



**Njoroge v Njuguna (Civil Appeal 104 of 2019)  
[2023] KEHC 84 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 84 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 104 OF 2019  
RB NGETICH, J  
JANUARY 19, 2023**

**BETWEEN**

**SIMON PETER NJOROGE ..... APPELLANT**

**AND**

**MICHAEL KIMANI NJUGUNA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's court at Thika by Hon N. M. Kyanya Nyamori in Cmcc No. 934 of 2016)*

**JUDGMENT**

1. This appeal arises from a suit filed by the Respondent in the trial court seeking liquidated sum of kshs 325,020.00 resulting from an accident which occurred on February 13, 2016 involving plaintiff's motor vehicle registration number KYZ 240 and the Appellant/Defendant's motor vehicle registration number KAJ 865L. Record show that at the time of the accident, each of the two parties were registered owner and driver of their respective vehicles.
2. After hearing, the trial court judgment delivered on June 26, 2019 finding the defendant wholly liable for the accident and awarded the plaintiff special damages of Kshs 301,020. Kshs 5,000/= as costs for procuring the attendance of PW2 and interest on special damages for the repairs at court rates from the date of filing until payment in full; plus, costs of the suit.
3. The appellant who was the Defendant before the trial court was aggrieved by the trial court's judgment and lodged a Memorandum of Appeal dated July 3, 2019 and filed on the even date, raising the following grounds: -
  - a. That the learned magistrate erred in law and in fact in awarding anticipatory loss.
  - b. The Learned Magistrate misdirected herself in law and in fact as a regarded liability as the plaintiff offered no evidence as to how the vehicles were driven.



- c. The Learned Magistrate misdirected herself in the probative value of the evidence PW2 the police officer and therefore arrive at the wrong decision.
  - d. The Learned Magistrate misdirected herself in questioning the abstract produced by the appellant when its production was not objected to.
  - e. The Learned Magistrate misdirected herself in equating estimate reports to special loss incurred.
4. He urged the court to set aside the lower court’s judgment and substitute with orders dismissing the suit and awarding costs to the appellant.
  5. The court directed that the appeal be heard by way of written submissions. Both parties filed written submissions.

### **Appellant’s submissions**

6. Ms Waithera, counsel for the appellant filed submissions on December 3, 2021 and submitted in four (4) folds:
7. On ground that the Learned Magistrate erred in awarding anticipatory damages, counsel submitted that the Respondent has not incurred the expenses of repairing the motor vehicle and the trial court erred in awarding anticipatory damages; and cited the case of *Society of Sacred Heart v Mary K Odemu* (2002) eKLR where the court held as follows: -
 

“One cannot be compensated for a loss he has not incurred and one cannot be said to have incurred a loss by producing documents which give proposition of what he/she expects to incur at some future date. Otherwise, a claim in anticipation of loss is not in conformity with strict proof required in case of special damages.”
8. Counsel further submitted that special damages must be pleaded and proved and stated that the Respondent has not incurred any expenses and no proof of the expenses was adduced and submitted that the trial Magistrate acted in excess of her jurisdiction in awarding reliefs not pleaded or canvassed during the trial
9. On whether the trial Magistrate misdirected herself on the facts and law as regards liability, Counsel submitted that in the trial court, the Respondent failed to particularize the evidence or testify on how the accident occurred; that the negligence of the driver was not proved and the allegation remained a mare statement and the testimony of the appellant at the trial court was neither challenged by any documentary evidence and/or testamentary evidence.
10. On whether the Learned Magistrate misdirected herself on the probative value of prosecution PW2’ s evidence, counsel submitted that PW2 the police officer who produced the P3 form admitted that in light of Two (2) conflicting abstracts, it is only the investigating officer who could clarify the circumstances of the accident and the Magistrate erred in discrediting the P3 form adduced by the Appellant.
11. In conclusion, counsel submitted that assessment reports cannot be equated to special loss and during hearing at the trial court, the appellant proved the Respondent caused the accident. The Applicant urged this court to allow the appeal.



