Kiiru t/a Kinamba General Suppliers & Transport v Kenya Ferry Services Limited & another (Civil Suit 275 of 2005) [2023] KEHC 20063 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20063 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 275 OF 2005

DKN MAGARE, J

JUNE 29, 2023

BETWEEN

DAVID KAROBIA KIIRU T/A KINAMBA GENERAL SUPPLIERS & TRANSPORT ..... PLAINTIFF

AND

KENYA FERRY SERVICES LIMITED ..... 1ST DEFENDANT

KENYA PORTS AUTHORITY ..... 2ND DEFENDANT

JUDGMENT

1. This matter in the ordinary cause of this was to be concluded latest by the year 2008. It has been in our courts for the last 18 years. I had to literally force parties to proceed at the point of the bayonet. As a result of delayed outcome, the Plaintiff's thirst for more money grew as years went by. He was under false and mistaken belief that the accident of 16/3/2005 is the panacea of all his troubles. In days running to delivery of this judgment he fired his long standing, advocate, probably to partake solely the expected fruits from his may years of waiting.

Pleadings

2. The plaintiff filed suit on 16/12/2005. On that day he was claiming Ksh. 13,750,383.00. he paid court fees of 3,200/= by cunningly claiming general damages and a declaration that the plaintiff is entailed special damages as determined by the court.

3. He made subsequent amendments, none of which he specifically pleaded for the actual amount.

4. In the last amendment, he was claiming in the body of the plaint, a sum of Ksh 335,344,388/=. However, the same were not claimed as prayers in the actual prayers. His is enough to dispose the case. During my sojourns in Mombasa, I stumbled upon the file. I directed that proper court fees be

paid otherwise the suit will stand dismissed. Money turned up and it was paid, the claim was still not properly prayed for.

5. The defendant, then Kenya ferry services and subsequently, Kenya ports authority, filed defence and blamed the plaintiff. They blamed the plaintiff for several times re-engaging and driving the said motor vehicle with full momentum and as a result were at danger to the people and property.

6. I wish to note that the plaintiff has almost a dozen times changed advocates and written letters to court unnecessarily especially on negotiations that ought to be undertaken. My honest view, is that had this claim been properly appraised, it ought to have been filed in the resident magistrate's court under section 11 of the *Civil procedure Act*.

7. The exaggerated claims resulted in a plotted claim of over 1/3 of a billion. It is untenable and reeks of mischief.

8. A claim on tort should at all times be filed having regard to the proximate cause and foreseeable damages. The claim for damages in real life that are too remote is a waste of judicial time.

9. Further, damages must be suffered by the plaintiff. The plaintiff is never entitled to double compensation for the same loss. In the case of *Leslie John Wilkins v Buseki Enterprises Limited* [2015] eKLR, Justice Rtd Mary Kasango, held as doth: -

> " The Learned author Mac Gillivay & Parkingon "Insurance Law" at page 471 had this to say in regard to that doctrine:
>
> "Nature of the doctrine. The doctrine concerns two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a son suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss."
>
> That doctrine was also discussed in local case namely *Abdul Razak (suing on behalf of the international Air transport Association – Iata & Another v Pinnacle Tours & Travel Limited & Another* [2005] eKLR viz:
>
> Before concluding this matter an issue has been raised as to whether the payment made by the 2nd Plaintiff to the 1st Plaintiff absolves the defendants from liability. With respect this is a misapprehension of the Law. The 2nd Plaintiff was entitled to file suit against the Defendants under the doctrine of subrogation. The claim made by the Plaintiff is one and as against the Defendants it is joint and several. The question of double enrichment does not therefore arise."

10. What the court was saying that money paid by the insurance for loss, is and remains money claimable by the insurance under the doctrine of subrogation. Therefore, the insured cannot as a corollary claim money that has been incurred by his insurance as his own. That is double compensation.

11. Secondly, once the insurance has compensated for loss, the vehicle is deemed as repaired. If the plaintiff does not repair, it is not the tortfeasor's problem.

Evidence

12. The Plaintiff testified and called 3 other witnesses. The defendant called one witness. A coxswain from the other ferry. The coxswain for the subject ferry had already retired. They adopted their statements and were cross examined. On behalf of the plaintiff, a quack testified and produced some accounts. He has not qualified within the meaning of the *Accountants Act*.

