



REPUBLIC OF KENYA



KENYA LAW
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**China Road and Bridge Corporation Kenya v Kariuki (Civil Appeal
E038 of 2022) [2023] KEHC 3900 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E038 OF 2022**

G MUTAI, J

APRIL 24, 2023

BETWEEN

CHINA ROAD AND BRIDGE CORPORATION KENYA APPELLANT

AND

PETER NDUNGU KARIUKI RESPONDENT

*(Being an Appeal against the Judgment dated 27th April 2022 delivered by
the Hon. Ruguru, Principal Magistrate in Ngong SPMCC No. E.094 of 2021)*

JUDGMENT

1. The instant appeal was filed on May 26, 2022. The Appellant was aggrieved by the judgment delivered by the Hon. Ruguru, Principal Magistrate. The Appeal was against both liability and quantum. The Record of Appeal was filed on October 19, 2022. The appellant filed a Supplementary Record of Appeal on November 4, 2022. The Appellant filed written submissions on November 30, 2022 while the Respondent filed submissions on January 9, 2023.

Duty of the appellate court

2. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



3. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd*[1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

4. Where the matter involves discretion like damages, the court will not just substitute the opinion of the court for its own. In the case of *Mbogo and Another v Shah* [1968] EA 93 the Court stated:

“...that this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Pleadings

5. The Respondent pleaded the subordinate court that on March 29, 2018 the appellant’s motor vehicle Registration No. KCD 193V was driven carelessly and as a result thereof caused an accident that resulted in the damage of the Respondent’s motor vehicle Registration KBV 734M.
6. By its Defence dated August 28, 2021 the appellant denied liability and attributed negligence to the respondent.

Evidence before the Subordinate Court

7. The Respondent called a motor vehicle assessor, one Josephat Kamau. He testified that he inspected the suit motor vehicle. In his opinion the respondent’s motor vehicle could be repaired at a cost of Kes.971,500.00.
8. The Respondent also called a PC Bernard Matheka. PC Matheka confirmed that the accident occurred. He stated that motor vehicle registration No. KCD 193V was to blame for the said accident.
9. The Respondent adopted his statement. He stated that he repaired the motor vehicle. The driver died as a result of the accident. The defendant did not testify.

Appellants Submissions

10. The appellant filed submissions that regurgitated evidence on record. It blamed the court for failing to give reasons for holding the appellant liable. It relied on the authority of *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472 which held as follows: -

“If each driver was alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw distinction between them”.

11. I agree with the Appellant in this respect. Appellant raised issue with the quantum. In particular, the Appeal on quantum relates to loss of user only.



Respondent's submissions

12. I have read the submissions of the Respondent. The Respondent urged the Court to dismiss the appeal.

Liability

13. The Appellant chose not to testify. The effect is that the court has no basis to award contributory negligence. All those beautiful statements in the defence remain that, statements. They have no evidentiary value. Indeed, the Appellant correctly submitted that:-

“Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them ...” (emphasis mine).

14. Section 112 of the *Evidence Act* provides a doth: -

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

15. In this case, after evidence was tendered by the Appellant, the Appellant was under duty to displace such evidence for now, the evidence of the Respondent remains uncontested. The police blamed the motor vehicle registration No. KCD 193V.

16. There was no rebuttal of the evidence given. To make matters worse, the one person who was present during the accident, chose not to testify. He must have known that his testimony would be adverse to the Appellant.

17. I therefore do not find any merit in the Appeal on liability. I dismiss the same in limine.

Quantum

18. The appeal is only on loss of user. Loss of user is usually given for the period required as the vehicle is being repaired. Put differently, if the vehicle is not being repaired, a party is not entitled to loss of user. I note the Respondent's relied on the case of *Jackson Mwabili v Peterson Mateli* [2020] eKLR.

19. The Respondent moved with haste to have assessment done on 1st April 2018. The motor vehicle assessor unfortunately did not indicate the estimated period of repairs.

20. However, the Appellant could not have known that the motor vehicle had a third-party insurance cover only. The period of two months as the period for repair of a motor vehicle, with such damage, would appear to me to be a short period. However, it is not so short as to amount to an erroneous estimate.

21. In any case the Respondent did not appeal. The second aspect on the loss of user is the quantum thereof.

22. The court assessed the amount payable as being Kes.971,500.00. Had the court awarded 3 – 4 months it would still be within a reasonable period for repair of the damage such as the one the subject of this appeal.



23. The evidence of the assessors on the length of repair is not binding on the court. The court will take judicial notice that preparing a motor vehicle for a major repair takes time. Indeed, paint works alone cannot be completed in 3 days. The court exercised discretion correctly in giving 2 months.
24. It would appear to me that the parties agreed on what would constitute daily loss. The Appellant only had an issue with the period of 2 months.
25. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
26. I therefore cannot set aside discretion of the court simply because I could have given a different figure. Speaking for myself I would have given a longer period. However, the court in exercise of its discretion gave a shorter period.
27. I therefore do not find merit in the appeal on loss of user.

Determination

28. I make the following determinations: -
 - a. The Appeal on quantum and liability is bereft of merit and is dismissed with costs of Kes.121,000.00 to the Respondent.
 - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF APRIL 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

.....

GREGORY MUTAI

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent.

Court Assistant - Winnie Migot

