



**John & another v Kihiko (Civil Appeal E016 of 2022)
[2024] KEHC 17207 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E016 OF 2022
TM MATHEKA, J
AUGUST 20, 2024**

BETWEEN

EDWARD MATHEKA JOHN 1ST APPELLANT

JAMES NGUGI KIBE 2ND APPELLANT

AND

STEPHEN MUCA KIHICO RESPONDENT

JUDGMENT

1. Stephen Muca Kihiko filed suit vide plaint dated 16/8/2021 in Kilungu PMCC 207/2021 against the defendants seeking judgment against them - general damage for pain, suffering and loss of amenities; special damage of Kshs. 5,200, costs and interest of the suit.
2. The claim was that on 8/1/2020 he was a passenger in motor vehicle reg. No. KCH 073Z registered in the name of the 1st defendant Edward Matheka John and driven by the 2nd defendant Musembi Muthoka as the 1st defendant's, agent, employee or driver - when 2nd defendant so negligently drove the said motor vehicle that it lost control veered off the road and fell as a result of which the plaintiff sustained injuries to wit; blunt injuries to head, neck and the right shoulder.
3. He pleaded re ipsa loquitur.
4. With the plaint he filed his witness statement. He stated that he boarded the motor vehicle at Sultan Hamud headed to Mlolongo, that he fastened his seat belt, that the driver drove at very high speed, that the road traffic accident happened along Nairobi/Mombasa Highway at Nyumba Ndune Area, he was assisted by a good Samaritan, taken to Assisi Nursing Home for treatment, was treated and discharged, reported at Salama Police Station, was issued with P3 , police abstract, later conducted search for the motor vehicle. That he blamed the driver for speed, reckless driving and without due regard for other road users. He annexed the supporting documents.



5. The defendants filed defence on 8/10/2021 dated 27/9/2021. They denied all the allegations and put the plaintiff to strict proof thereof; without prejudice pleaded contributory negligence on the part of the plaintiff, and that Res Ipsa Loquitur was applicable.
6. It was also pleaded that the plaintiff failed to heed the advice of the defendants and that the motor vehicle was not authorized to carry any passengers and he boarded the same without authority.
7. The defendants' witness statement was not annexed and was to be annexed 15 days to the trial.
8. On 10/2/2022 the defendant filed photos of the motor vehicle before and after the road traffic accident.
9. When the matter came for hearing on 27/1/2022 the defendant and his counsel were absent. The trial court satisfied that there had been proper service proceeded ex parte.
10. The plaintiff adopted his witness statement, produced the documents –as Pexh 1 to 8.
11. Both parties filed written submissions.
12. The learned trial magistrate found that the plaintiff's case was unchallenged found liability at 100%, awarded general damage of Kshs. 200,000, special damages of Kshs. 3,550 total Kshs. 203,550 plus costs and interest.
13. The plaintiff was aggrieved and filed this appeal on 26/4/2023 challenging the judgment on the grounds that; the learned trial magistrate erred in law and fact for; failing to appreciate that the burden of proof lay with the plaintiff; that as per Shighadai Vs Kenya Power & Lighting Co. Ltd & anor [1988] eKLR the court misdirected itself for not taking the facts of the matter as laid down in the plaint and the evidence adduced that the subject motor vehicle was meant for ferrying goods and not passengers; that the court did not appreciate that the appellant owned not duty of care to the respondent was carried in their motor vehicle as an un authorized passenger; and further misdirected itself is the assessment of damages.

The appellants seek from this court that the appeal be allowed the ruling (sic) of the subordinate court be set aside with costs.
14. Parties canvassed the appeal through written submissions by their respective counsel – which I have considered.
15. The issues for determination are whether the plaintiff established his case against the defendants, whether there is need to disturb the quantum.
16. On the 1st issue both parties cited memories authorities; For the appellant it is submitted that even if the defendant did not testify the plaintiff had the burden of proof as required by s. 107 of the Evidence Act and numerous authorities: In Charterhouse Bank Limited (under statutorymanagement) vs Frank N. Kamau [2016]eKLR it was stated; “ we would therefore venture to suggest that before the trialcourt can conclude that the plaintiff's case is notcontroverted or is proved on balance of probabilities byreasons of the defendant's failure to call evidence, the courtmust be satisfied that the plaintiff has adduced somecredible and believable evidence, which can stand in theabsence of the rebuttal evidence by the defendant...”(emphasis mine)
17. For the respondent it is submitted on numerous authorities that where the defendant fails to adduce evidence - the statement of defence remains mere statements of fact – and the court was asked to see



Linus Nganga Kiongo & 3 others V Town Council of Kikuyu [2012] eKLR, Kimatu Mbuvi V Benson Nguli [2010] eKLR;

Gilbert Kipngetich Aiyabe V Washington Mwambuiri [2018] eKLR;

