



REPUBLIC OF KENYA



**Karoki v Githiri (Civil Appeal 23 of 2020)
[2024] KEHC 13954 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13954 (KLR)

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

CIVIL

CIVIL APPEAL 23 OF 2020

BK NJOROGE, J

SEPTEMBER 26, 2024

BETWEEN

PATRICK MWANGI KAROKI APPELLANT

AND

PAUL WAMBUGU GITHIRI RESPONDENT

JUDGMENT

1. This Appeal arises out of the Judgement delivered by Hon. J.M. Macharia (P.M) dated 20/5/2020 in (Nyeri) CMCC NO. 357 of 2017. A reading of the Memorandum of Appeal shows that what is challenged is the decision on quantum. The Appellant does not challenge the decision on liability. The Appeal therefore challenges only a portion of the Judgement of the Trial Court.
2. This Appeal is in respect of a material damages claim arising out of a road traffic accident.
3. The Appellant who was the Plaintiff filed suit against the Respondent, then the original Defendant before the Trial Court. He sought the following reliefs:
 - a. Special damages of Kshs.107,050/-
 - b. Costs and interests on (a) & (b) above.
 - c. Any other relief this Honourable Court may deem just to grant.
4. The Trial Court found that the Appellant had not proved the repair costs of Kshs.97,500/-. It proceeded to deny that portion of the claim. It also awarded the Respondent 75% of the costs of the Suit. The Court did award the Appellant the costs of valuation of Kshs.9,000/-. It dismissed the claim for Kshs.550/- being fees on the copy of motor vehicle records. It is the failure to award the claims for repairs of Kshs.97,500/- that has triggered this Appeal.



The Background facts

5. The pleadings filed show that the Appellant was a passenger in his own motor vehicle KCF 907A a Toyota Hiace Matatu. It was said to have been driven from Nyeri town towards Mweiga. The Respondent's motor vehicle KBM 211Z a Toyota Probox was said to have been driven from Mweiga towards Nyeri. This is along the Nyeri – Nyahururu Road. It was said that the Respondent's motor vehicle was attempting to overtake along the said road, on the face of on coming motor vehicles. It left its left lane and veered into the lane occupied by the Appellant's motor vehicle. This resulted into a collision on the lane occupied by the Appellant's motor vehicle. For failing to keep to his left lane and attempting to overtake in a reckless manner the Appellant held the Respondent liable in negligence.
6. The Appellant testified and called a Police Officer who produced the Police Abstract as exhibit No.1. The Police charged the Respondent's driver. However, as witness did not attend Court, the charge of reckless driving could not be sustained. PW3 a Valuer produced a Vehicle Accident Assessment Report by AA Automobile Association of Kenya. The Appellant closed his case. The Respondent did not call any evidence and closed the case. Parties filed their written submissions. The Trial Court delivered a Judgment, now the subject matter of the Appeal.

Issues for determination

7. The Court has noted the Record of Appeal which raises Five (5) Grounds. The main thrust of the Appeal is on the manner in which the Trial Court handled the issue of proof of special damages of Kshs.97,500/-. The other issue is the manner in which the costs were awarded.
8. The Court therefore proceeds to frame two issues for determination in the Appeal as follows;
 - a. Is the Appeal merited?
 - b. What orders should lie in this Appeal?
9. The Court has noted that this matter was flagged down for the Rapid Results Initiative (RRI) for the Month of June, 2024. Directions as to the filing of submissions was given on 18.04.2023. The Court notes that both parties have filed their respective written submissions dated 7/7/2023 and 29/9/2023.

Analysis

10. This is a first Appeal. The Court is reminded of the duty to re-look, re-analyse and re-consider the evidence produced before the Trial Court. The Court should evaluate the evidence and draw on its own conclusion. This is all the while bearing in mind that it did not see any for the witness. *Selle & another -vs- Associated Motor Boat Co. Ltd* [1968] 123 E.A applies.
11. The Court also reminds itself that it should not disturb the award of damages unless it is so inordinately high or low as to represent entirely erroneous estimate. Or it is shown that the trial Court proceeded on the wrong principles or misapprehended the evidence in some material aspect. See *Bashir Ahmed Butt -vs- Uwais Ahmed Khan* [1982-88] KAR 5.
12. Lastly the Court will not interfere with the discretion of the Trial Court merely for the reasons that it would have arrived at a different figure. See *Butt v Khan* [1981] KLR 349.
13. The Court proceeds to apply the above principles to this Appeal in answering the two issues framed.



a. Is the Appeal merited?

14. As previously stated, the Trial Court dismissed the Appellant's claim for special damaged of Kshs.97,500/- being the costs of spares. The fees of Kshs.550/- for obtaining copy of records of the motor vehicle (search fees) were also dismissed. To the Trial Court, no evidence was led to show that these expenses were incurred.
15. As there was no receipt produced to show that the Appellant paid a sum of Kshs.550/- for the copy of records. The Court agrees that this expense was not proved.