Plaintiff's Submissions

13. The plaintiff filed submissions on 17/4/2023 stating that the accident occurred on 16/3/2005 at 6:00a.m. at Likoni Ferry. He blamed the coxswain for commanding the Motor vehicle Registration KAx xx8D ZC 18xx to reserve while it had partly entered the ferry. He also blames the motor vessel for starting the engine while the motor vehicle was entering the vehicle.

14. The plaintiff submitted that the vehicle was not overloaded. He submitted that the accident accidently occurred. Coxswain was reported 250 metres away and as such could not see what was happening.

15. The plaintiff pleaded that the defendant Breached the duty of care. He relies celebrated Case of *Katana Ngao v Andrew Kanan Wakabi* [1993] eKLR, save that the judge was dealing with a bus driver on the road, where the judge said: -

> "A prudent driver of a public vehicle should easily foresee that some passengers may be hampered by all sorts of factors, whether personal or otherwise, from speedily jumping into the vehicle; and so it behooves him to be patient and allow them enough time to safely get in the vehicle. He should ensure that all passengers are safely on board or have safely alighted before he drives from the stage"

16. They pray for the court to find the Defendant's to be found solely liable for the ferry accident.

On Quantum

17. The Plaintiff prayed for Ksh 333,343,988 as pleaded. This was made up of the following: -

    (a) Cost of the vehicle Ksh 1,600,000

    (b) Loan fees – Ksh 64,000/=

    (c) Insurance cover Ksh 484,006

    (d) Costs for recovering and assessment –

        (i) Letter dated 18/3/05 – Ksh 9,000

        (ii) Towing Ksh 100,000

        (iii) Mileage Ksh 30,912

        (iv) Assessors fees Ksh 116,000

    (e) Spare parts and repair Ksh 3,629,785

    (f) Material loss Ksh 8,211,606

    (g) Loss of goods Ksh 525,000

    (h) Loss of hire purchase instalment Ksh 2,284,361

(i) Lawyers' fees Ksh 210,000

(j) Loss of profit Ksh 6,156,376

(k) General damages Ksh 310,181,256

(l) General damages for breach of duty and care Ksh 2,000,000

Total Ksh 333,343,988

18. In Submissions, the figure is now Ksh 335,344,388.

19. The Plaintiff relies on the authority of *Abdi Kawiri v You Guo Jiang Sietco* [1999] eKLR, (Mbito J, as then he was) among other authorities.

Defendants' Submissions

20. The Defendant submitted that the plaintiff's motor vehicle was involved in a road accident a month prior to this accident and was not in sound mechanical position. They posit that this was the fist vehicle into the ferry and there was no reason the coxswain could move before other vehicles come in or pedestrians board.

21. Indeed, their view was that it was the plaintiff's duty to prove that the coxswain caused the accident in vain. They rely on page 125 of the Plaintiff's insurer's report that the ferry remained afloat. The insurers blamed their insured the Plaintiff.

22. The defendant state that, the foregoing is the raison d'etre for the insurers not seeking subrogation. Reliance is placed on the decision of *Karungi and Another v Kibiya and 3 others* (1987) eKLR 347 the court stated that the burden of proof still remained on the shoulders of the plaintiff to substantiate his case on a balance of probabilities.

23. They raise issue that the driver of the said motor vehicle did not testify. They relied on the case of *Evans Mogire Omwansa v Benard Otieno Omolo & another* [2016] eKLR, where the court, Honourable Justice Janet Mulwa, stated as follows: -

> " 8. Section 107, 108 and 109 of the *Evidence Act* places the burden of proof of a fact to who wishes the court to believe him. He did not call any corroborative evidence by way of witnesses. He stated that the first respondent hit the front of his bicycle. He did not elaborate on how the bicycle was hit on the front part if he had stopped at the junction. I agree with the trial court's finding that the respondents' evidence was scanty in detail. The Appellant was under a duty to prove his case on a balance of probability not withstanding that the respondents did not testify.
>
> The provisions of the *Evidence Act* came to play that he who asserts must prove. It was the appellants duty to tender satisfactory evidence to discharge the burden placed upon him. It is not enough to say that since the opposing part has not testified, my testimony must be taken as truthful. It must be proved. The Respondents in their written submissions stated correctly that though they did not testify there was enough rebuttal evidence during cross examination.
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> In *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR, it was held that where a party fails to call evidence in support of his

case, the parties pleadings remain as mere statements. The two police abstracts produced confirmed occurrence of the accident only. All other statements therein, there having been no evidence in support to the same, they remained as opinions, that are not binding on the court. The police abstract produced or the Respondent stated that the appellant was to blame yet no evidence was called to support such finding. As stated above, no investigation file and report were produced."

24. This is a unique case that has been made out without regard to the law governing liability in tort.

25. It is the duty of the tort feasor to compensate the injuries that arose out of the accidents. It is the concern of the law of torts to punish the tortfeasor.

26. Authorities on this are well settled. In *Kennedy Mwangi Muriithi v Attorney General & another* [2016] eKLR Justice J.M. BWONWONGA, held as doth: -

> " It is clear from the record that after due regard to the decisions cited by the parties, the learned magistrate was alive to all these factors in determination of the respondent's compensation. This is what he said in concluding his judgment;
>
> "Having observed this, this court is alive to the relevant factors considered in making awards. Normally courts consider the nature of injuries, the period of healing and whether the healing is full or partial, the residual incapacity if any, the inconvenience or deprivation encountered by the plaintiff, inflationary trends, cost of living and lapse of time from the time of any availed decided authorities.
>
> The plaintiff is only entitled to what is fair, just and reasonable. Money cannot renew a physical frame that has been shattered and battered. Assessment must be done with moderation. The aim is not to enrich the plaintiff. It is not also the aim to punish the defendant."

27. It was further stated in *Donald Ngoka Kalama v Luvuno Mwananjira Mwalimu* [2019] eKLR, Hon Justice R Nyakundi stated as follows: -

> " The purpose of awarding damages pursuant to injury claims is not to punish the tortfeasor but to assess a fair compensation arising out of the act in negligence. See the legal principles in *Tayab v Kinamu* 1982-88 1 KAR 90
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> As stated earlier in the case of *West H & Son Ltd v Shepherd* 1964 AC 326 it is important to bear in mind when faced with an issue on assessment of damages to take into account the following principles: -
>
> "But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach.
>
> By concern consent awards must be reasonable and must be assessed with moderation. Furthermore, it is amicably desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that awards which are awarded are to a considerable extent conventional."

Issues for Determination

28. The only issues that need to be looked at are only three.

    (a) Liability for the accident

    (b) Quantum of damages

    (c) Costs

Liability

29. The motor vessel Harambee was stationary. There were vehicles boarding, the first of which was the Plaintiff's motor vehicle Registration No KAx 8xx D/ ZC 18xx. This was before pedestrian boarded. The driver is said to have tried to board the motor vehicle and was not able to do so. On his third attempt he realized that he was not going to make it. He jumped off to save himself. The vehicle thus sank to the sea.

30. The plaintiff stated that that this was his third time boarding the ferry. He also stated the vehicle was laden with a load measuring 32 tonnes. To the Plaintiff this cargo was manageable.

31. The driver did not seem to have enough experience to board a ferry, at the angle the ferry is boarded. The first attempt should have warned him that he needed an experienced hand to move the motor vehicle KAx 8xx D/ ZC 18xx. Even if the defence had testified, I did not belief the plaintiff's story. The coxswain, who was handling the ship retired. This is expected with 18 years lapse in processing the case.

32. The adjacent ferry coxswain gave a vivid description on how the accident occurred. I have therefore come to the inevitable conclusion that the plaintiff was the sole cause of the accident. Both parties were in agreement that guidance was being given to the driver. He was not experienced enough to properly enter the ferry.

33. The coxswain did not move. I am entitled under section 60(10) of the *Evidence Act*, to presume circumstances of what may and may not have happened. The turnboy told us that the other personnel were guiding the driver. When the driver realized he could not manage the vehicle, he jumped off into the ferry leaving the vehicle to plunge into the sea, with the trailer first into the sea.

34. It is therefore clear beyond peradventures, I do not find the defendant liable in contributory negligence. The Defendant did not contribute in any way in the occurrence of the accident. It was admitted that the driver had admittedly partially entered the ferry. He jumped when it was obvious that he could not manage to fully park the vehicle in the ferry.

35. This case is different from the case of *Madale Trucking Co. Ltd v Kenya Ferry Services* [2017] eKLR, where the court, P.J.O. OTIENO, stated as doth: -

> " 29. I would replace the words driver with coxswain and stage with ramp and say that the duty of care as captured by Wambilyanga J, applied to the defendants' coxswain but he failed to observe and discharge that duty of care to the plaintiff. His action was most unexpected of a reasonable coxswain if not outrightly reckless. I say reckless in that with just basic watchfulness from his tower, he ought to have seen that his continued sail away was inevitably leaving the lorry with no option but to plunge.

