



**Manji Kanji Patel t/a Kajal Enterprise v Mbukoni Services Ltd (Civil Appeal
E029 of 2020) [2023] KEHC 21182 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E029 OF 2020
MW MUIGAI, J
JULY 31, 2023**

BETWEEN

MANJI KANJI PATEL T/A KAJAL ENTERPRISE APPELLANT

AND

MBUKONI SERVICES LTD RESPONDENT

*(Being an Appeal from the judgment and decree of the Chief Magistrate's Court at Mavoko,
Hon. R. Gitau, RM, in Civil Suit No. 500 of 2019 delivered on 28 th September,2020)*

JUDGMENT

Background

Proceedings In Magistrates' Court Plaintiff

1. Vide a plaint dated 11th June, 2019 and filed on 17th July,2019, brought against the Appellant in which the Respondent claimed that at all times material to the suit, the Respondent was and is the registered owner of motor vehicle registration Number KCA 667U while the Appellant was the registered owner of motor vehicle registration number KAK 548H.
2. Averring that on or about 28/4/217 the Respondent's motor vehicle Registration Number KCA 677U was lawfully and carefully being driven along Nairobi Mombasa Road when at Makuti area which is a few meters from Devki in Athi river Motor vehicle Registration Number KAK 548H which was negligently driven, controlled and/ or managed by the Defendant either by himself, his authorized driver, agent and/ or servant, veered off its lawful lane and hit Motor vehicle Registration Number KCA 677U causing an accident as result of which people were injured and the Respondent's vehicle was extensively damaged. The respondent further stated that it suffered loss and has incurred expenses. The particulars of special damages were:
 - a. Motor vehicle assessment fee 6,000/=



- b. Motor vehicle search 1,100/=
 - c. Repairs 1,655,000/=
 - Total 1,662,100/=
3. The Respondent prayed for judgment be entered in its favor against the Appellant as follows;
- a. Kshs 1,125,000/= for loss of user
 - b. Special damages in the sum of Kshs 1,622,000
 - c. Cost of this suit
 - d. Interest on (a), (b) and (c) above.

Defence

4. The Appellant in its defense dated 20th September,2019 opposed the Respondent's claims denying that on the date mentioned in the plaint or on any other date, the Respondent was lawfully driving motor vehicle registration number KCA 677U along Nairobi-Mombasa area when at Makuti Area the Appellant so negligently and carelessly drove, managed and / or controlled motor vehicle KAK 548H causing it to collide with motor vehicle registration number KCA 677U, thereby causing extensive damage to the Respondent's motor vehicle and puts the Respondent to strict proof.
5. The appellant further averred that if an accident did occur as alleged (which is denied in toto) the same was wholly caused or substantially contributed to by the Respondent's own negligence. The Appellant denied in entirety the contents of the plaint save for the jurisdiction this Honorable Court which was admitted and prayed that the Respondent's suit against the Appellant be dismissed with costs.

Reply To Defence

6. The Respondent, in its reply to defence dated 11th October,2019 denied the allegations contained in the defence and particulars of negligence attributed to it. Averring that after police investigations, the driver of motor vehicle registration number KAK 548H belonging to the Appellant was to blame for causing the accident and placed the Appellant to strict proof of any allegation to the contrary. It was averred that the Appellant's defence was a mere denial which is bad in law and an abuse of court process.
7. The matter was canvassed vide written submissions.
8. Vide judgment delivered on 28th September,2020, Hon. R.W. Gitau agreed with the Respondent and entered judgment on its favor in which the learned Magistrate entered the said judgment against the Appellant on the following terms:
- Repair cost Kshs. 1,655,000/=
 - Search Kshs. 1,100/=
 - Assessment fees Kshs. 6,000/=
 - Loss of user Kshs. 1,125,000/=
 - Total Kshs. 2,787,100/=
9. Vide a Notice of Motion dated 7th October,2020, the Appellant sought orders that pending the hearing and determination of the application the Honorable Court be pleased to extend stay of execution orders issued on 28/9/2020 staying execution of the judgment entered in this matter on 28/9/2020



