



**Kireri & another v Ngyo (Civil Appeal 78 of 2018)  
[2023] KEHC 26894 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26894 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 78 OF 2018**

**M MUYA, J**

**DECEMBER 14, 2023**

**BETWEEN**

**PETER MUGWE KIRERI ..... 1<sup>ST</sup> APPELLANT**

**CHRISTOPHER MUHOTI MWANIKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DR JOSIAH NGIGE NYGO ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgment by Hon. Ruth Kefa SRM delivered on 29<sup>th</sup> day of November 2018 in Nyeri CMCC 122 of 2009.

Being dissatisfied with the said Judgment the appellant filed this appeal on the following grounds:

1. That the learned magistrate erred in law and fact in proceeding with the hearing in disregard of stay of proceedings in Nairobi High Court (commercial and admiralty division) Miscellaneous suit No. 586 of 2012 and Nairobi High court Civil case No. 465 of 2011 (OS) and not taking Judicial notice of the same.
2. The learned magistrate's decrees are null and void ab initio for proceeding with the hearing in total disregard of stay orders from the superior court.
3. The learned trial magistrate erred in law and fact in finding the Respondent to have been negligent or solely liable for the accident.
4. The learned magistrate erred in law and fact in not finding and holding that the plaintiff owed a duty of care while in a bus stage under the traffic act and was therefore responsible for the same.
5. That the learned magistrate erred in awarding damages for loss of earning capacity when the same had not been proved



6. That the learned magistrate erred in law and fact in finding and holding that the plaintiff had proved his case on a balance of probabilities and was entitled to general damages for pain, suffering and loss of amenities.
7. That the trial court erred in law and fact in making very high awards for damages of loss of earning capacity and general damages in pain and suffering.
8. That the learned magistrate erred in law in fact in not finding that the plaintiff had not proved that his health condition had not been by the illegal accident and that same had been caused by other factors which were in existence at the time of the accident.

The appellant seeks orders for the Judgment and decree of the trial court dated 29<sup>th</sup> November 2018 to be set aside and to be substituted with an order dismissal of the plaintiffs' suit.

### **Background**

2. By a plaint dated 9<sup>th</sup> March 2009 the plaintiff initiated a suit for damages arising from injuries sustained in an accident that occurred on 27<sup>th</sup> September 2008 along Gakere lower Road where the 2<sup>nd</sup> Defendant negligently and without due care and attention controlled motor vehicle registration KBA 715Z causing it to knock the plaintiff down and causing him serious injuries. The 1<sup>st</sup> Defendant was the beneficial owner and thus vicariously liable.
3. The injuries were particularized thus:-
  1. Fracture of the right tibia
  2. Dislocation of both ankle joints causing severe osteoarthritis
  3. Bruises on the knees
  4. Bruises on the chest
4. Special damages
  - a. Police abstract Ksh 200/=
  - b. Medical report Kshs 260/=
  - c. Medical expenses Ksh 29,450/=

The defendant filed a defence on 28<sup>th</sup> day of April 2009 denying the claim and placed the blame on the plaintiff for being negligent.

### **Appellants submissions**

5. The appellants contention is that the proceedings and judgment was in disregard of stay orders granted by the High Court. That the case commenced on 26<sup>th</sup> October 2018 and in light of gazette Notice No. 14281 of 11<sup>th</sup> November 2017 which was stay of proceedings against blue shield insurance which was under statutory management and therefore in proceeding with the hearing of the suit this was in breach of Court Orders.

Further that the learned magistrate erred in holding that the 1<sup>st</sup> Defendant did not exercise due care. That the Respondent ought to have exercised due care as is required in the Highway code and regulations. In this, reliance was placed in the case of Patrick Muile Kimau v Judy Wambui Ndururumo.



6. On the issue of loss of earnings it is contended that the plaintiff did not produce any evidence to prove that he was in gainful employment prior to the accident as the P3 form indicated that he was 64 years of age at the time.

7. On general damages it is argued and submitted that the award of 1 million under this heading was not proved.

The plaintiff did not call a doctor to produce medical reports and any documents indicating that he was attended to on 27<sup>th</sup> September 2008. That the allegation to the effect that that the doctor who filled the P3 form was the one who attended him was not also proved.

### **Respondents submissions**

8. It is submitted that the learned magistrate disregarded the orders of stay issued in Nairobi Hc Misc civil suit No. 586 of 2012 and Nairobi Hc Civil suit No. 465 of 2011 (OS) because the orders of stay were vacated by Justice L. Njuguna in the case of the Blue Shield Insurance Company Ltd Under Statutory Management (2017) e KLR Civil case No. 465 of 2011 on 13<sup>th</sup> November 2017.

Thus the trial court was not in breach or error when it found the appellant wholly negligent for the accident at 100%. And that it was not in error when it found that the injuries were as a result of that accident.

The issues raised in grounds 3,4, and 5 of the appeal were not raised in the lower court.