30. The clip discloses no attempt by the coxswain to engage a gear so as to direct the ferry back to the ramp so as to hold or push the vehicle from plunging into the deep sea. I do not profess expertise in matters sea transport and traffic but a reasonable person watching the clip and having used some of those ferries would come to the opinion that had the ferry been controlled so as to stop or move towards the ramp, the vehicle would have not plunged as it did. For the foregoing reasons I hold that the accident, resulting into the loss sued for, was wholly occasioned by the defendant's coxswain's negligence for which the defendant is vicariously liable.

36. In *Katana Ngano v Kamau Wakabi* (*supra*), the court held as doth: -

> "A prudent driver of a public vehicle should easily foresee that some passengers may be hampered by all sorts of factors, whether personal or otherwise, from speedily jumping into the vehicle; and so it behoves him to be patient and allow them enough time to safely get in the vehicle. He should ensure that all passengers are safely on board or have safely alighted before he drives from the stage"

37. Therefore, it is not expected that the ferry could move before the first vehicle boarded It is not a natural phenomenon. The fact disclose, a driver who does not know what to do and does not call for help to pack the vehicle in the ferry.

38. A properly driven vehicle does not get into a road accident. In this case, the driver was simply required to park the vehicle in the Ferry and let other cars also park. The lorries are the first ones to park then small cars. I am entitled to take judicial note of any rule of the road, sea or air. In this case, the ferry, under section 60(1) I of the *Evidence Act*.

39. In the case of *Joseph Muthuri v Nicholas Kinoti Kibera* [2022] eKLR, the court of Appeal stated as doth: -

> "It is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities. The provisions of sections 107,109 and 112 of the Evidence Act, on the burden of proof, were extensively dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
>
> "As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

40. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

> "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

41. The driver owed the ferry owners and users a duty of care to use reasonable skill and board the vehicle. The defendant fulfilled its duty by parking the ferry for vehicles to board. It was clear that the driver was unable to properly estimate distance on how to board the ferry. The ferry owners have no duty to examine drivers to test their competence. It fell on the plaintiff herein to hire a well trained and experienced driver for his car. Despite having an accident earlier, the plaintiff entrusted the same driver to ferry calcium across the ferry laden with 32- 36 tonnes.

42. In *Robert Gitau Kanyiri v Charles R. Kahiga & 2 Others* [2010] eKLR, the court, Hon justice W. OUKO, as then he was held as follows; -

> "*Alfarus Muli v Lucy M. Lavuta & Another* Civil Appeal No.47 of 1997, vehicles when properly driven on the road do not run into each other."

43. I dare say, a vehicle, when properly driven does not plunge into the sea. It is not a wonder that the driver, did not testify on what happened. In the case of *Leo Investment Limited v Mau West Limited & another* [2019] eKLR, the court, hon Justice C Kariuki stated as doth; -

> "
>
> " 53. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."
>
> The driver, who knew what was happening ought to have testified, failure to testify, of the happening within his knowledge, the court, is entitled to construe negatively such failure.

44. Therefore, I find the plaintiff fully liable for the accident and accordingly, dismiss the plaintiff's case on liability.

Quantum

45. The plaintiff pleaded a mind boggling one third of a billion in damages.

46. Liability for an accident does not in any way make a party to earn a living from a simple accident. The law demands that we assess damage, even when dismissing the case. In the case of *Joseph Muthuri v Nicholas Kinoti Kibera* [2022] eKLR, the court, Patrick J.O Otieno stated as doth: - *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR, it was observed thus:

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

47. Further, in the case of *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR, where the court held that:-

> " Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment."

48. There can be no damages that are too remote or consequential. Damages arise only in unforeseeable damages. In the case of *Amani Kazungu Karema v Jackmash Auto Ltd & another* [2021] eKLR, the court stated as follows: -

> " The entire trial was basically on the law of negligence and liability on the part of the 2nd Respondent. The correct statement of the test on the ingredients of this tort is as defined by Clerk & Lindsell on Torts 18th Edition in the following passage; -
>
> There are four requirements for the tort of negligence namely; -
>
> 1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
> 2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;
> 3. a causal connection between the defendant's careless conduct and the damage;
> 4. that the particular kind of damage to the particular claimant is not so unforeseeable as to bee too remote. When these four requirements are satisfied the defendant is liable in negligence.
>
> "A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."

