



**Ngeruro v Mokaya (Civil Appeal E849 of 2022)
[2024] KEHC 7664 (KLR) (Civ) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7664 (KLR)

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

CIVIL

CIVIL APPEAL E849 OF 2022

WM MUSYOKA, J

JUNE 25, 2024

BETWEEN

JORAM NJOGA NGERURO APPELLANT

AND

PETER NYARIKI MOKAYA RESPONDENT

(An appeal arising from the judgment of Hon. Caroline Ndumia, Senior Resident Magistrate, SRM, adjudicator, delivered on 23rd September 2022, in Milimani SCCC No. E1572 of 2022)

JUDGMENT

1. The suit at the primary court was initiated by the appellant, against the respondent, for compensation, arising from a road traffic accident, which allegedly happened on 17th October 2020, along Kiambu Road, in Nairobi. The accident involved 2 motor vehicles, KCR 450M, beneficially owned by the appellant, and KBL 032H, beneficially owned by the respondent. The appellant alleged that his motor vehicle was hit from behind by that belonging to the respondent. He attributed negligence on the respondent. He claimed that he suffered material damage of Kshs. 229,266.00, being on costs of repair, assessment fees and tracing costs. The respondent filed a response, in which he denied everything pleaded in the plaint, save the accident, which he pleaded was caused by the sole negligence of the appellant, when he or his authorised driver abruptly braked, forcing the respondent or his authorised driver to ram into his vehicle from behind. The respondent counter-claimed, for Kshs. 35,000.00, for recovery of the material damage that he suffered on account of that incident.
2. The matter was disposed of orally. The appellant called 4 witnesses, while the respondent called 3. In the judgment, delivered on 23rd September 2022, the trial court found the respondent wholly liable for the accident, but on the material damage claimed by the appellant, the trial court was not persuaded



- that the money had been spent, as the documents availed did not point towards that. Both claims by the appellant and the respondent, for material damage, were dismissed.
3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 19th October 2022, revolve around the trial court failing to consider the case by the appellant, his testimony, submissions and the law; dismissing the claim for material damage after finding the respondent wholly liable for the accident; failing to consider the material placed on record on the material damage; failing to find that the specific damage had been specifically proven; and for finding that the doctrine of subrogation had not been proven to have crystallised.
 4. Directions were given on 20th February 2024, for disposal of the appeal by way of written submissions. It would appear that only the appellant filed written submissions.
 5. He reduces his grounds of appeal into only one issue, whether he had proved entitlement to special damages. He submits that in a claim for special damages, the plaintiff is required to what he actually lost, in terms of the moneys used, to put him in the position that he was at before the loss occurred. He submits that he produced a fee note from the Quality Motor Consultants, and 2 invoices, from Evolution Motors and Factual Facts Loss Assessors, to prove or establish his loss. He cites *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA), *David Bagine v Martin Bundi* [1992] eKLR (Gicheru, Shah & Pall, JJA), *Mugoya Construction & Engineering & another v Harrison W. Muindi* [2004] eKLR (Mwera, J), *Herbert Hahn v Amrik Singh* [1985] eKLR (Kneller, Nyarangi JJA, Chesoni Ag JA), *Kenny Nyaga Mboi v Mash Bus Services Limited* [2015] eKLR (Aburili, J) and *Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority* [2009] eKLR (Waki, Onyango Otieno & Visram JJA). He submits that some of the documents had Electronic Tax Register (ETR) receipts, while some of the invoices carried payment endorsements.
 6. The appeal herein turns only on the issue of special damages, on whether they were specifically proved, for they had been specifically pleaded.
 7. So, was there specific proof of the special damage? The witnesses presented by the appellant all said they wished to adopt their witness statements, and lists and bundles of documents, and that the said bundles of documents be produced as evidence in support of their case. Curiously, those documents were not marked as exhibits. There was no narration, of those documents, in terms of what they represented. In other words, no witness bespoke the contents of the documents. When PW2 testified, he stated that he had a payment voucher from Quality Motor Consultants and another from Factual Facts Loss Assessors. PW3 testified that he was paid Kshs. 7,000.00 to attend court as a witness; while PW4 said that he was paid Kshs. 5,500.00, for the assessment report done by Quality Assessors Consultants, and Kshs. 3,000.00 for attending court.
 8. The list of documents filed by the appellant, dated 20th June 2022, was of a police abstract, motor vehicle claim form, satisfaction note, assessment report from Quality Motor Consultants, a fee note from Quality Motor Consultants, an invoice from Evolution Automobile Limited duly annotated as paid, an invoice from Factual Facts Loss Assessors, and a demand letter. These were the documents that the witnesses claimed that they were adopting and producing in court as exhibits.
 9. It should be pointed out, from the outset, that a demand note, a fee note and an invoice are not documents that evidence payment, for they are merely notes making demands for payment. Payment is evidenced or established by a receipt, or some other document evidencing acknowledgement of payment. Indeed, in *Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority* [2009] eKLR (Waki, Onyango Otieno & Visram, JJA), the court asserted that invoices were not receipts, unless they



