



**Chapuka v National Police Service & 2 others (Civil Appeal E1373 of 2024)
[2025] KEHC 11717 (KLR) (Civ) (4 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1373 OF 2024

WM MUSYOKA, J

AUGUST 4, 2025

BETWEEN

SAMSON AMBOLE CHAPUKA APPELLANT

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

*(Appeal from judgement and decree of Hon. CK Cheptoo, Principal
Magistrate, of 30th October 2024, in Milimani CMCCC No. E2372 of 2022)*

JUDGMENT

1. The suit, at the trial court, had been filed by the appellant against the respondents, for special damages of Kshs. 432,994.00, general damages, exemplary damages and costs. The background was that the appellant had sustained injury in a road traffic accident, which had happened on 17th October 2019, caused by a hit and run motor vehicle, which hit the appellant and fled. The appellant was hospitalised, and a report was made to the police. The accident vehicle was not traced on CCTV footage, for the footage for the relevant date and time was blank, ostensibly as the system automatically deleted data after some time.
2. The case, by the appellant, was that the disappearance of that evidence deprived him of basis to recover compensation, for the vehicle in question was not traced, and its ownership was not established. He attributed his loss to the 2nd respondent, on grounds that his complaint was not processed expeditiously, the officers of the 2nd respondent ought to have foreseen that the CCTV footage would self-delete



- after 3 months, failure to obtain the footage in good time, and negligence in performance of duty. He claimed he had expended funds on treatment and filing the suit.
3. The respondents resisted the claim, in their defence, by denying liability.
 4. A trial was conducted. Only the appellant testified. Judgement was delivered, on 30th October 2024, dismissing the suit.
 5. The appellants were aggrieved, hence the appeal. The grounds revolve around the court erring in requiring production of documents by their makers, yet the contents of those documents were against the said makers; the trial court sitting on appeal on its own earlier orders, as it had already admitted the appellant's bundle of documents; being condemned to produce evidence of a CCTV footage, yet the suit was about the respondents failing to avail the same footage to the appellant; ignoring the fact that the respondents owed the appellant a duty of care to investigate the complaint that he had made, which investigation would have entailed production of the CCTV footage; the case by the appellant being uncontroverted; and disregarding evidence and submissions.
 6. Directions were given on 25th February 2025, for disposal of the appeal by way of written submissions. The appellant has filed submissions. The respondents never filed a notice in the appeal.
 7. The appellant has submitted on admissibility of documents, proof of elements of the tort of negligence, and whether the prayers sought are merited.
 8. On admissibility of documents, the appellant argues that the respondents had objected to production of 8 of his documents, and, in the judgement, the trial court expunged them from the record, on the basis that their makers were not called, and their authenticity was not established. He has relied on sections 33 and 35 of the *Evidence Act*, Cap 80, Laws of Kenya, and *Jubilee Insurance Company Limited vs. Kiguoya* [2024] KECA 1630 (KLR)(Musinga, Makhandia & Nyamweya, JJA). He submits that despite efforts to be availed with a report on the disciplinary proceedings conducted against one of the officers, the respondents had failed to respond, despite that information being pivotal to his claim. He cites section 8 of the *Access to Information Act*, Cap 7M, Laws of Kenya, and Article 35 of the *Constitution*. He argues that given that lack of cooperation, it was unlikely that the makers of the documents would attend court to testify on and produce those documents.
 9. It is argued that the appeal was merited, as the appellant could not procure the attendance of the makers of the documents as the evidence was against their interests; the documents had been availed to the appellant by Independent Police Oversight Authority, which fact was not controverted by the respondents; the appellant could not get them certified by the persons for whom the documents were adverse evidence, duty of care had been proved, and damage was suffered.
 10. On negligence, he discusses the elements of the tort of negligence, duty of care and its breach and consequential damage. He cites *Amani Kazungu Karema vs. Jackmash Auto Limited & another* [2021] eKLR [2021] KEHC 6455 (KLR)(Nyakundi, J), *Trustees of the Catholic Diocese of Machakos vs. Benjamin Mwanzia Muoki* [2019] eKLR [2019] KEHC 3559 (KLR)(Kemei, J), *Janet Kaphiphe Ouma & another vs. Marie Stopes International Kenya Kisumu* HCC No. 68 of 2007 (Ali-Aroni, J) (unreported), *National Bank of Kenya Limited vs. E Muriu Kamau & another* [2009] eKLR [2009] KEHC 3684 (KLR)(Warsame, J), *Beatrice William Muthoka & another vs. Agility Logistics Limited* [2020] eKLR [2020] KEHC 2580 (KLR)(Nyakundi, J), *Gabriel Mugai Njiri vs. Wanga Robert Hawi t/a RH Wanga & Company, Advocates* [2018] eKLR [2018] KEHC 8618 (KLR) (Njuguna, J) and *Barclays Bank of Kenya Limited vs. Mema* [2021] KEHC 333 (KLR)(Majanja, J).
 11. The genesis of the dispute was the road traffic accident that happened on 17th October 2019, where the appellant was injured by a hit and run vehicle. A report of the incident was made on 28th October



2019, by his agents. The bone of contention was that, following that report, the respondents failed to initiate investigations in a timeous manner, so that by the time they got serious with investigations, the evidence, by way of CCTV footage, was lost, by way of being deleted. That loss meant that the appellant had no evidence to present in court for the purposes of the compensation claim. He argues that that meant that he lost out, for he had been badly injured, in the accident, and he had spent money on his treatment. He attributed negligence on the respondents and claimed special damages of Kshs. 432,994.00, general and exemplary damages, costs and interest.

