



REPUBLIC OF KENYA



KENYA LAW
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**Kieru v Karanja & another (Civil Appeal E100 of 2022)
[2024] KEHC 10135 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E100 OF 2022
GL NZIOKA, J
AUGUST 12, 2024**

BETWEEN

ELIUD WANYOIKE KIERU APPELLANT

AND

PETER MBURU KARANJA 1ST RESPONDENT

KENYA AGRICULTURAL RESEARCH INSTITUTE 2ND RESPONDENT

*((Being an appeal from the decision of Honourable J. Ndeng'eri (SRM)
delivered on 15th December 2022, vide Naivasha CMCC No. 75 of 2019))*

JUDGMENT

1. By a plaint dated 28th January 2019 the plaintiff (herein “the appellant”) sued the defendant (herein “the 1st respondent) seeking judgment for: -
 - a. Kshs 70,202.00;
 - b. Costs of the suit.
 - c. Interest on the above at court rates from 29th April 2018 until payment in full.
2. The claim arose as a result of material damage on the appellant’s motor vehicle that occurred on 29th April 2018 at 12.00pm when the appellants motor vehicle registration No. KBY 231P was involved in a road traffic accident and damaged.
3. It is the appellant’s case that on the material date he was driving the said motor vehicle along Nairobi-Naivasha road. That on reaching at Nyakairo area, the 1st respondent as the 2nd respondent’s agent, servant, driver or employee negligently drove motor vehicle registration No. KBS 745Q, that it veered off the road and collided with motor vehicle registration No. KAL 416A, which in turn collided with his motor vehicle.



4. The appellant avers that, the 1st respondent was negligent by: -
 - a. Driving without due care and attention.
 - b. Failing to keep a proper look out.
 - c. Allowing and/or permitting an accident to occur.
 - d. Causing the said accident.
 - e. Failing to keep distance.
 - f. Failing to brake, stop slow-down and/or avoid the accident.
 - g. Failing to ascertain whether it was safe to overtake and overtaking when it was unsafe to do so.
 - h. Overtaking on a continuous yellow line.
 - i. Veering off its side of the tarmac road and colliding with motor vehicle Reg. No. KAL 416A.
 - j. Causing the accident.
 - k. Res Ipsa Loquitor.

5. That as a result his motor vehicle was damaged on:
 - a. Front right-hand door dented.
 - b. Right hand sliding door buckled
 - c. Right hand side mirror broken
 - d. Front windscreen cracked
 SUBPARA e.
 Driver door pillar bent

6. He avers that his motor vehicle was being used for carrying passenger generating daily net income of Kshs 3,000 and therefore he lost a total of Kshs 9,000, being income for three (3) days when the vehicle was under repair.

7. The appellant indicated the particulars of his claim as follows: -
 - a. Assessor report fees-----Kshs 5,900.00/=
 - b. Records from registrar of motor vehicle---Kshs 550,00/=
 - c. Motor spares part & repairs-----Kshs 54,752.00/=
 - d. Loss of income for 3 days @-----Kshs 9,000/=
 Total-----Kshs 70,202.00/=

8. However the 1st respondent denied liability vide a statement of defence dated 21st February 2019. In a nutshell the 1st respondent averred that, the accident did not occur as alleged, but even if it did, it was caused solely or substantially contributed to by the driver of the motor vehicle registration KAL 416A fwho negligently drove his motor vehicle and caused the accident.

9. That, the said driver was negligent by suddenly changing lanes in order to overtake a lorry and swerved onto the lane on which the 1st respondent's motor vehicle was and as a result both motor vehicles