18. I am however minded to follow the Court of Appeal in Charterhouse Bank Ltd (above) that the fact that the defendant does not tender any evidence does not mean that the trial court should not analyse the evidence/facts as laid out by the plaintiff to confirm that indeed the plaintiff established his case. This is also what was said in Kenya Power & Lightning Co. Ltd vs Nathan Karanja Gachoka & Anor [2016] eKLR.
19. The learned trial court still had the obligation to interrogate the evidence and determine whether or not the orders sought by the plaintiff were deserved.
20. What was the evidence before the subordinate court? - that he plaintiff boarded the motor vehicle, that on the way the motor vehicle was involved in an accident and he sustained injury.
21. The plaintiff established that he was a passenger in motor vehicle Reg no. KCH 073Z as a passenger as per the police abstract dated 10/12/2020 - that it was driven by James Ngugi Kibe , that the motor vehicle was registered in the name of Edward Matheka. He produced P3 form, medical report, and proof of the special damages. None of this evidence was controverted - and it is my view that it established the fact of the plaintiff being in the motor vehicle, there being road traffic accident, and his sustaining injuries.
22. Was the road traffic accident the result of the negligence of the defendants/appellants? - The plaintiff/respondent clearly described how the accident happened - that the motor vehicle was driven at high speed, that it lost control, fell - causing the plaintiff injuries - there was no evidence from the defendants/appellants to counter this evidence - it is now settled that when that evidence is not challenged then, when analysed and found to prove the facts - it will be considered uncontested and form the basis for the judgment.
23. In this case - that evidence on how the accident happened is not contested.
24. The appellant argues that the motor vehicle was not for carrying passengers and therefore, the respondent was an unauthorized passenger. This was merely pleaded in the defence - but no evidence was brought by the defence to establish that fact - there is no doubt the motor vehicle was a truck - there is no evidence that the respondent was ferried as 'goods'. He stated that he boarded the motor vehicle , put on the safety belt, and expected to be dropped at Mlolongo, safely.
25. It is submitted by the respondent that the submissions that this motor vehicle was only for ferrying goods cannot become evidence and several authorities are cited - See Ng'ang'a & Anor vs Owiti & Anor [2008] IKLR (EP) 749 - that submissions are not part of the case - and their absence would not prejudice a party.

"Submissions cannot take the place of evidence ... do not constitute evidence at all"

See also Daniel Toroitich Arap Moi Vs Mwangi StephenMuriithi & Anor [2014] eKLR cited in Efil EnterprisesLimited vs Dickson Mathembyo Kilonzo [2018]eKLR.



26. It was the duty of the appellants to demonstrate through evidence that the motor vehicle was prohibited from ferrying passengers - the respondent cited John Kibicho Thirima V Emanuel Passmei Mkoitiko [2017] eKLR to the effect that -

"there is no law that stipulates that for liability to attach, the vehicle must be a public service vehicle or that the passengers must be fare – paying... the defendant never pleaded/testified that there was any prohibition for him as the owner of the accident motor vehicle to carry any passengers in that vehicle. And if there was any such silent prohibition then the defendant under took the risk personally by carrying passengers in his vehicle. He had the option to refuse to carry any passenger in his vehicle..."

The plaintiff's evidence is clear that the defendant voluntarily carried the plaintiff ... there is no evidence that the plaintiff forced himself into the defendant's car ... it is upon the defendant to carry the burden and risk of carrying the plaintiff and if he was breaching his insurance terms, the plaintiff cannot share in that blame and breach."

27. I have to agree with this reasoning, if the defendant's motor vehicle was prohibited to carry passengers - then the person who did so, knowing that they were prohibited to do so would be liable. The defendant cannot blame the plaintiff when the 2nd defendant willingly & voluntarily allowed the plaintiff to board the motor vehicle. If perhaps there was evidence that the plaintiff was aware of the prohibition and boarded the motor vehicle without the knowledge and permission of the 2nd defendant - then the issue of contribution would arise.
28. In this case the uncontested evidence is that the 2nd defendant voluntarily permitted the plaintiff to board and ride in the motor vehicle on the day of the road traffic accident
29. In the circumstances the finding of liability at 100% by the trial court cannot be faulted.
30. On quantum - it was submitted for the appellant that no general damages should have been awarded - and if any Kshs. 50,000 would suffice as was in Paul Kipsang Koech & anor vs Titus Osulo Osore [2012] eKLR.
31. For the respondent it was submitted that in Kara Roadway Ltd vs Peter Kivuva Nyamai [2018]eKLR general damages of Kshs. 175,000 was awarded for blunt injury to chest, and both shoulders, and Philista Mukamu Makau vs Elizabeth Kanini Mulu [2015] eKLR the sum of Kshs. 150,000 for injury to the back, right hip & left leg.
32. The award of general damage is an exercise in discretion to be disturbed only for reasonable ground - either too low/too high, or awarded on the wrong principles, or in ignorance of relevant factors/ application of irrelevant factors.
33. The authorities cited clearly support the award and I find no reason to disturb.
34. In the upshot I find that the appeal is not merited. It fails with costs to the respondent.

DATED SIGNED AND DELIVERED VIS CTS ON 20/8/2024

MUMBUA T. MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT



HIGH COURT DIV

DATE: 2024-08-20 21:27:57



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