12. The appellant pleaded, at paragraphs 25, 26, 28 and 29 of his amended pleadings, that he suffered severe injuries, and was hospitalised, and attributed negligence on the respondents in the way they discharged their duties. He pleaded that he suffered pain and loss, and had expended funds on treatment.

13. For avoidance of doubt, he pleaded as follows:

“25) As a result of the said accident the 2nd defendant’s officers’ negligence the plaintiff suffered severe injuries, went for surgery and continues to attend hospital periodically for check-up.

26) 3rd defendant Bank acted in a negligent manner in performance of duty...

27) ...

28) As a consequence of the Defendants action, the plaintiff has suffered pain and loss.

29) The Plaintiff has expended funds for treatment and to bring this suit.”

14. In the prayers, the appellant sought:

“a) special damages of Kshs. 432,994/-

b) general damages;

c) exemplary damages;

d) costs of the suit;

e) any other relief ...”

15. In paragraph 25 of the amended pleadings, the appellant blamed the officers of the 2nd and 3rd respondents for the severe injuries that he suffered, and for his hospitalisation and surgery. At paragraph 28, he blamed the respondents for his pain and loss, and pleaded, at paragraph 29, that he expended funds on treatment.

16. Yet, the respondents were not responsible for the accident. It was pleaded, at paragraph 6 of the amended pleadings, that the vehicle that hit the appellant sped off, so it was a hit and run case. The ownership of the vehicle was not established, for the registration particulars or details of the offending vehicle were not recorded. I note, though, that at his viva voce evidence, the appellant testified that the motor vehicle was a GK car, something which was not pleaded in the amended pleadings, nor mentioned in his witness statement. Nevertheless, there was no evidence, or even pleading, pointing to the accident vehicle belonging to any of the respondents.

17. The pain, loss and damage that was suffered by the appellant arose from the alleged motor traffic accident, and not from the failure by the respondents to investigate the report of the road accident made on behalf of the appellant. The failure to investigate probably denied the appellant access to



- useful or helpful information or evidence, but certainly did not cause the pain, loss and damage pleaded in his filings. I say “probably” because there was no evidence that the accident occurred at a spot where the CCTV cameras had coverage, and, therefore, evidence could be obtained that the CCTV cameras captured images of the accident incident, or the vehicle that allegedly caused the injury to the appellant.
18. Secondly, there was no evidence that the CCTV cameras were under the control of the respondents. There was equally no proof that the respondents were the only people or entities that had exclusive access to the CCTV footage, and the appellant could not access it through other means, without having to pass through the respondents.
 19. The report made to the respondents related to the occurrence of the road traffic accident, and it was in the nature of a complaint that a road traffic offence had been committed. The report was made with a view to having the respondents investigate the alleged traffic accident, to determine whether the driver of the motor vehicle in question, alleged to have had hit the appellant, had committed some traffic offence, in respect of which the respondents could prosecute. The mandate of the respondents, in handling such a report, would be to establish whether an offence has been committed, with a view to prosecuting the offender. The respondents were not obliged, or under duty, to gather evidence for the appellant, for the purpose of the appellant starting civil proceedings for compensation for the pain and injury suffered.
 20. Fourthly, there was no certainty as to whether the accident vehicle would have been traced, and, if traced, whether the motorist would have been found liable for the accident.
 21. As the respondents did not cause the accident, which inflicted injury on the appellant, the issue of them paying damages, caused or arising from that accident, for their failure or omission to have investigations conducted into the accident, would not be justifiable. They were not directly responsible for the pain and loss the appellant suffered. There was remoteness of damage. The appellant, no doubt, suffered pain and loss, caused directly by the motorist whose vehicle hit him, but that pain and loss could only be remotely attributed to the respondents. The respondents had nothing to do with the injuries sustained, and could not be held liable for the medical expenses incurred as a result. The failure to investigate did not cause the injuries, nor the consequent expenses. See *Hadley vs. Baxendale* [1854] 9 Ex. 341 (Parke, Alderson, Platt & Martin, BB), on remoteness of damage, which, although it turned on damages in the law of contract, is relevant to this case, to the extent of the issue of duty of care, breach of that duty of care and consequential loss arising from that breach.
 22. Of course, it would appear that there was dereliction of duty on the part of the respondents, in failing to investigate the report made to them relating to the accident, but that dereliction of duty did not cause the pain and loss the appellant suffered. It would appear that there was a breach of a public duty, or violation of a public right. However, the remedy for such does not lie in civil damages, but in constitutional compensation, which can only be accessed through a constitutional petition, in a cause initiated at the High Court.
 23. Usually, discharge of a public duty does not give rise to a tort or is not tortious. It only becomes a tort where the public duty is done dishonestly and unreasonably. See *James Karuga Kiiru vs. Joseph Mwamburi & 2 others* [2001] eKLR (Omolo, Lakha & Owuor, JJA), with respect to application of that principle, regarding the tort of malicious prosecution. However, that principle does not apply to the instant case. One may argue that the fact of not acting on a report, around a traffic accident, is not tortious, unless there is dishonesty, unreasonableness or malice. Even then, no known tort would arise, from that set of facts, to entitle the appellant to damages in the manner he sought them at the trial court. He did not plead that the conduct alleged was dishonest, unreasonable or malicious, and