- and the resulting decree; that pending the hearing and determination of the appeal by the Appellant, this Honorable Court be pleased to grant an order of stay of execution of the judgment as well as the resulting decree delivered by this Honorable court and the cost of application be costs in the Appeal.
10. Vide the supporting affidavit dated 7th October, 2020, it was deposed that there was an existing temporary order of stay of execution issued by the court for a period of 30 days which is set to expire on 28th October, 2020 thereby exposing the Appellant to execution since the Respondent will be at liberty to enforce the judgment upon lapse of the said period; that the Appellant being aggrieved by the said judgment of the Honorable Court has lodged an appeal against the judgment at the High court and that the said appeal is arguable and with high probability of success (annexed was a copy of the memorandum of appeal); deposing that the Appellant was ready, willing and able to deposit part of the decretal amount in court as may be directed by the Honorable Court as a condition for Grant of the orders of stay of execution pending the hearing and determination of the appeal.
 11. Vide replying affidavit dated 23rd October,2020, Respondent opposed the application terming the application as frivolous, vexatious and an abuse of court process, deposing that it lacked merit and should be dismissed on the very outset; the Respondent averred that the Appellant was yet to file a Memorandum of Appeal as the annexed Memorandum of Appeal was not officially received by the High Court Registry and had not been allocated case number; the respondent further deposed that the Appellant had not met the threshold and requirements for granting such application and that the Appellant had failed to demonstrate the substantial or irreparable loss it would suffer if the orders sought are not granted. It was deposed that the Appellant is a well-established transport company that will have no difficulty in repaying the decretal sum should the appeal succeed. Urging that the Appellant deposits the entire decretal sum plus costs of the suit or such other security that the court may order for the due performance of the decree.
 12. Vide a supplementary affidavit dated 26th November,2020 the Appellant attached the Memorandum of Appeal duly received by the High Court in Machakos and with the case number and deposed that failure to attach the duly stamped copy in the first instance was due to online filing system challenges evidence was shown on how emails was exchanged between the High Court Registry and the Appellant. It was further deposed that they were very apprehensive of the Respondent's financial muscle to refund the decretal sum should the appeal succeed as the Respondent had not adduced any evidence and that the burden is on the Respondent to provide proof to court that it is capable of refunding the decretal sum should the Appeal be successful. Deposing that the Appellant's appeal has reasonable chances of succeeding as it raises arguable grounds for consideration and determination by the High Court; lamenting that the Respondent is unlikely to suffer any prejudice this Honorable court grant the orders sought by the Appellant.
 13. The application and the opposition to the application was canvassed by way of written submissions.
 14. Vide a ruling dated 15th December,2020, entered in favor Appellant in which it was directed that the Appellant deposit half the decretal sum in court within 30 days from the date of the delivery of the ruling.
 15. Pursuant to yet another Notice of Motion Dated 11th February, 2021, in which the Appellant sought orders that: the Honorable Court be pleased to enlarge the time within which the Applicant can comply with orders of the court issued on the 15th December,2020 to deposit as security half of the decretal sum as a condition for the grant of stay of execution orders; and on the alternative the decretal amount required to be deposited as security be deposited in a joint interest earning account held in the names of both the advocates on record for the Respondent and for the Appellant. Further that court



be pleased to reinstate the orders of stay granted pending appeal. The said application was supported by the supporting affidavit of the Appellant.

16. The Respondent Vide grounds of opposition dated 26th February,2021 opposed the Notice of Motion dated 11/2/2021 and sated that the extension of time is not a right of a party; contending that court's ruling was clear that the amount was to be deposited within 30 days of 15/12/2020 which lapsed on 15/1/2020 terming the current application an afterthought; it was its opposition that application intends to enlarge time for orders that have already expired therefore non extent and court cannot act in vain and that the Appellant sat in their offices and did not take any initiative to comply with the orders until the Respondent wrote to them on the intention to proceed with the execution that they came to court seeking the orders; urging that the Appellant had approached the court with unclean hands and the current application is meant to defeat finality and justice to move the Respondent away from the seat of justice and enjoying the fruits of the regular judgment entered on 28/9/2020; contending that the Appellant's application is bad in law, an abuse of the court process and ought to be dismissed with costs to the Respondent.
17. The application and grounds of opposition to the application was canvassed by way of written submissions.
18. Vide a ruling dated 24th May,2021, the Appellants application was granted and directed to deposit half the decretal amount in court within 15 days from the date of the delivery of the ruling and further that the orders of stay pending appeal reinstated.