carried an endorsement that the goods, or services for that matter, for which the invoice was raised, had been paid for.

10. So, what is the case here? From the list of documents dated 20th June 2022, I see a fee note from Quality Motor Consultants, dated 23rd October 2020, for Kshs. 6,270.00. There is nothing, on its face, to indicate that it was settled, although it bears an endorsement that it was authorised for payment the same day, but there is nothing in the authorisation stamp, to indicate that the same emanated from the appellant or his insurer. There is an invoice, from Evolution Automobile Limited, number 369, dated 20th November 2020, for Kshs. 189,136.00. It bears a date stamp, indicating that it was received by the insurer on 1st December 2020. On its face there is what looks like a stamp, from Evolution Automobile Limited, bearing the date of 1st December 2020, and the figure of Kshs. 189,136.00. None of the witnesses said a word about Evolution Automobile Limited, and the figure of Kshs. 189,136.00. No witnesses attended court, from Evolution Automobile Limited. No one bespoke the contents of that invoice, and what the writings on it were all about. It is not enough to just file a document in court, and expect the court to interpret or make sense of it for itself. Then there is a fee note, number 1746, from Factual Facts Loss Assessors, dated 20th January 2022, for Kshs. 37,750.00. There is nothing on its face, to indicate that it was settled.
11. The witnesses talked of being paid moneys for attending court as such. The claim for paying witnesses for attending court ought to have been specifically pleaded, as it was not, there would have been no basis for allowing it. PW4, a witness from Quality Assessors Consultants, claimed, on the witness stand, that he was paid Kshs. 5,500.00, exclusive of VAT, for the assessment report. The amount in the statement of claim, for assessment fees, was Kshs. 6,380.00. The impression created, in that pleading, was that that was what the insurer spent on the assessment exercise. So, if Kshs. 6,380.00 was what was spent, where was the Kshs. 5,500.00, that PW4 was talking about, coming from? What about the Kshs. 6,270.00 in the fee note that had been raised by the same assessor, and which is attached to the list of documents filed in court? Where was the truth? Some witnesses talked of payment vouchers. No such vouchers were filed, as part of the bundle of documents in the list of documents, and none were produced as evidence at the trial.
12. In the end, I find that the appeal herein is not merited, for the trial court decided on the basis of the evidence that was placed before it. I hereby dismiss the appeal. The consequence is that the order made on 23rd September 2022, by the trial court, dismissing the claim by the appellant, on its entirety, is hereby affirmed. As the respondent did not participate in these appeal proceedings, there shall be no order on costs. It is so ordered.

**JUDGMENT IS DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA,
THIS 25TH DAY OF JUNE 2024**

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Obam, instructed by KRK Advocates LLP, Advocates for the appellant.

