trial did not comply with Article 50 and 159 of *the Constitution*, and the judgments in the two cases amounted to an injustice.



5. The High Court therefore allowed the Respondents' appeals and returned suit to the Magistrate's Court to be re-heard by a different Magistrate, consolidated the suits to be heard as one suit and granted the Appellants leave to amend their complaints. In light of its findings and directions the High Court also noted that "it is inappropriate for this Court to comment on the evidence that could or may be adduced in the lower Court."
6. The Appellants, being dissatisfied with the decision of the High Court filed their respective appeals in this Court through Memoranda of Appeal dated 20<sup>th</sup> January 2020, in which they each raised 22 grounds of appeal which challenged the findings of the High Court on the ground that the said Court introduced, framed and determined issues that were neither raised in the grounds of appeal nor canvassed in the submissions by the parties; that its findings were not supported by the evidence or applicable law on standard of proof, assessment of liability and damages, and that the ordering of a retrial was erroneous in the circumstances. These are also the main issues of law arising for determination in this appeal.
7. This being a second appeal, we are restricted to determining points of law, as was explained by this Court (Waki, Karanja & Kiage JJ.A) in the case of *Stanley N Muriithi & another vs Bernard Munene Ithiga* [2016] eKLR:

"We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the Civil Procedure Act, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.

In *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR (Civil Appeal No. 127 of 2007) Onyango Otieno, J.A. put it succinctly in the following words:

"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, on 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."

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."

8. We heard the parties virtually on 21<sup>st</sup> March 2022, and learned counsel Mr. Macharia Burugu, appeared for all the Appellants, and Mr Wafula, learned counsel for the Respondents was also present. On the first issue as to whether the High Court introduced, framed and determined issues that were not pleaded or canvassed, the counsel for the Appellants, relied on the provisions of Order 42 Rule 4 of the *Civil Procedure Rules* and the proviso to the said Order that a Judge should not base a decision on a matter in which a party had not had a chance of contesting in the case, and identified the first issue that was not pleaded and introduced by the High Court as that of vicarious liability. The counsel in this respect submitted that the Respondent filed a joint statement of Defence in the trial Court and did not raise an objection as to their inclusion in the suit; neither did they adduce evidence during trial denying vicarious liability.
9. On the contrary, that the 2<sup>nd</sup> Respondent filed a witness statement and unequivocally acknowledged that she was the registered owner of motor vehicle registration No. KAU 502V and that the driver was her employee. Further, that after the Respondents were found liable in the trial Court, they did



- not raise the issue of misjoinder in the appeal before the High Court, neither did they challenge the trial Court's finding on vicarious liability, and their contention was the finding of their 100% liability, which they disputed on account of the Trial Court not apportioning the liability.
10. This submission appears to be fortified by the Respondents' counsel, who submitted that the holding by the trial court went against the principle found by this Court in *Kiama Mutuku vs Kenya Cargo Hauling Services Limited* (1991) 2 KAR 258 that there is no liability without fault, and in total disregard of the evidence on record purported to hold the Respondents 100% liable for the accident.
  11. The second issue identified by the Appellant's counsel that was introduced by the High Court was in relation to its verifying affidavit, which the High Court faulted on the ground that it was not filed by an eye witness. While submitting that this is not the requirement under Order 4 Rule 2 of the [Civil Procedure Rules](#), the counsel submitted that the Appellants were legal representatives of the deceased victims and need not be eyewitnesses to file a verifying affidavit. Counsel placed reliance on the decision in the case of [Independent Electoral and Boundaries Commission & another v Stephen Mutinda & 3 Others](#) [2014] eKLR that parties are bound by their pleadings which in turn limits the issues upon which a trial Court may pronounce.
  12. Therefore, that while the High Court was allowed to re-evaluate the evidence and reach its own independent conclusions of issues of facts as per the principles enunciated in the case of [Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates](#) [2013] eKLR, the Court did not have the latitude to depart and derogate from the issues presented by the parties in their pleadings, evidence and submissions and more particularly in the Memorandum of Appeal filed by the Respondents.
  13. The Respondents' counsel's submission, while citing the decision in *Selle and Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123, was that the appeal in the High Court was a first appeal, and the High Court could reassess the entire evidence and make its own independent findings.
  14. The submissions by the Appellant's counsel on the second and third issues on the findings of the High Court not being based on the evidence and applicable law and the orders being unlawful were in the same vein. The counsel in this regard submitted that it was erroneous for the High Court to conclude that the trial Magistrate assessed damages as a global figure without stating which amount related to special damages, whereas the Magistrate awarded each head of claim separately and justified the same including the special damages that had been proved by documentary evidence. Further, that impugning the judgment of the trial Court on the basis that it awarded general damages based on 'pure conjecture' was not correct and since the trial Court followed ordinary principles used by the Court to deal with claims under the [Fatal Accidents Act](#) and the [Law Reform Act](#). In addition, that contrary to the conclusion by the High Court that the trial Magistrate treated the demise of both deceased persons as instantaneous, the trial Magistrate did note that Obadiah Kariuki Mbugua died 4 days after the accident and awarded Kshs 50,000/=, for pain and suffering whereas Wilson Gachanja Njenga who died on the same day was awarded Kshs 10,000/= under the same head. In any event, that the issue of death was not contested in the trial Court and was not made a ground of Appeal.
  15. The Appellant's counsel further submitted that the holding that the trial Court ought to have called for the police files and inquest files on its own motion is contrary to the provisions of section 107(1) of the [Evidence Act](#), as it is the parties who ought to cause witnesses to attend Court or cause documents to be availed, and reference was made to the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 in this regard. Lastly, counsel, while citing the decision in the case of [Otieno Ragot & Company Advocates vs National Bank of Kenya](#) [2020] eKLR, submitted that the orders for rehearing the suit afresh was not one of the reliefs sought by the Respondents in their appeals, and that