The Appeal

19. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 6th October, 2020 sought orders to have the Appeal allowed and the trial court's judgment be set aside; in the alternative, this Honorable Court be pleased to reassess and/ or re-evaluate the evidence and make a fresh assessment of damages and a finding of liability; this Honorable Court be pleased to make any other order it deems fit and just; the costs of this appeal be provided for. On the grounds THAT:
 - a. The learned Trial Magistrate erred in law and in fact by basing her decision and apportioning liability solely on the basis of hearsay evidence.
 - b. The learned Trial Magistrate erred in law and in fact in awarding a sum in respect of loss of user in the absence of cogent evidence specifically proving the same, hence, the resulting award by the trial court represented an entirely erroneous estimate of damages.
 - c. The Trial Magistrate proceeded on wrong principles by using a multiplier of Seventy-five (75) days when assessing the damages to be awarded to the respondent and thus failed to apply precedents and tenets of the law applicable.
 - d. The Learned Magistrate grossly misdirected herself by adopting a multiplicand of Fifteen Thousand (15,000) as proposed by the Respondent and in the circumstances failed to take into account deductions in the said sum thus arriving at an inordinately high award.
 - e. The Learned Magistrate grossly misdirected herself in treating the evidence and submissions on liability and quantum before her superficially and consequently coming to an erroneous conclusion on the same.



- f. The Learned Trial Magistrate Misdirected herself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in written cited in the written submissions presented and filed by the Appellant
- g. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
- h. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate.
- i. The Learned Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on liability and quantum and thereby arrived at a decision unsuitable in law.

20. The Appeal was disposed by way of written submissions.

Submissions

21. The Appellant did not file its written submissions as per the court record.

Respondent's Submissions

22. The Respondent vide its Submissions dated 28th November,2022, raised the following issues sequentially:

- a. Whether the Trial Magistrate was right in regards to apportionment of liability. On this issue reliance was placed on Section 107 (1) of the Evidence Act Cap 80 laws of Kenya which provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

23. Similarly, while addressing the question on what amounts to proof on the balance of probabilities, reliance was places on William Kabogo Gitau vs George Thuo & Others (2010) 1 KLR 526, where Kimaru J stated that:

“In ordinary civil cases, a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

24. Submitting that the respondent's witness Pw1 produced the police Abstract marked PEX1 which blamed Motor vehicle KAK 548H for the accident during the hearing. Contending that Respondent relied on the police Abstract report produced without objection by the Appellant was involved in the said accident.

25. The position of the Respondent was that since the Appellant alleged that they were not completely liable for the accident, the burden shifted onto them to prove this fact by way of evidence. Reliance was made on Section 109 and 112 of the Evidence Act as follows:



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. 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.
26. Consequently, the respondent relied on the case of *Evans Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR, in which court reiterated the above provisions.
27. Further, the Respondent relied on the case of *Palace Investment Ltd Vs Geoffrey Kariuki Mwenda & Another* (2015) eKLR, while citing *Miller vs Minister of Pensions* (1947) 2 All ER 372, where held that:
- “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.”
28. Submitting that the Appellant was involved in the said, in the absence of any evidence to the contrary there was no basis in finding otherwise and that the learned trial Magistrate was correct to have found that the Appellant was completely liable for the accident.
29. On whether the Learned Trial Magistrate was right in her estimate of the damages in respect of loss of user, it was the Respondent’s submission that loss of user are special damages that must be proved. Reliance was made on the case of *Civil Appeal No. 283/1996, David Bagine Vs Martin Bundi* as Cited in *Jackson Kiprotich Kingeno & Another vs Daniel Kiplimo Kimetto* (2008) eKLR, it was held that:
- “We must and ought to make it clear that damages under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no 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...”
30. It was the contention of the Respondent that special damages are out of pocket expenses and provable losses that have been incurred as a direct result of the defendant’s actions or behavior and that the principle of mitigation of loss imposes a duty on the party injured by a breach of contract or tort to mitigate his loss by taking such reasonable measures to minimize his loss arising from the breach or tort. Reliance was on the case of *Farah Awad Gullet vs CMC Motors Group limited* (2018) eKLR, that

On mitigation of loss, we agree with the Judge’s finding that it is now a well settled principle of law that a party seeking redress in damages either for breach of contract or in tort has a duty to mitigate his loss;(cited with approval the case of *British Westing House Electric and Manufacturing Company versus Underground Electricity RYS Company of London* [1912] A.C 673 as per Lord Harldarne LC.



31. Respondent further relied on the case of Summer Limited Meru Vs Moses Kithinji Nkanata (2006) eKLR, and submitted that the Respondent's witness PW1 who is one of the Respondent's Directors, pleaded 15,000/= as the sum per day that the company lost during the 75 days the motor vehicle was out of commission for repairs during the hearing and that a schedule of earnings marked PEX 7 was produced to support the claim.
32. Submitting that the loss of user was specifically proved and was specifically pleaded in the plaint therefore it was correct on the part of the Learned Magistrate to have found that the Appellant was liable for loss of user and correctly calculated the sum in accordance with the evidence tendered.
33. Urging that it is not only just but fair to dismiss the appeal with cost as the same is not merited and the orders sought are incapable of issuing.

