



**Muchiri v Holiday Cars and Tours Limited (Civil Appeal
E002 of 2022) [2023] KEHC 20761 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E002 OF 2022**

**PM MULWA, J
JULY 26, 2023**

BETWEEN

JAMES KIMANI MUCHIRI APPELLANT

AND

HOLIDAY CARS AND TOURS LIMITED RESPONDENT

*(Being an appeal from the judgment delivered by Hon.
Priscah Nyotah (RM) in Ruiru CMCC no. E025 of 2021)*

JUDGMENT

1. This appeal emanates from the material damage claim brought on behalf of CIC General Insurance under the doctrine of subrogation. By the plaint dated 19th January 2021, the appellant sought special damages of Kshs 1,335,985/= being money used in the repair of Motor Vehicle KCG 185Y. The appellant alleges that on 25th January 2018, along Thika Superhighway, the defendant's driver or servant managed and or controlled the motor vehicle registration number KBP 948E and caused it to ram on motor vehicle KCG 185Y leading to extensive damages.
2. The appellant alleged negligence on the respondent's driver hence the accident. The respondent filed a statement of defence on 29th June 2021 denying the averments in the plaint and attributed negligence on the part of the appellant.
3. At the hearing three (3) witnesses testified for the appellant's case, while the respondent did not call any witness. The learned trial magistrate in her judgment dismissed the claim and found the appellant had failed to prove to the required standard the negligence on the part of the respondent.



4. Dissatisfied with the court judgment, the appellant filed the memorandum of appeal on 7th January 2020 and cited the following six (6) grounds:
 - i. That the honourable Learned Magistrate erred in law and in fact in applying the wrong principles of law on standards of proof in civil cases.
 - ii. That the learned magistrate erred in law and in fact in failing to consider and properly evaluate the Plaintiff's evidence.
 - iii. That the honourable learned Magistrate erred in law and in fact in failing to consider and apply some weight on the evidence tendered by the Plaintiff evidence.
 - iv. That the learned trial magistrate erred in law and in fact in dismissing the plaintiff's evidence and the suit due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - v. The learned trial magistrate misdirected herself by failing to consider the evidence and the submissions by the Appellant while arriving at the judgment.
 - vi. That the learned trial magistrate erred in law and in fact in awarding costs of the suit to the Respondent.
5. The appellant proposed to ask the court to allow the appeal and set aside the judgment of the trial court, enter liability in favour of the appellant and the respondent be condemned to pay the costs of the appeal and in the trial court.
6. The appeal was heard by way of written submissions. Only the appellant filed submissions.

Appellant's submissions

7. Counsel reminded the court of its duty sitting as an appellate court as stated in *Selle & Anor v Associated Motor Boat Co. Ltd* [1986] EA 123.
8. Counsel submitted that the suit was brought under the doctrine of subrogation and evidence was adduced for compensation of the loss that was occasioned to Motor Vehicle Registration Number KCG 185 Y. He relied on the case of *Africa Merchant Assurance Company vs Kenya Power & Lighting Company Limited* [2018] eKLR where the court stated "the essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insured is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated."
9. It was submitted for the appellant that the burden of proof shifted to the respondent to prove its agent was not negligent while driving on the said road, but it failed to call a witness. That the appellant's evidence was uncontroverted in the absence of any contrary evidence to rebut his assertions and testimony. And that it should be found that the appellant proved his case on a balance of probability.
10. It was further submitted that the variance in respect of the evidence on record and the pleading was not fatal as the respondent did not adduce any evidence to prove that the accident did not happen. The error in the pleadings is excusable as it does not negate the occurrence of the accident. That there was evidence that is consistent with the pleadings to the extent that there was an accident involving Motor Vehicle registration numbers KBP 948E Isuzu Minibus and KCG 185Y on 25th January 2018. It was



submitted that the accident was caused by the negligence of the driver of Motor Vehicle KBP 948E, who changed lanes without giving notice.

11. Counsel submitted there was overwhelming evidence tendered to prove the accident was caused by the negligence of the driver of KBP 948E. Pw1 testified the damage to the motor vehicle KCG 185Y was caused at the time of the accident, which occasioned the costs of the repairs. The total repair costs were as per the assessment report and the invoice dated 30th January 2018. The appellant seeks the special damages outlined as follows:

Cost of repairs Kshs. 1,274,492/=

Assessment fees Kshs. 10,208/=

Re-inspection fees Kshs. 2,320/=

Towing refund Kshs. 28,000/=

Tracing Fees Kshs. 20,965/=

All of these receipts have been attached.

