



REPUBLIC OF KENYA



**Fedha v Chepchumba (Civil Appeal E016 of 2021)  
[2024] KEHC 394 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E016 OF 2021**

**JR KARANJA, J  
JANUARY 24, 2024**

**BETWEEN**

**BENSON MOHELI FEDHA ..... APPELLANT**

**AND**

**VICTORY JEPCHUMBA A.K.A. VICTORY CHEPCHUMBA A.K.A. VICTORIA  
CHEPCHUMBA ..... RESPONDENT**

*(appeal is against an interlocutory ruling made on the 28th July  
2021 by the Learned Principal Magistrate in CMCC No. 58 of 2020)*

**JUDGMENT**

1. This appeal is against an interlocutory ruling made on the 28<sup>th</sup> July 2021 by the Learned Principal Magistrate in CMCC No. 58 of 2020, in which the Appellant Benson Maheli Fedha, was sued by the Respondent, Victory Jepchumba or Chepchumba or Victoria Chepchumba for damages arising from a road traffic accident which occurred on 18<sup>th</sup> November 2018 along the Kapsabet/ Lessos Road when the Defendant's Motor Vehicle Registration No. KCP 388S Toyota Hilux Double Cabin lost control allegedly due to its driver's negligence and hit a Motor Cycle Registration No. KMPD 740D Boxer on which the Plaintiff was a pillion passenger.
2. The Plaintiff suffered bodily injuries as a result of the accident and later filed the present suit against the Defendant praying for general damages for pain and suffering, damages for diminution and/or loss of future earning capacity, loss of income or earning at Kshs. 10,000/- per month or any other sum and/or minimum range for such time or period that the court shall deem fit, special damages of Kshs. 30,650/- together with costs of the suit and interest.



3. After the close of pleadings, the matter was set down for hearing in the course of which the parties agreed on liability and entered a consent as follows: -

“The consent judgment on liability dated 25<sup>th</sup> February 2021 and filed on 2<sup>nd</sup> March 2021 be and is hereby adopted.

Liability agreed at 65% to 35% in favour of the Plaintiff as against the Defendant”.

The quantum of damages therefore remained the only issue for determination at the hearing.

4. In that regard, on the 28<sup>th</sup> July 2021, the Plaintiff called Dr. Wallington Kyamba (PW1) as her first witness. The good doctor took the stand and in the process of his testimony indicated that he was paid a sum of Kshs. 80,000/- as his fee for coming to court. He then sought to produce a receipt as proof thereof but immediately thereafter counsel appearing for the Defendant raised an objection to the production of the receipt.

5. The Objection was grounded on the facts that the sum of Kshs. 80,000/- was not pleaded and the receipt was not served upon the Defendant as was required.

The Defendant’s Counsel opined that the production of the receipt amounted to the Plaintiff litigating by ambush and prayed for the receipt of Kshs. 80,000/- be disallowed and not be admitted in evidence.

6. In the response, the Plaintiff’s Counsel submitted that the Objection was not merited as what was in issue was court attendance for which payment was made and the receipt issued on the previous day prior to the hearing. That, the witness in the dock was the maker of the receipt and that it was not a requirement of law that such receipt be filed.

7. After considering the objection and opposition thereto, the trial court overruled the objection without giving reasons thereby implying that it fully agreed with the Plaintiff’s reasons for opposing the objection.

The impugned receipt was accordingly produced and marked P. Exhibit 10.

Being aggrieved with the ruling, the Defendant/ Appellant preferred the present appeal on the basis of the eight (8) grounds set out in the memorandum of appeal dated 14<sup>th</sup> August 2021 and filed herein on 20<sup>th</sup> August 2021.

8. The appeal was canvassed by way of written submissions with both sides filing their respective submissions.

Having given due consideration to the appeal and the rival submissions this court was required to re-consider the application and arrive at its own conclusions. But, this being an appeal on a matter which is partly heard and pending a final determination of the dispute at hand it would follow that it is premature in as much as it is based on pure procedural technicalities rather than the substance of the case and serves to delay the expeditious hearing and determination of the dispute.

9. It would have been most ideal for the Appellant/ Defendant to hold the reins of his horse and await a full hearing and final determination of the case prior to filing an appeal. In any event, the case could go either way and if it goes contrary to the Appellant’s expectation then the admission of the impugned receipt by the trial court would be a relevant ground of appeal if the receipt was treated as part of the availed documentary evidence for proof of special damages which must not only be specifically pleaded but also specifically proved.



10. In the plaint dated 13<sup>th</sup> February 2020 and filed in court on 23<sup>rd</sup> June 2020, the sum of Kshs. 80,000/- is not pleaded as special damages.

Therefore, the production of the impugned receipt was unnecessary at that juncture as it did not form part of the pleadings in the main suit. Its production by the Plaintiff was therefore hasty and premature.

11. There would have been nothing easier than for the Plaintiff/ Respondent to apply for amendment of her pleadings to include special damages in the sum of Kshs. 80,000/- if she intended to treat the receipt as proof of that amount. Therefore, the production and admission of the receipt in this matter would have no significance prior to a final determination of the dispute for the reason that it does not form part of the pleadings to be considered by the court in arriving at its final determination of the matter.

12. It is settled that parties are bound by their pleadings and any evidence which does not support the pleadings or is at variance with the pleadings becomes a non-issue and ought to be disregarded by a trial court (See, *Daniel Otieno Migore Vs. South Nyanza Sugar Company Limited [2018]* e KLR)

13. With the admission and marking of the impugned receipt as P. Exhibit 10 for whatever its worth, the Appellant/ Defendant if necessary ought to challenge it on appeal after the final determination of this case by the trial court.

It was held in *Republic Vs. Fredrick Ole Leliman and Others [2020]* e KLR, that improper admission of evidence cannot itself be a ground for reversal of any decision in a case until the court has made a determination or adjudicated any matter based on that evidence.

14. It is ultimately the finding of this court that this appeal is unmerited for being premature and is hereby dismissed with costs to the Respondent/ Plaintiff.

The Lower Court record be returned to the trial court for the matter to proceed from where it lastly stopped.

Ordered accordingly.

**DELIVERED AND DATED THIS 24<sup>TH</sup> DAY OF JANUARY 2024**

**J. R. KARANJAH,**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