Determination

34. The Court considered the memorandum of appeal, the Lower Court record and written submissions of the Respondent. The Appellant did not file written submissions despite the option to file the written submissions with the Deputy Registrar before the Judgment.
35. In spite of lack of written submissions, this Court is mandated as 1st Court of Appeal to evaluate the evidence on record.

This being a first appellate court, it was held in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“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.”

36. The evidence adduced during trial was by PW1 Alfred Kyalo Kivuu Director of the Plaintiff Company recorded Witness Statement and stated that owned motor vehicle Reg. KCA 677U a Transporter vehicle that was involved in an accident on 28/4/2017. The driver, Anderson Kitele Mutua driver of the said vehicle on the said day recorded A Witness Statement but did not testify.
37. PW1 produced Police Abstract Ex -1 that blamed the Defendant for the road traffic accident; Certificate of Examination and test of vehicle and Inspection Report- Ex 2; Copy of Records – Ex 3a Registered owner of their vehicle Reg KCA 677U is Mbukoni Services Ltd. Copy of records Ex 3b Vehicle Reg. KAK 548H is Manji Kanji Patel. Statutory Notice – Ex 4 Ex a bundle of receipts confirming repairs on the vehicle Ksh 1,655,000/-.
2 receipts confirming search fees 2 copies of records Ksh 1100/- Ex6b.
Schedule of Loss of Earnings for 75days while the vehicle was out of transport business that showed 75 days x 15000/- =Ksh1,125,000/-
38. PW2, Moles Mwangi, Motor vehicle Assessor, who assessed motor vehicle Reg KCA 677U Mitsubishi on 28/4/2017, the damage on the vehicle was fresh and consistent with violent impact on front left-hand side of the vehicle. He prepared his Report and produced as Ex 5 a Report & Ex 5 b the receipt.



39. The Defendant did not adduce any evidence.
40. The Court has evaluated the evidence on the Trial Court record and based on the Standard and burden of Proof provided by Section 107-112 of *Evidence Act*, the evidence as indicated by Police Abstract, motor vehicle Reg. KAK 548 H was to blame. This fact was not controverted by any other evidence by the Defendant. The Plaintiff witnesses were subjected to cross examination by Defendant's advocate on record to test veracity of the evidence and/or challenge any of the documents produced as exhibits.
41. In the absence of any doubt cast to the Plaintiff's case, the Plaintiff has established its case on a balance of probabilities that the accident of 28/4/2017 was caused by the Defendant's driver and resulted in damage and loss to the Plaintiff.
42. Therefore, 100% liability is upheld.
- As to quantum,
43. In BUTT vs KHAN [1977] KLR C.A.E.A.; the Court observed;
- The principles that guide an appellate court in handling a complaint on award of damages are clear and well settled;
- “an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”
44. Boniface Waiti & Another Vs Michael Kariuki Kamau Hcca 705 Of 2003 (nambuye.j) on the established principles in assessment of damages;
- 1) Award of damages is meant to compensate but not enrich the victim
 - 2) Award should be commensurate to the injuries
 - 3) Awards in decided cases are mere guides each case should be treated on its own facts and merit Awards in decided cases taken into consideration , the issue of own element of inflation has to be taken into consideration.
 - 4) Awards should not be inordinately too high or too low.
45. In the instant case, PW2 the Motor Vehicle Assessor examined the motor vehicle Reg KCA 677U Mitsubishi on 28/4/2017 and produced his Assessment Report annexed in the Record Of Appeal Pragma- Tech Auto Assessors Ltd Report for M/vehicle Reg KCA 677U which listed parts to be repaired and parts to be replaced and market prices totaling to Ksh 1,960,000/- and breakdown of Total Repair Cost and in cross examination he stated the cost of repair was almost the insured amount and was declared write off or could be repaired if spares could be availed other than the new/market prices.Ex 4 Ex a bundle of 4 receipts confirming repairs on the vehicle Ksh 1,655,000/-and Schedule of Loss of Earnings for 75days at Ksh 1,125,000/-both specifically pleaded in Paragraph 7 & 8 of the Plaintiff and also proved.

Disposition

1. Appeal dismissed with costs to respondents.
2. Trial Court judgment of 28/9/2020 is upheld.



JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 31ST JULY 2023. (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence of:

No Appearance - for the Appellant

No Appearance - for the Respondent

Geoffrey/patrick - Court Assistant(s)