a fresh trial will subject the parties to the injustice of incurring more costs and prolong the conclusion of this matter in violation of Article 159 (2)(b) of the *Constitution*.

16. The Respondents' counsel's submissions in this respect were that the inquest proceedings and findings are a judgment as envisaged under section 47 of the *Evidence Act* and the High Court was aware of this fact, and cannot be faulted for ordering a retrial after assessing the evidence afresh.
17. We need to state at the outset that after a perusal of the impugned judgment by the High Court, we note that other than setting out the grounds of appeal stated in the Respondents' memorandum of appeal and issues arising therefrom, no attempt was made by the High Court to set out the evidence called by the parties on the said issues nor the arguments made by the respective parties thereon, save for the evidence called on the ownership of motor vehicle registration number KAL 907G, when the said Court was discussing the issue of vicarious liability. We also note in his regard that the issue of vicarious liability was not one of the issues raised by the parties in the High Court.
18. The High Court appeared to have instead only addressed the findings made by the trial Court, and then reached a conclusion that those finding were either not based on evidence or erroneous in law, without setting out and evaluating the evidence that was adduced in the trial Court leading to the findings, and whether the correct legal principles were applied by the trial magistrate to the evidence. We again reiterate that the legal arguments made by the Appellants and Respondents in this regard were also not set out nor analysed.
19. It is therefore apparent that the High Court did not discharge its duty as a first appellate Court as set out in *Selle and Another vs Associated Motor Boat Co. Ltd & Others* (supra) where it was stated that a first appeal is by way of retrial, and the applicable principles are that the first appellate Court must reconsider the evidence, evaluate it and draw its own conclusions of facts and law, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In this regard the appellate Court will only depart from the findings by the trial Court if they are not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) E.A.
20. In addition, it is also the position in law, as set out in the *Civil Procedure Rules* Order 21 Rule 4, that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision and a Court is thereby bound by the parties pleadings, and its judgment should set out the issues raised by the said pleadings, and its decision thereon. This Court in *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda & 3 Others* (supra) explained as follows in this regard:

“It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered



to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

21. It is not disputed by the Respondents that the issues of the vicarious liability and propriety of the Appellants’ verifying affidavit were not pleaded in its appeals to the High Court, and indeed they were not set out in the issues for determination delineated by the said Court in the impugned judgment. To this extent, we respectfully find that the High Court did commit fundamental errors of law which are dispositive of this appeal, and indeed preclude and constrain us from considering the outstanding issues in this appeal. To attempt a determination in the circumstances will entail undertaking an exercise of speculation and conjecture as to what may or may not have informed the High Court’s conclusions given our limited mandate as a second appellate Court, and even though the Appellant’s counsel in this respect went to pains to illustrate the evidence and legal principles that informed the decisions by the trial Court.
22. We therefore find that the consolidated appeals herein are merited, and hereby set aside the judgment of the High Court delivered on 27<sup>th</sup> June 2019 in Voi High Court Civil Appeals No. 1 and 2 of 2017, with the effect that the judgments delivered on 23<sup>rd</sup> January 2017 by the Senior Principal Magistrate Court at Voi in Civil Cases 182 and 183 of 2014 are hereby reinstated. The Respondents shall meet the Appellants’ costs of this appeal and that of the appeal in the High Court.
23. It is so ordered

**DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY, 2022.**

**S. GATEMBU KAIRU (FCIArb)**

**JUDGE OF APPEAL**

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**P. NYAMWEYA**

**JUDGE OF APPEAL**

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**J. LESIIT**

**JUDGE OF APPEAL**

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*I certify that this is a true copy of the original Signed*

**DEPUTY REGISTRAR**

