



**Onsongo & another v Mcharo (Civil Appeal E241 of 2023)
[2024] KEHC 11327 (KLR) (Civ) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11327 (KLR)

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

CIVIL

CIVIL APPEAL E241 OF 2023

JM OMIDO, J

SEPTEMBER 27, 2024

BETWEEN

KENNEDY ONSONGO 1ST APPELLANT

REHEMA ACADEMY & COMPUTER SCHOOL 2ND APPELLANT

AND

GRACE WANJALA MCHARO RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Judith Omollo, SRM & Adjudicator delivered on 22nd March, 2023 in 27th September, 2019 in Milimani SCC No. E910 of 2022)

JUDGMENT

1. This appeal was preferred by Kennedy Onsongo and Rehema Academy & Computer School (hereinafter referred to as “the 1st and 2nd Appellants” respectively, or “the Appellants”), against the judgement and decree of Hon. Judith Omollo, Senior Resident Magistrate & Adjudicator delivered on 22nd March, 2023 Milimani SCC No E910 of 2022.
2. In the matter before the lower court, the Respondent herein was the Claimant while the 1st and 2nd Appellants were the 1st and 2nd Respondents respectively.
3. The nature of the claim before the lower/trial court was one of tortious liability. In the filed Amended Statement of Claim dated 8th July, 2022, the Respondent sought the following reliefs;
 - a. Judgement in the sum of Kshs 158,310/-.
 - b. Compensation (to be determined by the court).
 - c. Costs of the Claim (to be assessed by the court).



- d. Other appropriate relief.
 - e. Interest on the liquidated sum of Kshs 158,310/- at court rates.
4. The Claim was resisted by the Appellants who filed an undated joint Response to the Amended Statement of Claim wholly denying liability and seeking that the same be dismissed with costs.
 5. After hearing the matter, the trial court entered judgement in favour of the Claimant and against the Appellants jointly and severally as follows:
 - a. Liability 100%.
 - b. Special damages Kshs 158,310/-.
 - c. Costs.
 - d. Interest at court rates from the date of filing the suit until payment in full.
 6. Being aggrieved with the judgement of the trial court and the above findings, the Appellants presented the following grounds of appeal vide their Memorandum of Appeal dated 28th March, 2023:
 1. That the learned trial Magistrate erred in law and in fact in entirely allowing the Claimant's claim.
 2. That the learned trial Magistrate erred in law and in fact in arriving at a finding that the Claimant had proved her case.
 3. That the learned trial Magistrate erred in law and in fact in arriving at a decision that the Claimant had proved her case specifically.
 4. That the learned trial Magistrate erred in law and in fact in arriving at a finding that the Claimant was entitled to a sum of Kshs 158,310/= when most of it had not been proved specifically.
 7. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
 8. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
 9. Going to the evidence before the trial court, the Respondent testified as CW1 and adopted the contents of her statement dated 12th April, 2022 as her testimony.
 10. In her statement, the Respondent stated that on 19th February, 2020, she was driving her motor vehicle registration number KCP 504V and as she proceeded to join Bunyala Road roundabout from Uhuru Highway, the 1st Appellant, while driving motor vehicle registration number KBU 408C from



Industrial Area direction joined the inner lane while on the roundabout thus hitting the Respondent's vehicle on the front right side.

11. That as a result of the accident, the Respondent's vehicle was damaged on the right headlamp, wing and bumper. A police officer attended to the scene and took police action. The Respondent's vehicle was then taken for repairs.
12. Upon being cross examined, the Respondent blamed the 1st Appellant for causing the accident, stating that the 1st Appellant joined the roundabout and changed lanes from the outer to the inner lane when Respondent's vehicle was already on the roundabout.
13. The Respondent called Police Constable Dennis Mwaniki Mwathi, a traffic police officer as CW2. The witness testified before the lower court and stated that the accident in question occurred on 19th February, 2022 and that he attended to the scene. The officer stated that police investigations revealed that the 1st Appellant was wholly to blame for the accident for the reason that he abruptly changed lanes on the roundabout.
14. The officer produced a police abstract that was issued following the accident.
15. The Claimant called as CW3 a witness who identified himself as John Nicholas Mwangi, a Claims Officer working with Inter Africa Insurance Company Limited as CW3. The witness adopted the contents of a statement dated 8th July, 2022. It is instructive from the record that the statement bears the name of John Ndichu as the author.
16. In the statement, it is stated that motor vehicle registration number KCL 634N was insured by Intra Africa Assurance Company Limited ("the insurer"). It is further stated that the following the occurrence of the accident, the insurer instructed Safety Surveyors Limited ("the assessor") to assess the extent of the damage and the assessor prepared a report to that end. The assessor charged Kshs 6,380/- for the report.
17. That thereafter, the insurer instructed Golden Autobody Limited to undertake the repairs, which cost Kshs 104,980/-, which the insurer paid. That the insurer expended a further Kshs 46,400/- on account of tracing the owners of motor vehicle registration number KBU 408C.
18. Having perused and considered the Memorandum and Record of Appeal, the lower court record and the submissions by the parties, I note that the single issue that is challenged in this appeal is the award of special damages totaling Kshs 158,310/-, costs of the suit and interest on both. In particular, under the head of special damages, the Appellant challenged the trial court's findings that led to the award of special damages, urging that the same were not specifically pleaded and proved:
19. Under the above head, the Appellant urged that no receipts were produced to prove that the various respective broken-down amounts thereunder were expended by the Respondent and that the court should therefore not have awarded the same, as the same were not proved by production of receipts.
20. To begin with, there is no dispute that an accident did occur involving the two vehicles belonging to the Appellants and the Respondent and that the learned trial Magistrate's finding on liability is not questioned in this appeal.
21. The issue then that I am to determine is whether the learned trial Magistrate erred by awarding the claim for special damages for the various items totaling Kshs 158,310/-, where no receipts were produced by the Respondent.
22. I will take guidance from case law on the matter.



23. In the case of *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013] eKLR the Court of Appeal referred to the authority of *Kenya Industrial Industries Ltd v Lee Enterprises Ltd* [2009] KLR 135 where it was stated as follows:

“Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction.”

24. In the Court of Appeal decision of *Nkuene Dairy Farmers Cooperative Society Ltd & another v Ngacha Ndeiya* [2010] eKLR, the court rendered itself thus:

“In our view special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent’s vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty.”

25. The same court in the case of *David Bagine v Martin Bundi* [1996] eKLR, in asserting the probative value of an assessor’s report in a material damage claim, reiterated that:

“The Assessor’s report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent’s claim”.

26. There is also the case of *Silas Mutua Mberia v Muthoni Njue Veronica* [2021] eKLR where the High Court observed as follows:

“It is thus clear that the Appellant only needed to prove the extent of the damage to his motor vehicle and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. It must always be remembered that the balance of proof on the Appellant was at all times on a balance of probabilities and not higher. The claim by the Appellant was not for an expense already incurred but a claim to restore his damaged motor vehicle to its pre-accident state. The value of the damage was assessed and a report produced in evidence. It was therefore not necessary to demonstrate that indeed the costs of repairs were incurred, because the report was sufficient proof on a balance of probabilities.

I find that the trial court erred in dismissing the Appellant’s claim for special damages on account of damage to the motor vehicle when there was tendered uncontroverted evidence in the assessment report produced by the assessor.”

27. The court went on to conclude as follows:

“.....in conclusion, the appeal is allowed, the decision of the trial court disallowing the special damages claim is set aside and in its place substituted a judgment in the sum of Kshs 250,000/- being the loss occasioned to the Appellant by the Respondent’s tortious conduct.”



28. The jurisprudence that emerges from the authorities that I have referred to above (which include those of the Court of Appeal which bind this court) is that in a material damage claim which is a claim for special damages, a claimant does not necessarily have to produce receipts to prove that he expended monies in repairs and that an assessor's report suffices as proof of the claim. This court reaches a finding, therefore, that the Respondent proved on a balance of probabilities, vide the assessor's report which was produced as an exhibit, the special damages totaling Kshs 158,310/-.
29. On interest, the law generally provides that in respect of special damages, the same accrues from the date of filing suit. I therefore order that the interest on the amount of Kshs 158,310/- shall accrue at court rates from the date of filing the claim/suit.
30. Being of the foregoing persuasion, I find that the appeal herein lacks merit. I proceed to dismiss it with costs to the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 27TH DAY OF SEPTEMBER, 2024

JOE M. OMIDO

JUDGE

For the Appellants: Mr. Onindo.

For the Respondent: Mr. Ochieng'.

Court Assistant: Ms. Njoroge.