- the evidence he adduced was not trained to establishing any of those elements, if James Karuga Kiiru vs. Joseph Mwamburi & 2 others [2001] eKLR (Omolo, Lakha & Owuor, JJA) were to be applied.
24. On admission of documents, the appellant has relied on sections 33 and 35 of the *Evidence Act* and Jubilee Insurance Company Limited vs. Kiguoya [2024] KECA 1630 (KLR)(Musinga, Makhandia & Nyamweya, JJA), which turned on admissibility and production of documents without calling the makers, to argue that the trial court ought not to have expunged from the record disciplinary proceedings that were conducted against the police officer who failed to investigate his accident report.
 25. Jubilee Insurance Company Limited vs. Kiguoya [2024] KECA 1630 (KLR)(Musinga, Makhandia & Nyamweya, JJA) is distinguishable. It related to documents that had been exchanged between the parties. The appellant was not party to the police disciplinary proceedings, and the fact that Independent Police Oversight Authority made them available to him did not make the proceedings capable of admission and production without calling the maker. If he was keen on calling the maker, he should have made an application for summons to issue upon the maker, he did not make any such application. There is no material to show that the maker declined to attend court upon being summoned by the court. It would not be enough to merely argue that since the material in those proceedings was adverse to the case by the respondents, the attendance of the maker should have been dispensed with, or that it would have been difficult to procure the attendance of the maker. Dispensing with the maker of those documents should have been sought upon the failure of the maker to attend court upon being summoned by the court.
 26. He cited the matter of having written to the respondents, who did not respond to his correspondence, on those proceedings. There is a difference between correspondence between the parties and court summons. The court allows parties to apply for summons to issue upon witnesses who usually would not attend court without such official summons. That is common with public officers, being called upon to attend court to produce official documents. That should also have been the case with the respondents. The appellant could have had access to the documents through the court, and a witness to produce them again through the court, by simply causing the court to issue a notice to produce and a witness summons.
 27. There is also the question of admission and expungement of documents. The court had, at some point, admitted some documents as evidence, then in the judgement expunged them. It is related to the above. Admission of a document is one thing, and its production is another. Admission is mere placing of a document on record, if it falls within the category of admissible evidence, however, that does not mean that it has been produced. Production has something to do with the admitted documents being formally proved, after which they are produced as exhibits. See Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] eKLR [2015] KECA 334 (KLR) (Visram, Mwilu, & Otieno-Odek, JJA) and Finmax Community Based Group & 3 others vs. Kericho Technical Institute [2021] eKLR (Ouko P, Musinga & J Mohammed, JJA). See also South Nyanza Sugar Co. Ltd vs. Mary A. Mwita & another [2018] eKLR (Mrima, J), Billiah Matiangi vs. Kisii Bottlers Limited & another [2021] eKLR (Ndung'u, J), Sammy Wafula Meja vs. Republic [2021] eKLR [2021] KEHC 4885 (KLR)(Kimaru, J), Jackson Ndwiga vs. Elizabeth Thara Ngahu [2021] eKLR (Njuguna, J), Lwangu vs. Ndote [2021] KEELC 2 (KLR)(Nyagaka, J) and Sofie Feis Caroline Lwangu vs. Benson Wafula Ndote [2022] eKLR (Nyagaka, J).
 28. The documents in question were admitted into the court record, and they were formally produced, to the extent that they were marked as exhibits. By the time judgement was being written, by the trial court, the said documents were exhibits, and the court ought to have considered them as evidence, for having them marked as exhibits meant that the calling of their makers had been dispensed with. The trial court could not mark the documents as exhibits and still expect that their makers be called. The



trial court was, clearly, mixed-up, on admission and production of documents. In this case, the said documents were admitted and produced as exhibits. Having been so produced, the trial court was not entitled to expunge them from the record. The issue of expungement should, perhaps, have only arisen if they had been admitted but not produced. Whether the said documents were adequate proof, upon which the orders sought could have been granted, is another issue altogether, which I have discussed and disposed of hereabove.

29. I have said enough, to demonstrate that the appellant was non-suited, and, therefore, his claim at the trial court lacked merits, for remoteness. The trial court did not err in dismissing the suit. The appeal, herein, consequently, lacks merit, and it is hereby dismissed. Each party shall bear their own costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 4TH DAY OF AUGUST 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Karue, instructed by Chimei & Malenya, Advocates for the appellant.

The Hon. The Attorney General, for the respondents.