12. In conclusion counsel urged the court to allow the appeal and set aside the trial court's judgment.

Analysis and determination

13. Section 78 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, provides for powers of the court on appeal as a first appellate court to "re-evaluate, re-assess and re-analyze the extracts of the record and draw its own conclusions." These principles were reiterated by the Court of Appeal in the case of Peter M. Kariuki vs. Attorney-General [2014] eKLR where the court stated that; "We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

14. Given the duty of this court sitting as a first appeal court I will first analyse the trial court evidence.

Trial court evidence

15. Pw1 - Fredrick Mutwiri testified he was a motor vehicle assessor, who assessed motor vehicle registration KCG 185Y and he produced the assessment report and invoice of Kshs. 10,208/=, receipt and voucher.
16. Pw2 Sgt Millicent Kenga, a police officer attached to Ruiru Traffic Base told the court the accident happened on 25th January 2018 involving motor vehicles KCG 185Y and KBP 948E. That the driver of KBP 948E was blamed for the accident for changing lanes without taking caution. That motor vehicle KBP 948E was damaged on the rear bumper, rear right tyre, and rear right body while motor vehicle KCG 185Y was damaged on the bonnet, bumper, rear right boot, headlights, windscreen, and rear right door. She adduced the police abstract.
17. In re-examination she told the court the OB did not indicate which vehicle caused the accident.
18. Pw3 - Joseph Karanja Muchiri testified he is the legal officer at CIC General Insurance. He adopted his witness statement and list of documents.
19. In cross-examination he stated it was an error that he indicated the motor vehicle KBP 948E rammed into motor vehicle KCG 185Y from behind.
20. The Defendant did not call any witness.



21. The trial magistrate opined that the "...testimony of pw2 and pw3 was in complete variance with the pleadings of the plaintiff. According to the pleading the defendant's vehicle hit the appellant's vehicle from the rear which Pw3 attempted to correct in his cross-examination. That the error was not a typo but a substantive variance that affected the issue of liability. I am unable to find liability on the part of the defendant. The suit against it is dismissed"
22. I have considered the appeal, the appellant's submissions and the impugned judgment. The issue for determination is whether the appellant made payments in respect of repair costs for which they now seek compensation.
23. In *Kenya Power & Lighting Company Limited v Julius Wambale & Another* [2019] eKLR the court stated:

"The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby, usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract insurance."
24. In due consideration of the documents filed I have perused the accident assessment report prepared by Elite Automobile Valuers and Assessors as well as the Police Abstract, they both confirm that indeed an accident happened and Motor Vehicle KCG 185Y was damaged. As per the Post Valuation Assessors report filed by Master Assessors and Engineers, it is sufficient evidence that the Motor Vehicle KCG 185Y was repaired and an invoice dated 28th February 2018 was issued by Alpha Touch Motors Masters in respect to the said motor vehicle for the sum of Kshs. 1,274,492/=.
25. An insurer has a right to bring a claim for reimbursement of the insured in the name of the insured after it has settled the amounts on behalf of its client. The appellant adduced evidence that indeed the motor vehicle was repaired as per the post assessment report.
26. In the case of *Indemnity Insurance Co. of North America and Another vs. Kenya Airfreight Handling Ltd and Another* [2004] 1 EA 52 the court held: "Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured."
27. Therefore, it is my finding that the learned trial magistrate erred in holding that the appellant did not prove liability on the part of the respondent. The appellant's evidence was that the driver of Motor Vehicle KBP 948E caused the accident, by changing lanes without due regard and notice to other road users. The evidence of the appellant was not controverted by the respondent. It was also proved by evidence that Motor Vehicle KCG 185Y was repaired at the cost of the insurance company and a receipt of Kshs. 1,274,492/= issued.
28. In the foregoing circumstances, I am satisfied that the appeal is merited and this court will exercise its jurisdiction and interfere with the trial court's finding.
29. Accordingly:
 - i). The appeal is allowed.
 - ii). The appellant is awarded the sum of Kshs. 1,274,492/=.
 - iii). Each party is to bear their costs of the appeal. The appellant will have costs in the trial court.



It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU
THIS 26TH DAY OF JULY 2023.**

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P.M. MULWA

JUDGE

In the Presence of:

Duale – Court Assistant

Ms. Achola h/b for Mr. Ngigi for the appellant

N/A for the respondent