## Respondent's submissions

12. Counsel submitted that it is the Respondent/Plaintiff's responsibility to bring proof of the repairs he would have been forced to undergo to return his car to his original state. The obligation was fulfilled by the assessor's report whose estimated costs of repair was Kshs 301,020/= and cited the case of [\*Julius Kariuki Kimani v Evanson Kariuki\*](#) (2021) Eklr where the court held as follows: -

“the party claiming special damages must prove that they made the payments or suffered the specific injury before compensation will be permitted or otherwise demonstrate with the permitted degree of certainty what loss or the amount he will suffer in the future.”
13. Further, the High Court in Naivasha in [\*Gerda Maria Simon v Global Trucks Limited\*](#) (2020) Justice Richard Mwongo faulted the trial court for finding that the assessor's report was not sufficient evidence of material damage.
14. Counsel further submitted that it proved at trial the Appellant was to blame for the accident by adducing the police abstract and calling an assessor who indicated that the respondent would incur Kshs 301,070/= to repair the vehicle and evidence of Pw2 was to shed light on the question of liability in support of the Plaintiff/Respondent's case.
15. Counsel submitted that the suit is a material damage claim for which special damages need not have been incurred; one is required to show the material damage occurred. He cited the case of [\*Silas Mutua Mberia v Muthoni Njue Veronica\*](#) (2021) eKLR where the court held that the claim was not for an expense already incurred but a claim to restore the damaged car to its pre-accident value. He urged this court to dismiss the appeal with costs.

## Analysis and determination

16. I have considered the grounds of appeal, the submissions filed and the trial court's record. This being the first appeal, I am obligated to re-evaluate the evidence of the trial court and come up with my own conclusion. I am however minded of the fact that unlike the trial court, I did not have the chance to hear witnesses and observe their demeanor, for this I give due allowance. This position was held in the case of *Selle & Another v Associated Motor Board Company Ltd* [1968] EA 123, where the court held as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
17. Record show that during hearing in the trial court, PW1 Michael Kimani Njuguna informed the court that he had not repaid the motor vehicle but he had engaged the services of an assessor. He stated the motor vehicle was assessed at Makongeni Police Station. He pointed out he did not witness the accident but his driver informed him of the accident.
18. Pw2 Pc Charles Mwandime from Thika Police Station produced the abstract dated February 20, 2016 of OB no 5/12/12/16 filed for KWZ 240 Mitsubishi Canter. According to the abstract, the driver of motor vehicle KAJ 865L was blamed for the accident. He denied ever seeing the abstract adduced by the Defendant



19. DW1 Simon Peter Njoroge adopted his witness statement, he blamed the driver of KYZ for the accident, he states his vehicle was damaged and he conducted the repairs.
20. What I consider in issue is whether the trial court erred in awarding costs of repairs to the Respondent.
21. The appellant has faulted the trial court for allowing special damages for repair of the motor vehicle based on the assessor's report yet payment was not proved. The Respondent contends that the assessor's report is evidence of the amounts to be incurred during the motor vehicle's repair.
22. The court of appeal in the case of *Nkuene Dairy Farmers Co-operative Society & Anor v Ngacha Ndeiya* (2010) eKLR, the court held:-

“In our view, special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage was complained of. An accident assessor gave details of the damaged parts of the respondent's vehicle. Against each item, he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”
23. Claim filed by the Respondent in the trial court was a material claim; what the Respondent needed to prove was the damage caused on his motor vehicle KYZ240, not the expenses already incurred in repairing the motor vehicle. The Respondent proved damage to the motor vehicle through the abstract and the assessor's Report.
24. It is trite law that the appellate court will interfere with the decision of the trial court only when the award was inordinately too high or too low, or where the court applied the wrong principles to as represent an erroneous estimate as was held in the case of *Butt v Khan* (1938) KLR.
25. In the instant appeal, I find the trial court's decision to award the Respondent special damages on account of damage to the Motor vehicle KYZ240 was proper. From the foregoing I see no merit in the appeal.
26. Final Orders:
  1. This appeal is hereby dismissed
  2. Costs to the Respondent.

**JUDGMENT** delivered, dated and signed virtually at **Kiambu**

**This 19<sup>th</sup> day of January, 2023**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of**

Martin – Court Assistant

Ms. Waithira Mwangi for Appellant

Mr. Macharia holding brief for Mr. Kariuki for Respondent