On Special Damages of Kshs.97,500/-

16. The Appellant relied on an invoice dated 7/5/2017 from Chand Auto Spares. It was referred to as a receipt on the Appellant's list of documents. It was listed as item no. 4. It was produced by the Appellant without any objection by the Respondent as exhibit No. 4. The Respondent's Counsel did not cross examine the Appellant on the veracity or authenticity of the document.
17. The Respondent took up the objection in his submission dated 6/7/2020. The objection taken was that this was an invoice and not a receipt. Hence, it could not prove special damages. The Trial Court was referred to *Zacharia Njoroge Thumbi -vs- Samuel Njoroge Thuku HCCCA No. 445 of 2003*; Great Lakes Transport Co. (U) Ltd and Kenya Revenue Authority [2003] eKLR 720. The Trial Court followed *Total (Kenya) Limited -vs- Janevams Limited [2015] eKLR*; *Abscar Motors Limited -vs- Dominic Onyango Kadidi [2018] eKLR* and *David Bagine -vs- Matui Bundi*. What these decisions amplify is that special damages must strictly be proved. That an invoice is not proof of payment.
18. The Court has looked at the document from Chand Auto Spares identified as exhibit No. 4. It bears the name invoice and a date 7/5/2017. It also bears two rubber stamps by Chand Auto Spares of 7/5/2017 marked "paid". For emphasis the two stamps appear at the top and the bottom of the invoice. The amount reflected is Kshs.97,500/-.
19. The Appellant submits before this Court that the stamps marked "paid" converted the invoice into a receipt.
20. The Court has been referred to the case of *Guardian Coach Ltd & another vs- Kiptoo (Civil Appeal 34 of 2020)* (2022) KEHC 12397 (eKLR) (26th May, 2022) and *Great Lakes Transport Co. Ltd -vs- Kenya Revenue Authority [2009] eKLR*. These two authorities do clarify that an invoice cannot be a receipt. However, once it is endorsed as paid, it becomes proof of payment. This Court is alive to the custom of tradesmen/women and businessmen stamping invoices as "paid" or "settled" to negated the need for a further receipt. The Court also considers the following authorities *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams*; *Space Geo Enterprises Limited v Kenya National Highways Authority [2023] eKLR* and *Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] eKLR*
21. The Trial Court ought to have given more consideration to the invoice and note that it had been endorsed as "paid". Having been paid, then the document was sufficient proof of the Appellant's expenses for the repairs. To this Court that aspect of special damages had been proved on a balance of probabilities.
22. Having failed to consider the evidence of "paid" on the invoice, the Trial Court fell into an error and arrived at the wrong decision. Hence the Court is entitled to interfere.



On Costs

23. The Court notes that the Trial Court did not make a finding on liability, though the case hinged on the Appellant proving liability against the Respondent.
24. In as much as the trial Court did not state that it finds the Respondent 100%, all the evidence points to the Respondent being liable at 100%. The evidence of the Appellant on how the accident occurred was not controverted. No witnesses were called by the Respondent to present a different version of how the accident happened.
25. There is no cross-Appeal by the Respondent.
26. The Respondent having been found liable wholly, the general principle of the law is that costs follow the event. Costs are also awarded at the discretion of the Court.
27. This means that the Court may decline to award costs or reduce the same but in doing so it must act judicially. A party may conduct itself during a trial in such a manner that it may be found to be undeserving of costs. An example is failing to comply with Court's directions which leads to delay in finalization of a case.
28. It is not clear why the Trial Court was directing the Respondent to be paid 75% of the costs, yet they were the tortfeasors. The liability had not been apportioned at 15%:75%.
29. This Court having found the Respondent 100% liable also find that he is liable to pay the costs of the suit before the Trial Court.

b. What orders should lie in this Appeal?

30. The Court proceeds to allow the claim for repairs of Kshs.97,500/-. The costs of the suit in the Court below being the Trial Court are awarded to the Appellant. The cost of the Appeal should be borne by the Respondent. The Appeal therefore succeeds.

Determination

31. The Appeal succeeds to the following extent.
 - a. Liability in the matter before the Trial Court is assessed at 100% against the Respondent.
 - b. The Judgment of the Trial Court dismissing the Appellant's claim for special damages of Kshs.97,500/- is set aside and replaced with an order allowing the same.
 - c. The Judgment of the Trial Court is therefore substituted with a Judgment as follows;
 - i. Liability 100% against the Respondent
 - ii. Special damages costs of auto spares Kshs. 97,500.00
Fees on valuation Kshs. 9,000.00
Total Kshs.106,500.00
 - d. The costs of the trial before the Trial Court are awarded to the Appellant.
 - e. The costs of the Appeal are awarded to the Appellant.
32. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

Court Assistant:

