David v Teacher Service Commission (Civil Appeal E031 of 2021)
[2023] KEHC 1850 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E031 OF 2021

RK LIMO, J

FEBRUARY 28, 2023

BETWEEN

MWALIMU DAVID ..... APPELLANT

AND

TEACHER SERVICE COMMISSION ..... RESPONDENT

(Appeal arose from the Judgement of Hon. I.G. Ruhiu delivered on 29th April, 2021 vide Mwingi Principal Magistrate Courts Civil Case No. 36 of 2018)

JUDGMENT

1. This Appeal arose from the Judgement of Hon. I.G. Ruhu delivered on 29th April, 2021 vide Mwingi Principal Magistrate Courts Civil Case No. 36 of 2018.

2. In that case, the Respondent had sued the Appellant as the owner/driver of motor vehicle registration No. KAU xxx D for causing an accident where the Respondent's Motor Vehicle Registration No. GKB xxx F was damaged forcing the insurance to pay Kshs. 366,570 for repairs.

3. The Respondent had pleaded in its claim that the Appellant's driver was negligent in the manner it managed motor vehicle Registration Number KAU xxxD thus causing the accident.

4. The Appellant on the other hand, blamed the Respondent's driver pleading inter alia that it was speeding and rammed its motor vehicle from behind.

5. The following is the evidence tendered at the trial.

6. The driver of the Respondent Motor Vehicle Registration No. GKB xxxF testified that he was driving from Nairobi to Wajir and on his way he drove behind a lorry at night hours. He testified that the Appellant's motor vehicle which was a lorry was ahead of him and that he indicated that he was overtaking as the road was clear adding that as he overtook, the appellant's driver drove into his lane and rammed on his front part causing the accident. He testified that the driver did not stop but he had

taken down the Registration No. of the lorry and went to Bangale Police Station to report. He testified that he did not find the lorry on reaching the Police Station adding that the lorry driver had driven into the bushes in an attempt to hide.

7. He denied the Appellant's suggestion that he hit the lorry from the rear adding that, his headlights were on and had made two prior attempts to overtake the lorry but every time he tried, the driver would drive onto his lane to block him. He testified, had he hit the lorry from the rear he could have damaged the bonnet of his car and the engine. He told the trial court that the lorry broke his side mirror and part of the bonnet of his car.

8. He testified that the police blamed the appellant's driver for the accident pointing out that the Police Abstract stated so. He testified that he drove the damaged motor vehicle to Toyota Kenya for repairs.

9. Zaddock Memyo(PW2) told the court that he was a motor vehicle assessor contracted by First Assurance Company Ltd. to assess damages on the Respondent's vehicle. He stated that he assessed the Respondent's vehicle at Toyota Kenya Limited's yard in Nairobi and prepared a report. The witness stated that the vehicle's front grill/ball bar and side mirror were damaged. He produced the said report dated 6th July 2015 which estimated the cost of repairs at Kshs 329,430.17. The report was tendered as Kshs. 329,430.17.

10. The witness testified that the damaged part of the Respondent's motor vehicle indicated side-glazing impact.

11. Godfrey Njenga (PW3) on his part testified that he was an employee of First Assurance Co. Ltd., the insurer of the Respondent's motor vehicle, he testified that the Respondent reported the accident on 27th May, 2015. He testified that they requested the Respondent to get a Police Abstract to facilitate them cover the loss as per the policy of the cover given to the Respondent. He testified that, from the Police Abstract, they learnt that the Police laid blame on the Appellant's driver adding that they instructed Bright Loss Assessors to assess the damage and document it. He testified that the total repair costs from Toyota (K) Ltd were as follows: -

    i. Damage on the motor vehicle -Kshs. 329,430

    ii. Assessment and Inspection report-Kshs. 6,300

    iii. Re-inspection report -Kshs. 2,040

    Total Kshs. 337,770

    He testified that they settled the costs and sued the Appellant for recovery of costs.

12. David Wambua Mwalimu (DW1) The Appellant herein testified that he was the owner of the motor vehicle registration number KAU xxx D. He stated that he was not present when the accident occurred stating that it was a forgery as the document had what appeared to be two different handwritings. He also blamed the Respondent's vehicle for the accident and stated that his motor vehicle was not damaged in the accident.

13. Joseph Mbai Ngui (DW2) the driver of the Appellant's vehicle blamed PW1 for the accident. He stated that he saw PW1 indicating and signaling that he wanted to overtake but in the process, PW1' swerved and hit the Appellant's vehicle from behind. The witness also stated that his vehicle was not damaged but the Respondent's vehicle was damaged on the bonnet, side mirror and bull bar. He stated that he did not stop at the scene after the accident as he feared for his life because the accident occurred at night. He also stated that, he thought that the appellant's vehicle had a tyre burst. The driver (DW2) also conceded that the road at the scene was wide enough and that there was no oncoming vehicle from

the opposite direction when the accident occurred. He also faulted the contents on the police abstract stating that the same was a forgery as the part which indicated that he was to blame for the accident contained a different handwriting from the rest of the contents in the abstract.

14. He conceded that the Respondent's driver is the one who reported the occurrence of the accident to the Police but insisted that he was hit from behind and the driver of the Respondent motor vehicle was to blame for the accident.

15. He further stated that the vehicle he was driving was not damaged but the Respondent's Land Cruiser was damaged on the left side of the bonnet and side mirror. He stated that he thought that the vehicle that hit his lorry had a tyre burst and that is why he did not bother to report.

16. The trial court evaluated the evidence and found that the Appellant's driver was 100% to blame for causing the accident and awarded the Respondent Kshs. 366,570 for the material loss suffered.

17. The Appellants felt aggrieved and lodged this appeal raising the following grounds namely: -

    i. The Learned Magistrate erred and misdirected herself in law and in fact in failing to analyze the evidence recorded in favour of the appellant.

    ii. The Learned Magistrate erred and misdirected himself in law and in fact in failing to consider the submissions filed by the parties and the case law which was binding on him.

    iii. The Learned Magistrate erred in law and misdirected himself in law and fact by failing to set out and consider the law and principles applicable to the case thereby arriving at an erroneous judgment.

    iv. The Learned Magistrate erred and misdirected himself in law and fact in failing to give reasons for his decision.

18. The appellant faults the trial court for failing to consider all the issues that were tabled by the parties for determination. Firstly, the Appellant submits that the trial court failed to address itself on the question of ownership submitting that the Respondent failed to establish by way of evidence that it was indeed the registered owner of the suit motor vehicle. The Appellant further submits that the Respondent failed to establish that the suit motor vehicle was indeed insured by First Assurance company as it failed to produce insurance policy, contracts or certificates as proof. It has been submitted that the Appellant produced a schedule of its 20 vehicles insured by First Assurance Company Limited but the Respondent's vehicle was not included in the said list.

19. It has also been submitted that there was no proof that the amount claimed was paid to Toyota Kenya Limited. The Appellant avers that the Respondent only produced an invoice voucher from Toyota Kenya and a document titled "Recovery/Interim Payment/Final Payment Voucher" but there was no evidence evidencing that the amount was disbursed and received by Toyota Kenya Limited going against the principles of the doctrine of subrogation. The Appellant has cited the case of Christine Mwigina Akonya vs Samuel Kairu Chege (2017) eKLR in support of this submission. The court in that matter held that invoices could not be deemed to be receipts in a claim for special damages.

20. The Appellant contends that there was no evidence tendered to prove that he was the owner of the lorry that caused the accident.

21. On liability, the Appellant submits that the trial court erred in its finding that his driver was to blame for the accident. The Appellant submits that Respondent's driver should have exercised due care before he tried to overtake the Appellant's vehicle as the accident occurred at night. Besides that, the Appellant submits that the trial court should have considered that his vehicle is big and bound to have several

blind spots which are not visible in the side mirror. The Appellant also faults the trial court for relying on the testimonies of PW2 and PW3 on the occurrence of the accident stating that they were not present when the accident occurred.

22. The Respondent has opposed this appeal vide written submissions through Counsel dated 25th January 2023.

23. The Respondent faults the appellant in this appeal on grounds that he has departed from the grounds raised in his memorandum of appeal and delved on new additional grounds without leave of this court. It cites the provisions of Order 42 Rule 4 of the Criminal Procedure Rule that requires that a party can only raise new grounds with leave of court.

24. The respondent defends the trial court for reducing the issues for determination into two, to wit who was to blame for the accident and how much damages were payable. It contends that the two issues were broad in nature adding that the trial court had discretion to frame issues for determination in its judgement it relies on the decision of Middle East Bank Kenya Ltd. versus Thalia Katia Castanha [2016] eKLR, where the Court reiterated that a trial court has discretion to condense the issues framed by the parties and from disputed facts and is not bound to deal with each and every issues as framed by parties.

25. On liability, the Respondent supports the finding of the trial court contending that the Appellant's witnesses were unreliable. It submits that DW1 was not present at the scene of the accident and could not be relied upon to give correct details on how the accident occurred.

26. It faults DW2 stating that he gave a false and inconsistent narrative on how the accident occurred pointing out that in one instance he stated that the lorry was hit hard and in another he stated that the Respondent's motor vehicle was slightly damaged.

27. It submits that ownership of Respondent's motor vehicle was proved to the required standard contending that PW1 confirmed that he was an employee of the Respondent while PW1 confirmed that the Motor Vehicle was insured by the First Assurance Co. Ltd. It also contends that the case being a case of subrogation, it was only required to proof ownership and insurance relationship on a balance of probabilities and that failure to produce a policy documents showing the insurance contract did not affect its case. It contends that it relied on the Police Abstract as proof of ownership which in its view was sufficient.

28. It submits that the issue raised by the Appellant on the ownership of the lorry that caused the accident was a frivolous one contending that the Appellant admitted ownership in his evidence at the Trial Court.

29. The Respondent has contested the appellant's claim that there was no proof of payment to Toyota Kenya Limited by the insurance company, and contends that production of an assessment report confirming the total cost of repair together with the invoice from Toyota Kenya as well as a payment voucher from First Assurance Company Limited was sufficient proof of repair costs and settlement of the same. The Respondent on this scene relies on the case of Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya (2010) eKLR. In that matter, the Appellant claimed that the trial court and the High Court had erred for failing to find that a claim of special damages had not been proven yet there was no evidence tendered providing that repairs had been carried out. The Court of Appeal held that the claimant was 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 complained of and that an assessors report was sufficient for the same.

30. This court has considered this appeal and the response made, this being a first appeal, the duty of the first appellant court was well stated in Selle vs. Associated Motor Boat Co. [1968] EA 123 where the court of Appeal stated: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has 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."

31. The issues arising from this appeal are: -

i. Whether the trial court failed to consider issues as drawn by the appellant and/or considered irrelevant ones.

ii. Whether the trial court was correct in the determination of liability.

iii. Whether the decision on assessment of damages was correct.

32. The Appellant takes issue with the manner in which the trial court framed the issues for determination in its judgment. The Appellant submits that he had framed ten issues for determination but in the judgment, the trial court only dealt with two issues in respect to liability and compensation.

33. This court has considered this ground carefully and finds that the appellant appears to have significantly departed from the grounds contained in his memorandum of appeal.

34. The memorandum of appeal has majorly attacked the trial court's analysis of evidence tendered and principles applied in arriving at the decision it made. The closest the appellant went was stating that his submissions were not considered which in my view was too general without any specificity.

35. This court finds that by raising this ground at submissions stage the appellant breached the provisions of Order 42 Rule 4 of the Civil Procedure Code which stipulates as follows.

> "The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule;
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground"

36. This court further finds that even if that ground had been properly raised, I would still not have found no merit in the same because, the trial court is not bound by issues drafted or agreed by parties in a case so long as the court deals with issues in controversy and determines the matter conclusively.

37. From the judgement of the trial court, it is clear that the court framed the issues before analyzing them. This is how that court framed the issues:-

> "Since the Defendant's Witness (DW2) acknowledged the occurrence of the accident, I have reduced the issues for determination to who is to blame for the accident (liability) and the damages, if any".

38. The trial court in condensing the issues framed into only two in my view cannot be faulted because in principle the court was required to basically determine the question of liability and damages if any because it was a material claim arising from a road traffic accident. The Respondent's suit or cause of action against the Appellant was based on tort of negligence. It pleaded that the Appellant's driver was negligent in the manner it drove motor vehicle Registration No. KAU xxxD (Lorry) attributing the cause of the accident to him.

39. The Appellant on his part denied causing the accident and instead blamed the Respondent's driver for hitting his motor vehicle from the rear.

40. The main issue in view of the above was the question of liability and the trial court was correct to state that his first issue was to determine who was to blame and secondly, determine the question of damages if any. That shows that the Court's mind was properly directed to determine if the Respondent had proved that it suffered damages and by how much.

41. The Provisions of Order 15 Rule 2 Civil Procedure Rule gives a trial court power and discretion to consider issues raised by the parties and even frame the issues arising from pleadings or evidence tendered. The provisions states.

> "The Court may frame the issues from all or any of the following materials;
>
> a. Allegations made on Oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties.
>
> b. Allegations made in the pleading or in answers to interrogations delivered in the suit.
>
> c. The Contents of documents produced by either party....(emphasis added).
>
> The operative word in the above provisions is "may" which means that it is a discretionary matter."

A Court is not bound to deal with each issue as framed by the parties. Adopting the issues as framed by the parties or framing own issues is a discretional matter.

42. This court partly agrees with the appellant that perhaps it was advisable for the trial court to isolate the question of insurance of insurance contract between the Respondent and its insurer since the claim in principle was based on the doctrine of subrogation.

43. The principle of subrogation applies where there is a contract of insurance. If the "insured risk" takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor.

44. In this case, the Respondent through the testimonies of PW2 and PW3 adduced evidence to the effect that First Assurance Company Limited had insured the Respondent's vehicle at the time of

the accident under policy number 14/21/014555/09. The Respondent did not attach the policy document, however it attached a schedule at page 12 of the Record of Appeal from the insurer. The schedule contains a list of vehicles belonging to the Respondent and insured by the insurer but as pointed out by the Appellant, the accident vehicle is not listed in the schedule. The Respondent also attached a Motor Vehicle Accident Claim form (page 15 of the Record of Appeal) from the insurer to the effect that it had insured the subject motor vehicle.

45. This court is persuaded that non-production of the insurance policy document by the Respondent was not fatal to its claim. In Gahir engineering Works Ltd. versus Rapid Kate Services ltd. [2018] eKLR, Justice C.W. Githua made the following observation which I find relevant in this context;

> "The fact that the appellant did not produce in evidence the policy document itself though material was not fatal to the insurer's claim since it was only required to prove its claim on a balance of probabilities not beyond reasonable doubt. If the insurance company had not insured the appellant's vehicle, it would not have taken the trouble to appoint an assessor to estimate the repair costs; appoint investigators and more importantly, it would not have shouldered the burden of financing the vehicle's repair costs and the other incidental expenses."

46. In my view, in every claim filed in Court of Law the bottom line is proof and Section 107 of the *Evidence Act* provides that whoever alleges must be proved or has the burden to proof and in civil matters the standard of proof and in civil matters, the standard of proof is on a balance of probabilities.

47. The Court of Appeal in Ignatius Makau Mutisya versus Rueben Musyoki [2015] eKLR while citing Denning 3 in Metter versus Ministry of Pensions 91947)2ALL ER succinctly partly stated;

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

48. The documents tendered by the respondent through plaintiff's list of documents dated 16th May, 2018 and Plaintiff's Supplementary List and bundle of documents dated 30th October, 2018 together with testimonies or evidence given by PW2 and PW3 during trial demonstrated that first Assurance had insured the insured the Respondent's motor vehicle. The documents were all admitted in evidence by consent. The evidence tendered in my view met the threshold in law.

49. The Appellant has also submitted that another issue left out by the trial court was the question of ownership. According to him, the Respondent was required to prove that it was registered owner of GKB 801F and that the motorvehicle was insured by First Assurance Co. Ltd.

50. While this Court finds the Respondent's response in that regard is legitimate because, it is another new and additional ground not raised in the Memorandum of Appeal, I also find that the ground is unsustainable for the following reasons: -

    a. Firstly, the issue of ownership and the evidence tendered by the Respondent was not seriously challenged by the Appellant during trial.

b. Secondly, proof of ownership is not necessarily proved only by production of a logbook.

A Police Abstract or any other document apart from a logbook can suffice. In Wellington Nganga Muthiora versus Akamba Public Board Services Ltd & Another [2010] eKLR the Court of Appeal observed as follows: -

> "Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary."

51. Further, in the case Nancy Ayemba Ngana Vs. Abdi Ali (2010) eKLR it was held that;

> "There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.
>
> And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.
>
> Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question..."