49. The financial losses and losses related to business are remote. The only damages that are relatable relate to repair and loses of business during the time the motor vehicle was awarding repair. The loss of business in this sense is either the cost of getting alternative transport of profits foregone for that particular vehicle. This is only limited to the period normally required for repair. The plaintiff made the following claims: -

a. Cost of the vehicle 1,600,000

b. Loan fees – 64,000/=

c. Insurance cover 484,006

d. Costs for recovering and assessment –

e. Letter dated 18/3/05 – 9,000

f. Towing 100,000/=

g. Mileage 30,912

h. Assessors fees 116000

Sub total

i. Spare parts and repair 3,629,785

j. Material loss 8,211,606

k. Loss of goods 525,000

l. Loss of hire purchase instalment 2,284,361

m. Lawyers' fees 210,000

n. Loss of profit 6,156,376

o. General damages 310,181,256

p. General dames for breach of duty and care 2,000,000

Total 333,343,988

50. The motor vehicle was apparently repaired over a period of 1 year. It was never to be. The indications were that repairs could have been for 4 months. The Plaintiff pleaded spare parts of Ksh 3,377,871/=, hire purchase of Ksh 8,211,806.

51. Further, the vehicle was paid by the insurance awarding an amount. It was not clear how much was paid. The amendments done and the figures spewed were mind dazzling. Had the plaintiff proved his case, the only damages payable are a sum of Ksh 360,000 being the net of Monies paid by the insurance.

52. The insurance paid the costs of repairs. Therefore, even if the plaintiff had Succeeded, he had been fully paid for repairs. The vehicle was thereafter attached and sold for loan default.

53. General damages are not payable for breach of contract. In the case of *David Bagine v Martin Bundi*[1997] eKLR, the Court of Appeal stated as doth: -

> " The learned judge proceeded to assess "loss of user" damages as general damages although the same were claimed as special damages "to be proved at the hearing of the suit". In doing so the learned judge erred. We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in not circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

54. The nature of damages in the motor vehicles are not at large. They are in the nature of special damages that must be specifically pleaded and proved.

55. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019] eKLR, Justice D.S Majanja on 21st February, 2019 held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

56. Therefore, the claim for general damages for Ksh General damages for 310,181,256 and General damages for breach of duty and care 2,000,000 all totaling to Ksh. 312,181,256 will be dismissed.

57. Loss of hire purchase instalment of Ksh 2,284,361 is too remote. In any case, the vehicle was sold and as such no amount is recoverable.

58. Loss of Loan fees – 64,000/=, Insurance cover 484,006, Costs for recovering and assessment –, Letter dated 18/3/05 – 9,000, Mileage 30,912, are remote and have no causal link with the particular accident.

59. Material loss Ksh 8,211,606 and Loss of goods for Ksh. 525,000 are not due to the plaintiff. Material loss covers the whole vehicle. The vehicle was repaired and available to the plaintiff. Unfortunately, the plaintiff did not service his home. As vagaries of nature will have it, the said motor vehicle was in arrears and definitely sold.

60. As for the material lost there was no proof that the same was lost. If such evidence was available, and specifically pleaded, then it is allowable.

61. The other aspect is: -

    a. The cost of the vehicle 1,600,000,

    b. Towing 100,000/=,

    c. Assessors fees 116,000

    d. Spare parts and repair 3,629,785

62. The bulk of the Repair that was were paid by the insurance company to be paid or not paid. This is the only money not paid was the money for Excess. Towing charges were incurred by the insurer

63. The plaintiff is not claiming under subrogation.

64. In the circumstances, I would have given the plaintiff 340,000, being the portion of the repair charges he incurred had he succeeded on liability. I must confess, that there were difficulties comprehending evidence around repair charges as they were literally thrown at the court. The rest of the claims will also be dismissed. The cost of repairs cannot be made on a vehicle valued at 1,600,000/= to outstrip its value.

65. In the circumstances, the claim for Kshs. 335,344,3888 is equally dismissed.

Costs

66. A successful party is entitled to costs. Under Section 27 of the *Civil procedure Act*, a successful party is entitled to costs. The costs can be on scale or nominal.

67. I find that the defendant is entitled to costs. The matter having been filed in 2005, the 1997 advocates (Remuneration) (Amendment) Order was applying. I therefore award the Defendant cost of Kshs. 600,000/= payable within 45 days, in default execution to issue.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29TH DAY OF JUNE, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Otuya for Jadi for the Defendant

Mr. Korobia for the Plaintiff

Court Assistant - Brian