



**Kahura v Wangui & another (Civil Appeal E1447 of 2023)
[2024] KEHC 16233 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E1447 OF 2023
LP KASSAN, J
DECEMBER 19, 2024**

BETWEEN

GEOFFREY KIHANYA KAHURA APPELLANT

AND

DAMARIS WANGUI 1ST RESPONDENT

PETER MUCHENE 2ND RESPONDENT

((Being an appeal from the Judgment delivered by the Honourable Linda Kananu (RM) on 14th December 2023 in Milimani SCCC No. E2710 of 2023))

JUDGMENT

1. This is an appeal from the decision of Hon Linda Kananu dated 14th December 2023 in Milimani SCCC 2710/23 in which the learned Magistrate awarded material damages. I have read the proceedings and taken into account all relevant factors including submissions and authorities. To dispose off this appeal, I shall note the following;

1. Right of Appeal

Section 38(1) of the small claims Act.

This section stipulates that a person aggrieved by the decision or an order of that Court may appeal against the decision or order to this Court on Matters of Law. This Section has generated a flurry of interpretation which I shall address as follows;

a. Is liability a matter of fact or law

Determination of liability requires taking into account both factual evidence and matters of Law. Factual evidence constitutes the evidence of eye witness, exhibits produced in court or generally the circumstances leading to the accident. On the other



hand, there are legal requirements that one must take into account when apportioning liability such as the traffic rules which are matters of Law. For example, a case of not giving way or causing obstruction is a matter of law with specific provisions in the *Traffic Act*. An Appeal against an award of liability can be said to be both factual and lawful because it begins with the fact, the real evidence on what occurred before it is finally tested with clear provisions of the Act. In other words, these facts must fall in line with the law as it cannot stand alone. If the lower Court does not align facts with the law, the High court has jurisdiction to tamper its findings by looking at what the law says. If the High Court was to rule that it cannot interfere with the Lower Court's apportionment of liability, then the right of appeal shall be a mirage in small Claims Courts even though it is a fundamental right. In fact, there would be unnecessary discrimination of cases based on their value such that one with a claim above one million will have a right of appeal while the other whose claim is below one Million will not have recourse to the High Court. What then would be the basis of this discrimination? For me I do not think that this is what the legislatures envisaged. It would be tantamount to according a small Claims court the Status of the Court of Appeal or even the Supreme Court.

b. Award of damages

Again damages are awarded based on the evidence in Court but it is noteworthy however that an award of damages must also align itself with the Law. For example, where general damages are awarded, "Common Law" must be taken into account. Courts do not just award damages without taking into account Common Law. The high Court being a Superior Court has Jurisdiction to ensure that the awards are lawful and not excessive or below. I have looked at the Claim and noted that it is a material damage. The Law whether Common or statutory Law requires that it must be specifically pleaded and proved. This therefore is both a matter of law and facts. What if for example the Lower Court awarded damages that were not pleaded and proved, would it not be a matter of Law or both factual and Law? What would be the recourse for a litigant contesting this issue if it is branded only factual that cannot be appealed against? The aftermath of this is that appeals lies to the High Court.

2. The evidence :

I have read the learned Magistrate's analysis leading to determination of liability and damages. This judgement is a clear outcome of the evidence tendered during hearing. The highlights of the evidence adduced to determine liability have three key areas- the fact that the Plaintiff's motor vehicle was hit from the rear end and which is not denied by all witnesses, Police abstract blaming the third party (duly produced as exhibit) and the testimony of two eye witnesses as to wit:- the plaintiff and the third party. The only evidence that attempted to mount albeit a feeble challenge to the Plaintiff's testimony is that of the third Party witness who said in parts of his testimony as follows and I quote

“At Marumi Junction KCK 922 blocked KCL ". " the two motor vehicles were being driven carelessly". “The driver of Motor vehicle KCL 440P came out and was staggering". "you should keep distance".

what is emerging from this excerpts are that the witness is attempting to blame both drivers for careless driving at a point while at the same time blaming the Plaintiff for blocking the road. This inconsistency creates credibility issues. By admitting that the accident occurred



at a junction and that the Plaintiff car was hit from behind, the witness appears to be directly blaming the driver of the third Party. This is because normally, cars slow down when approaching Junctions. The witness said that the Plaintiff got out of the vehicle while "staggering". No one gave evidence to the effect that the act of "staggering" was as a result of drug/alcohol abuse or the effects of being involved in an accident which is possible because sometimes people who sustain injuries stagger outside their vehicles. This coupled with lack of medical evidence and shadow of credibility manifested in the Third Party's evidence works against the Third Party in a fair trial.

I do not need to emphasize that Material damages were proven solidly. All exhibits were produced in Court. No contrary evidence to wrestle the said prove.

3. The determination
2. The fate of this appeal is properly determined. The Appeal is dismissed with costs.
Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024.

L. KASSAN

JUDGE

In the presence of:

Amandi holding brief Wayayi for Applicant

Njoroge for Respondent

Carol – Court Assistant

COURT

Stay 30 days

L. KASSAN

JUDGE