52. The Police abstract dated 27th May 2015 produced by consent of both parties indicated that motor vehicle registration number GKB 801F was owned by the Respondent and as pronounced by the Court of Appeal, this was sufficient proof of ownership on a balance of probabilities.

53. On liability, this court has re-evaluated the evidence tendered at the trial in regard to liability which issue is central in this appeal.

54. There is no dispute that the facts surrounding the accident between the appellant's motor vehicle and that of the Respondent indicate that the accident occurred at night. It occurred as the Respondent's driver was trying to overtake the appellant motor vehicle and both drivers testified that the road was in good condition and wide enough to allow safe overtaking as there was no oncoming motor vehicle.

55. The point of contention was whether the Appellant's lorry was hit from behind as advanced by the appellant or whether the Respondent's motor vehicle was hit at the side as the Respondent's driver was overtaking. The big question before the trial court was, who was to blame for the accident or who caused it because it was conceded by the Respondent's driver (DW2) that the accident occurred.

56. In Gideon Ndungu Nguribu & another v Michael Njagi Karimi [2017] eKLR the Court of Appeal was faced with this subject and observed that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 where the court observed as follows:-

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it .....The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must distinguish between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

57. The trial court found that the Appellant driver (DW2) was 100% to blame for the accident and the Appellant held vicariously liable for the driver's negligence being the registered owner of the lorry Registration No. KAU xxx D.

In apportioning liability, the trial court relied on the evidence of PW1, PW2 and PW3.

58. This Court has as I have observed, perused through the evidence of PW1 and DW2 both of whom were at the scene at the material time. There are number of facts or circumstances which supports the finding made by the trial court in regard to the question on liability.

59. The evidence contained in the Police Abstract though much faulted by the Appellant on grounds of authenticity, it indicates that the Appellant driver was to blame. The record shows that the Police Abstract among other documents were admitted in evidence by consent. That in effect meant that the evidence contained in the documents were conceded and it was not open for the Appellant to turn round and say that the Police Abstract or the information therein, were fake. He had the opportunity to challenge the document by insisting that the author/the Police be summoned to tender or produce the document but he did not raise any objection.

60. Secondly, and more importantly, is that PW1 stated that he was following the Appellant's motor vehicle from behind and had its head lights on and had made two previous attempts to overtake but had been frustrated by the Appellant's driver who kept on swerving to the right to block or prevent the Respondent's motor vehicle from overtaking.

61. The Appellant's driver during cross-examination made a telling statement when he stated;

> "The accident occurred at around 12am or 1 am. My headlights were on. I had seen the vehicle behind me. It had trailed me for some distance.....I do not know if he had tried to overtake me severally. I saw the vehicle indicate.....I was driving at a speed of about 50 to 60Km/h....."

This is an accident that occurred at night and with the headlights on, it is expected that a motor vehicle from behind or even ahead is quite visible it is no wonder that the Appellant's driver conceded that it had seen the Respondent's vehicle trailing him, lending credence to the evidence by PW1 that he

had indeed attempted twice to overtake but was prevented from doing so through reckless behaviors of the Appellant's driver.

62. Thirdly, the point of impact on the Respondent's vehicle supports the narrative given by PW1 as opposed to the narrative given by the Appellant's driver during trial that is the allegation that his lorry was hit from behind. I have looked at the evidence tendered by PW2 and PW3 in respect to physical assessment of the side that was damaged on the Respondent's motor vehicle. From the assessment report, it can clearly be seen that the point of impact was the left side on the side mirror to the bonnet. The Motor Vehicle Loss Assessment Expert (PW2) termed it "side glazing" clearly corroborating the narrative given by PW1. I have seen the photographs taken by the said motor vehicle assessors and in particular the front part which has grills. That part of the vehicle was not damaged which negates the narrative given by the Appellant's driver (DW2) that he was hit from behind. If that was true, then obliviously, the headlights and the front grill of the Respondent's motor vehicle could have suffered some significant damages because according to DW2, the "Land Cruiser' hit my vehicle very hard."

63. Fourthly, the conduct of the appellant's driver immediately after the accident suggest that he was the culprit that caused the accident.

    According to PW1, the Appellant's driver afterwards, drove into the bushes perhaps to hide and run away from responsibility but, the Respondent's driver had memorized the Registration No. of the Lorry. Why would the Respondent's take off from the accident scene and fail to go and report the accident after feeling the impact?

