



REPUBLIC OF KENYA



KENYA LAW
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**Amos v Juma (Commercial Appeal E136 of 2022) [2023] KEHC 21844 (KLR)
(Commercial and Tax) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E136 OF 2022
DAS MAJANJA, J
AUGUST 31, 2023**

BETWEEN

NDERI KAHERI AMOS APPELLANT

AND

JOSEPH ODHIAMBO JUMA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. S. Aswani, SRM dated 19th July 2022 at the Nairobi Magistrates Court, Milimani in SCCC No. E894 of 2022)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant from the judgment of the Small Claims court dated July 19, 2022 where the Appellant was found 100% liable for an accident along the Northern Bypass at Maruirui involving the Respondent's motor vehicle registration number KCT C and the Appellant's motor vehicle registration number KBF D. The Appellant was also ordered to pay Kshs. 513,881.00 being repair costs and assessment fees.
2. The background leading to the judgment can be gleaned from the record. By a Statement of Claim dated April 14, 2022, the Respondent filed suit claiming that on April 19, 2019, he was lawfully driving his motor vehicle at Maruirui along the Northern Bypass when the Appellant or his authorized driver negligently drove his motor vehicle KBF D causing it to ram into the Respondent's motor vehicle KCT C resulting in extensive damage. The Respondent claimed repair costs of Kshs. 507,001.00, tracing fees of Kshs. 26,585.00 and assessment fees of Kshs. 6,880.00 bringing his total claim to Kshs. 540,466.00.
3. The record indicates that despite service of the claim, the Appellant did not file a response within time leading the subordinate court to enter an interlocutory judgment against him. The court directed that



the issue of liability proceed for formal proof by way of documents and submissions. The appellant then filed an application seeking to set aside the ex parte judgment claiming that he was never served with the pleadings and summon. The Adjudicator dismissed the application on July 19, 2022. The Adjudicator also dismissed a similar application on September 1, 2022 which in effect affirmed the court's previous ruling and judgment of July 19, 2022 thus leading to the present appeal which has been canvassed by way of written submissions.

Analysis and Determination

4. The court's jurisdiction in dealing with appeals from the Small Claims Court is limited by section 38(1) of the *Small Claims Court Act, 2016* ("the SCA") which provides that 'A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.' A court limited to matters of law is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuwe Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).
5. The appellant raises 10 grounds in its memorandum of appeal however, in its submissions, it has condensed the same to two issues; Whether the respondent had proved its case against the appellant on a balance of probabilities and whether the appellant was liable for the loss and damage caused to the respondent's motor vehicle.
6. The appellant submits that the respondent failed to prove its claim that the appellant was responsible for the damage caused to the respondent's motor vehicle as the only evidence tendered in support was a police abstract dated April 23, 2019 and the respondent's witness statement. Further, that there was no testimony by the Investigating Officer or an Officer who was at the scene of the accident. The appellant further submits that the abstract lacked any probative value as it did not show causation by the appellant for the accident and the Abstract did not specify who was found culpable for the accident contrary to the assertion by the trial court in its judgment that the appellant's motor vehicle was blamed for the accident.
7. The appellant submits that respondent still had a duty to discharge his evidential burden of proof notwithstanding the ex-parte judgment. He contends that the respondent's witness statement is the only other evidence tendered that relates to the alleged accident and that the same is neither independent nor objective and cannot be relied upon to prove causation. Therefore, the appellant submits that the respondent failed to prove causation and its claim on a balance of probabilities hence he cannot be held liable for the loss and damage.
8. The Respondent opposes the appeal, contends that it is not on a point of law and urges the court to dismiss it. He further submits that he proved liability before the trial court as the motor vehicle search indicates that the Appellant was the owner of the motor vehicle number KBF D, that the Abstract places the motor vehicle at the scene of the accident and that evidence adduced indicates that the motor vehicle KBF D hit the Respondent's vehicle from behind. The Respondent submits that the evidence above on liability was never controverted as the Appellant closed its case without presenting evidence or exhibit in support of its case. He points out that the Appellant's negligence can be inferred from the occurrence of the accident as the Appellant's vehicle hit Respondent's vehicle from behind and as stated in the Respondent's witness statement, the Respondent's vehicle was moving and the Appellant's vehicle caused the accident.
9. The Respondent maintains that he proved the quantum of damages to the required standard by demonstrating that he spent Kshs. 540,466.00 on the repair of his motor vehicle by producing receipts.



10. The Appellant appears to be challenging the trial court's factual conclusions on the issue of liability contrary to section 38(1) of the SCA enunciated above. As stated before, this court can only intervene on the factual issues if it is demonstrated that the findings of the trial court are inconsistent with and cannot be supported by the evidence to the extent that no reasonable trial court would have arrived at them.
11. Although the Appellant attempts to rehash the evidence in order to attack the judgment, it is common ground that the Appellant did not have a response to the Respondent's claim as its attempts to file a response were rejected by the subordinate court, the same having been presented out of time despite proper service. This failure to file a response in time paved the way for the entry of the interlocutory judgment against the Appellant in line with Rule 11(1) of the *Small Claims Court Rules*, 2019. I note that the Appellant did not appeal against the Subordinate Court's ruling that affirmed the interlocutory judgment. He has also not appealed to the court by claiming that he had a response that raised any triable issues before the Subordinate Court. This in effect means that the Appellant had no defence or response to the Respondent's claim.
12. Without the defence on record, the averments in the statement of claim were deemed to be admitted. Moreover, the issue of the Appellant's liability was determined conclusively by the entry of interlocutory judgment. The direction by the Adjudicator that the matter proceed for hearing on the issue of liability was therefore superfluous in view of the interlocutory judgment. The only issue left resolution was the determination of damages. The Court of Appeal dealt with the effect of interlocutory judgment in *Felix Mathenge v Kenya Power & Lighting Company Ltd* NRB CA Civil Appeal No. 215 of 2002 [2008] eKLR. It observed as follows:

The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages. See *Kavindu & another v Mbaya & another* [1976] KLR 164. We would agree, therefore, with Mr. Muturi that it was an error on the part of the Hon. Commissioner of Assize to dismiss the suit for want of proof of liability instead of merely assessing damages.

13. The import of the aforesaid decision is that once the court enters interlocutory judgment, the question of liability becomes a foregone conclusion and that the role of the court thereafter is to assess damages. In this case, the assessment of quantum was done by way of formal proof and presentation of documents in line with section 30 of the SCA which permits the court to hear a matter based on documents and as read with Rule 5(1) of the Rules which requires a party to attach to its statement of claim documents proving the cost of repairs and, "an itemised receipt issued in acknowledgment of money paid by the claimant to a licenced mechanic on account of repairs already carried out on the motor vehicle in question." The Adjudicator found that the Respondent had proved the repair costs and assessment fees by way of receipts and also rightly declined to award the tracing fee as it was only supported by an invoice which does not amount to proof of payment.



Disposition

14. Having reviewed the record, I do not find any merit in the appeal. It is dismissed with costs. The Appellant shall pay costs of the appeal assessed at Kshs. 30,000.00.

DATED and DELIVERED at NAIROBI this 31st day of AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Kibaara instructed by Kimondi, Gachoka and Company Advocates for the Appellant.

Mr Juma instructed by J. O. Juma and Company Advocates for the Respondent.

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