- collided and thereafter motor vehicle KAL 416A lost control and rammed into the appellant's motor vehicle. As such, the 1st respondent blamed the driver of motor vehicle KAL 416A fully for the accident.
10. Pursuant thereto the 1st respondent served a third-party notice upon the owner of the motor vehicle registration No. KAL 416A. The notice dated; 14th June 2022, indicates that the driver of the motor vehicle for the accident, drove the subject motor vehicle negligently by: -
 - a. Failing to heed the warning of the driver of motor vehicle registration number KBS 745Q.
 - b. Failing to notice the presence motor vehicle registration number KBS 745Q.
 - c. Colliding with motor vehicle registration number KBS 745Q.
 - d. Failing to have regard of other road users and especially motor vehicle registration number KBS 745Q.
 - e. Causing the accident.
 - f. Overtaking when it was not safe to do so.
 - g. Encroaching onto the lawful path of motor vehicle KBS 745Q.
 11. In the meantime the appellant filed a reply to the 1st respondent's defence reiterating what was pleaded.
 12. The matter proceeded to full hearing with the appellant supporting the case by the evidence of PW1 Eliud Wanyoike Kieru the owner of the appellant's motor vehicle, the appellant and PW3 No. 76934 PC Rodgers Wafula who produced the police abstract. The defence did not call any witnesses.
 13. At the conclusion of the trial, the trial court delivered a judgment dated 15th December 2022 wherein the court found the 3rd party fully liable for the accident and absolved the 1st respondent from any blame. The court then awarded the appellant Kshs 7,000 as special damages.
 14. However, the appellant is aggrieved with the decision of the trial court and appeals against it on the following grounds: -
 - a. That the learned magistrate erred in law and fact in holding the 2nd respondent 100% liable in the absence of any evidence supporting such a finding.
 - b. That the learned magistrate erred in law and fact by holding that the evidence adduced did not prove negligence on the part of the 1st respondent
 - c. That the learned trial magistrate erred in law and fact in failing to award all the appellant loss/ damage pleaded and proved
 - d. That the learned magistrate erred in law and fact in writing a judgment which failed to meet the criteria set out in the Civil Procedure Rules.
 15. The appeal was disposed of vide filing of submissions. The appellant in submissions dated; 3rd April, 2023 argued that the trial Magistrate erred in concluding that the 2nd respondent was the registered owner of motor vehicle registration No. KBS 745Q contrary to the evidence produced which showed the 1st respondent was the registered owner. As a result, the trial court arrived at an erroneous finding that absolved the 1st respondent of liability for causing the accident and shifting the blame to the 2nd respondent.
 16. Further, the trial Magistrate erred in awarding special damages of Kshs 7,000 contrary to the receipts produced showing a total sum of Kshs 61,202, which amount the 1st respondent admitted was proved.



He urged the court to set aside the award of Kshs 7,000 and substitute it with an award of Kshs 61,202 as special damages.

17. However, the 1st respondent in submissions dated 2nd May 2023 argued that the 2nd respondent was responsible for causing the accident and that he filed a third-party notice against it but the 2nd respondent failed to enter appearance and/or file a defence and therefore the 1st respondent's averments were uncontroverted.
18. Further, that it was the evidence of the appellant and his driver that there was no contact between the appellant's motor vehicle and the 1st respondent's motor vehicle and therefore any damage to the appellant's motor vehicle was occasioned by collusion with the 2nd respondent's motor vehicle registration No. KAL 416A. That the 1st respondent was not the tortfeasor thus the trial court correctly held the 2nd respondent 100% liable.
19. On the issue of special damages, the 1st respondent submitted that they must be specifically pleaded and proved. That, the appellant failed to provide proof of the repair costs to the trial court and thus the trial court cannot be blamed for not awarding what was not proved. However, he urged that if the court is to find that special damages of Kshs. 61,202 as supported by the court's record and against the 2nd respondent.
20. At the conclusion of the hearing of the appeal, I have considered the appeal in the light of the material place before the court. The main question to determine is whether the trial court erred in holding the 2nd respondent liable at 100% and fully exonerating the 1st respondent from blame.
21. In that regard, I note that, the appellant sued the 1st respondent not the 2nd respondent. Hence the liability of the 2nd respondent was premised on the finding of the trial court on the liability of the 1st respondent.
22. Further, from the evidence in chief of PW2 Moses Mwaura, who was driving the appellant's motor vehicle was that, the 1st respondent's motor vehicle registration No. KBS 745Q was overtaking other motor vehicles and being driven on the middle lane reserved for motor vehicle going uphill. That it collided with the 2nd respondent's motor vehicle registration No. KAL 416A which was being driven in the middle lane. That, the Isuzu trooper was thrown on the lane on which the appellant's motor vehicle was being driven and collided with the appellant's motor vehicle registration No. KBY 231P.
23. The witness reiterated in the statement filed in court and adopted as his evidence in chief, the particulars of negligence attributed to the 1st respondent.
24. It is noteworthy that, the 1st respondent did not adduce any evidence to rebut the evidence adduced by the appellant against him, as such the 1st respondent cannot have been fully absolved from blame.
25. Furthermore, the defence filed by the 1st respondent blamed the 2nd respondent cum driver of the motor vehicle KAL 416A for the accident and issued a third party notice, therefore, the 1st respondent is the only party who could enforce a claim against the 2nd respondent. The liability between the 1st and 2nd party ought to have been canvassed before the court could hold who among the 1st and 2nd respondent was to blame and the degree of liability. That was not done. At least it is not reflected in the trial court's judgment.
26. In absolving the 1st respondent from liability the trial court stated in brief that:

“The court analyzed the evidence that was tabled before it. With regard to liability, the court established from evidence that, though the vehicle that actually hit the plaintiff's vehicle



was KAL 416A, the cause of the accident was the negligent driving by the driver of motor vehicle registration KBS 745Q. The court thus absolves the defendant of any negligence in the accident. The third party is thus found liable at 100%.”

27. However, the afore finding does not elaborate how the evidence was analyzed to lead to the exoneration of the 1st respondent. Consequently, I find and hold that, the trial court’s finding that the 3rd party was liable at 100% was not well founded on the evidence adduced and thus erroneous.
28. I further find that, the appellant’s evidence against the 1st respondent was not rebutted. As such, I set aside the trial court finding on liability and I hold the 1st respondent 100% liable. The 1st respondent is at liberty to pursue third party claim against the 2nd respondent. This court cannot make a finding thereto as that issue was not canvassed in this appeal.
29. As regards the special damages, the trial court made an award based on three (3) receipts amounting to Kshs 7,000. The trial court decision does not identify those particular receipts. As such this court cannot appreciate how the sum of Kshs 7,000 awarded was arrived at.
30. I have considered the pleadings, the appellant stated that, there were a total of eight (8) documents annexed to the PW1’s statement witness. Document No. 3 is a receipt from AA Automobile Association of Kenya, for a sum of; Kshs 5,900 at page 24 of the Record of Appeal. Document 6 is a receipt from NTSA for a sum of Kshs 500 at page 23 of the Record of Appeal. Document 8 are receipts from Glory breakdown Services in the sum of Kshs 16, 900 and Triplati Auto Parts in the sum of Kshs 37, 852 page 25 of the Record of Appeal.
31. However, in ascertaining why the trial court did not take note thereof, I realize that, these receipts at page 25 of the Record of Appeal are not in the trial court’s proceedings.
32. But even then the receipts in the trial court’s record are only two in the sum of Kshs 5,900 and Kshs 500. They do not add to Kshs 7,000 awarded.
33. To convolute the matter, I note that, the 1st respondent in his submissions in the trial court submitted that; “the plaintiff’s claim should thus be Kshs 61,202 against the third party”. Earlier on the 1st respondent submitted that, “the documents filed by plaintiff proved stated costs. The same can be awarded against the third party being the tortfeasor”. The afore submission were made under a heading of “accessors report fees, records from registrar (sic) of motor vehicles, motor spare parts and repairs”.
34. However, the judgment by the trial court did not deal with the said submission, therefore I find and hold that, the figure of Kshs 7,000 awarded as special damages was not explained and/or supported by evidence.
35. Both parties to the matter do agree there were receipts amounting to Kshs 61,202. In that regard I set aside a sum of Kshs 7,000 awarded by the trial court and substitute it with a sum of Kshs 61,202. The costs of the suit in the trial court, the interest thereon at court rate from the date of filing suit until payment in full are awarded to the appellant. However, each party shall bear the costs of the appeal.
36. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 12TH DAY OF AUGUST, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:



Mr. B.G Wainaina for the appellant

Mr. Safari for the respondent

Ms Ogutu: court assistant