9. As regards ground 7 and 8 of appeal it is contended that the trial court had the opportunity to see for itself the Respondent who was in a wheel chair and who was incapacitated. Reliance was placed in the case of *Mumias Sugar Company Limited v Francis Wanalo* (2007) e KLR

10. As regards loss of earning. It is submitted that documentation is not the only proof of earning. As for retirement age it is contended that the Respondent was not a civil servant and was not bound to retire at the age of 60 years.

### **Analysis and determination**

11. This being the first appellate court, it has a duty to examine and evaluate a fresh the evidence on record and also bear in mind that it did not have the opportunity of observing the demeanour of the witnesses. *Abok James Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates* (20130 e KLR Civil Appeal No.161 of 1999.

In the case of *Mbogo v Shah* (1968) EA Page 93 it reiterates that the court ought not to interfere with the discretion of the lower court unless it is satisfied that its discretion is clearly wrong for having taken a misdirection and in so doing arriving at a wrong conclusion.

In the case of *Gitobu Imanyara and 2 others v Attorney General* (2016) e KLR , the court of appeal held:-

“It is firmly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages, merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to Justify reversing the trial Judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the Judge acted upon some wrong Principle of law, or that the amount awarded was so extremely high or so very low as to make it in the Judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled”



The appellants contention is that there was a stay of the proceedings before the trial court in this appeal. But in the case of in the matter of *Blue Shield Insurance Company Limited (under Statutory Management)* 2017 e KLR

Where the Judge in vacating the earlier orders had this to observe.

“I have considered the submissions by the opposing parties and it is clear that there is not dispute that the said moratorium was issued under Section 67 © (10) which section only seeks to protect the insurer against claims from its policy holders claims against the police holders from third parties. In fact there is no privity of contract between the insurer and the third party for a moratorium to extend to the third parties. If insurers were allowed to issue moratoriums to third parties then it is the third parties who would be prejudiced as they would not be in a position to enforce claims against negligent policy holders.

The interested parties were not parties to the initial proceedings declaring the moratorium as a result of which they did not have the opportunity to oppose the application.

Borrowing wisdom from my learned members of the bench, I find that the orders issued by the court on 28<sup>th</sup> December 2011 in so far as they extend to the 1<sup>st</sup> to 22<sup>nd</sup>

Respondent were issued without Jurisdiction. Section 34 of the *Civil procedure Act* gives this court the inherent power to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the court.

The finding of this court therefore is that the proposed interested parties in the two applications are neither policy holders nor creditors of the insurance company and as such the moratorium declared by the statutory manager in so far as it extends them was ultra vires.”

12. Thus the orders of the trial court cannot be said to have been void ab initio as argued by the appellants. The case started in the year 2018 after the orders were vacated.

As regards the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal. These were not raised in the trial.

Parties are bound by their pleadings.

In the case of *IEBC – v Stephen Mutinda Mule and 3 others* (2014) e KLR it was held:-

“ it is now very trite Principle of law that Parties are bound by their pleadings and that any evidence led by any of the Parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded”

13. It is the contention by the Respondent that they had proved their case on a balance of probabilities.

In the case of *Palace investment Ltd v Geoffrey Kariuki Mwenda and Another* (2015) e KLR the court of appeal held:- “ Lord Denning, 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. Unconvincing the party bearing the burden of proof will lose because the requisite standard will not have been attained.



In the instant case the plaintiff claimed to have been hit by the 2<sup>nd</sup> Defendant who was driving motor vehicle registration number KBA 715 Z. He produced a P3 form, a Medical report a demand letter Statutory notice an assessment report.

The plaintiff testified that he was hit by the vehicle as he walked behind it and as it was reversing at the bus terminus. The appellant had three witness who countered the evidence of the plaintiff by stating that it is the plaintiff who was assisting the driver to reverse from the parking bay and that he was standing beside the vehicle that he was hit. In the present case it is the word of the Plaintiff as a single witness against that of the Defendant and his three witnesses.

14. It is also noted that the Plaintiff produced documents without calling the makers.

In the court of appeal case of *Kenneth Nyaga Mwige v Austine Kiguta and 2 others* (2015) e KLR It was held:-

“Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If documents is not marked as an exhibit its not part of the record. It admitted into evidence and not formally produced and proved the document would only be hearsay, untested and an authenticated account”

By not calling the makers of the documents the court missed the opportunity of testing the veracity and authenticity of the same.

Evidence tendered by the three eye witnesses contrasted against that of one is more probable.

15. Therefore on a balance of probabilities, the plaintiff case was not proved in the lower court. The plaintiff did not have receipts for the medical expenses allegedly incurred. It is highly doubtful for such alleged serious injuries one would not have receipts for medical expenses. Special damages must be specifically proved. These have not been proved and are disallowed. The issue of liability was not proved on a balance of probabilities. The appeal is hereby allowed, the orders and decree of the lower court is set aside with costs to the appellant.

**JUDGEMENT READ AND DELIVERED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF DECEMBER 2023**

**HON. JUSTICE M. MUYA**

**JUDGE**

In the presence of:

Muhuhu holding brief for Wahome 1<sup>st</sup> Appellant

30 days R/A

**HON. JUSTICE M. MUYA**

**JUDGE**