64. The Appellant's driver never stopped after the accident or even drive to the nearest Police Station to report if it is true that he feared for his life. I also find the explanation given in the cross-examination to be a bit contradictory because, on one hand, he says his lorry was "hit very hard" and on the other hand he says he thought there was a tyre burst in respect to the motor vehicle trailing him and never bothered to report. The apparent contradiction in my view, supports only one thing. His, was a false narrative in an attempt to avoid responsibility.

65. His actions before and after the accident is indicative of recklessness and the trial court was correct in finding him 100% to blame for the accident. The Respondent's driver duly reported the occurrence of the accident to the police as any responsible driver would do as opposed to the appellant's driver who instead took to the bushes after the accident thinking that he would escape liability unbeknown to him that the Registration No. of the lorry he was driving had been memorized by the Respondent's driver.

66. This Court is satisfied that the Respondent discharged its burden of proving that the Appellant was to blame on account of vicarious liability owing to the cited negligence acts of his driver. The trial court was apt in its findings on liability and cannot be faulted because the Respondent's driver caused the said accident.

67. On the question of quantum of damages, this was a claim based on the material loss on costs of repairs. The trial court found that the Respondent had proved that he suffered damage of Kshs. 366,570 in repairing its motor vehicle which it stated was done at Toyota Kenya Ltd.

68. The Appellant has taken issue with the court's decision citing that first, ownership of motor-vehicle KAU xxxD was not proven. This submission is rather odd as the Appellant stated that he was the owner of the vehicle on several occasion. In his witness statement dated 2nd July 2019, he stated at paragraph 2 (indicated as 16) that he was the owner and that he had mandated his employee DW2 to go to Bangale Market to ferry cattle to Mwingi town. Secondly, he referred to the motor vehicle severally as his in his testimony in court. DW2 also testified in court and stated that he was driving the vehicle which belonged to his employer.

69. For the Appellant to now turn around and say there's no proof of ownership of motor vehicle registration No. KAU 752D is escapism and misleading in light of the evidence tendered at the trial.

70. The Respondent submitted that the repair cost were paid and received by Toyota Kenya Ltd who had undertaken repairs of the said motor vehicle. In support of this submission, the Respondent called a motor vehicle assessor from Bright Loss assessors who produced a motor vehicle assessment confirming the total cost of repair at Kshs 329,430/-. The Respondent also produced an invoice from Toyota Kenya Limited dated 16th September 2015 addressed to the insurer and a payment voucher from the insurer to Toyota Kenya Limited dated 12th October 2015.

The Respondent claim which was a special claim was pleaded as follows: -

a. Repair fees Kshs. 329,430

b. Assessment fees Kshs. 6,300

c. Investigation fees Kshs. 2,040

Total Kshs. 366,570

71. I have looked at the documents tendered by the Respondent in proving his loss (the law required him to specifically prove each and every claim because it was special damages) and am satisfied that, the following were proved to the required standard:

a. Cost of Repairs-There is an invoice from Toyota (K) Ltd. dated 16th September, 2015 and a letter dated 16th October, 2015 from the Respondent's insurer (First Assurance Co. Ltd Cheque No. 209 of Kshs. 328,420

b. I also find that Kshs. 6,300 was proved to have been paid to Bright Loss Assessors for Inspection and Assessment fees.

c. The amount of Kshs. 2,040 was also well proved.

d. The claim of Kshs. 28,800 was not proved. The only amount proved vide an acknowledgement dated 3.08.2016 is Kshs. 27,170 for the investigation report. The amount proved and payable to the Respondent therefore, is as follows:-

i. Cost of Repairs Kshs. 329,430

ii. Assessment fee Kshs. 6,300

iii. Re-inspection Fees Kshs. 2,040

iv. Investigation fees Kshs. 27,150

Total Kshs.364,920

72. In sum, this appeal on liability fails and partly succeeds on quantum albeit a small difference. The amount awarded to the Respondent of Kshs. 366,570 is set aside and in its place the Respondent is awarded Kshs. 364,920 with interest at Court rates from the time of filing the suit at the trial court. The Respondent will have costs of this appeal but the appellant will have 10% costs on account of his minimal success.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH, DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE