



REPUBLIC OF KENYA



KENYA LAW
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**Peter v Wambui (Civil Appeal 67 of 2018)
[2023] KEHC 22897 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 67 OF 2018
LM NJUGUNA, J
SEPTEMBER 29, 2023**

BETWEEN

NDERITU MATHU PETER APPELLANT

AND

GERISHON MAINA WAMBUI RESPONDENT

(Appeal arising from the decision of Hon. D.N. Sure RM in Senior Principal Magistrate's Court at Wang'uru Civil Case No. 99 of 2017 delivered on 23rd July 2018)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 22nd August 2018 being dissatisfied with the abovementioned decision and seeking orders that the judgment of the trial court be set aside. The appeal is premised on the grounds that:
 - a. The trial magistrate erred in fact and law by awarding the respondent special damages while the same was not specifically pleaded as required by law;
 - b. The trial magistrate erred in fact and law by awarding the respondent costs of repairs or loss of motor vehicle while evidence before her demonstrated that the accident motor vehicle was owned by someone else;
 - c. The trial magistrate erred in law by failing to find that the evidence on ownership of the motor vehicle was not sufficient to prove the case on a balance of probabilities;
 - d. The trial magistrate erred in fact by failing to deduct the salvage value from the special damages;
 - e. The trial magistrate erred in law by not subjecting all the damages awarded to reduction equivalent to the level of contribution agreed by the parties; and



- f. The trial magistrate erred in law by making an award of damages that was too high to amount to a completely wrong estimate.
2. The facts of the case are that vide plaint dated 30th June 2017, the plaintiff/respondent instituted a suit claiming general and special damages, costs of future medical expenses and costs of the suit. This, following a road traffic accident whose particulars are that on 05th July 2015, the plaintiff was driving motor vehicle registration no. KAT 163G along Sagana-Kenol road when the defendant carelessly and recklessly drove motor vehicle registration no. KDB 197T that it lost control and violently collided with the plaintiff's motor vehicle, as a consequence of which the plaintiff sustained serious injuries and his motor vehicle was extensively damaged. The injuries sustained were fractures on the right femur, right foot, right fibia and fibula, head injuries marked with loss of consciousness and multiple soft tissue injuries. He claimed special damages for medical expenses incurred, future medical expenses to be incurred, costs of repair of the motor vehicle, towing charges, motor vehicle assessment fees and general damages.
 3. In his defence, the defendant/ appellant denied the averments and stated that the plaintiff/respondent substantially contributed to the accident. The parties agreed on a liability ratio of 70:30 in favour of the plaintiff.
 4. The trial court awarded Kshs. 171,000/= for future medical expenses, Kshs. 630,000/= as general damages prorated, special damages for medical expenses of Kshs. 170,100/=, pre-accident motor vehicle value of Kshs. 450,000/= and towing charges of Kshs. 40,000/=.
 5. In this appeal, the court directed that the parties file their written submissions and both of them complied.
 6. In his submissions, the appellant reminded the court of its appellate powers as stated in the case of *Bwire Vs. Wayo & Sailoki (2022) eKLR*. He submitted that special damages must not only be specifically pleaded but must be proved as was stated in the case of *Hahn Vs. Singh (1985) eKLR*. That the plaintiff/respondent was not the registered owner of the motor vehicle and cannot therefore claim compensation on it. That the sale agreement for purchase of the motor vehicle was undated and the plaintiff/respondent seemed unsure of the purchase price and the colour of the said motor vehicle he was purchasing from the owner, one Paul Karimi. That there was not sufficient proof of ownership of the said motor vehicle and yet the trial court relied on the details on the police abstract to verify ownership of the motor vehicle. He cited the cases of *Wellington Nganga Mathiora Vs Akamba Public Road Services Ltd & Anor [2010]eKLR* and *Joel Muga Opinja Vs. East Africa Seafood Limited (2003)eKLR*.
 7. It was his submission that the case ought to have been proven on a balance of probabilities according to section 109 of the *Evidence Act* and the case of *Karugi & Another Vs. Kabiya & 3 Others (1987) eKLR* and *Treadsetters Tyres Ltd Vs. John Wekesa Wepukhulu (2010) eKLR*. That when he was cross-examined, the plaintiff/respondent admitted that the vehicle was yet to be transferred to him and he produced an undated sale agreement between him and one Paul Karimi. That the plaintiff/respondent stated that he was unable to repair the motor vehicle and therefore claimed the pre-accident value. On this, he submitted that the pre-accident value should be less the salvage value as was stated by the court of appeal in the case of *Jimnah Munene Macharia Vs. John Kamu Erera civil appeal no. 218 of 1998*.
 8. He submitted that all the damages should have been subjected to the liability ratio of 70:30 and not just the general damages and on this he relied on the case of *Slapper Shoes Ltd Vs. Nixon Wekesa Masinde civil appeal no. 74 of 2002*. He also decried the award of general damages terming the same as



inordinately high and relied on the cases of Butt Vs. Khan (1978) eKLR, West (H) and Sons Limited Vs. Shepherd (1964) AC and Parodi Giorgio Vs. John Kuria Macharia (2014) eKLR.

9. The respondent submitted that special damages were specifically pleaded under paragraph 7 of the plaint and receipts were produced and led to the trial court's award. That regarding the ownership of the motor vehicle, the respondent had begun payment of the purchase price of Kshs. 500,000/= to the owner, Paul Karimi, on agreement that the transfer would be done once the payment is made in full. That the police abstract recognized the respondent as the owner of the motor vehicle and the court was right in following this interpretation. He urged the court not to disturb the findings of the trial court as was stated in the case of Gitobu Imanyara & 2 Others Vs. Attorney general (2016) eKLR. That special damages should not be subjected to the liability ratio because they are a refund and not compensation according to the case of Mara Tea Factory Ltd Vs. Lilian Bosibori Nyandika (2021) eKLR.
10. From the memorandum of appeal and the submissions herein, in my view, the issues for determination are as follows:
 - a. Whether the ownership of the plaintiff/respondent's motor vehicle was correctly determined by the trial court;
 - b. Whether the case was proved on a balance of probabilities; and
 - c. Whether the award of the special and general damages by the trial court was proper in law.
11. On the first issue of ownership of the motor vehicle, the trial court stated that the motor vehicle is legally owned by the Plaintiff/respondent according to the police abstract which captured insurance information as Invesco insurance policy no. P/No.087/0804/1/001076/2014 taken out in favour of KAT163G. An official search of the said motor vehicle shows that it still belongs to Paul Karimi Kithaka and not the plaintiff/respondent. In the case of Osapil v. Kaddy (2000) 1 EALA 187 The Court of Appeal of Uganda held that:

“Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.”
12. I further notice that the sale agreement referred to, is undated. Without the ability to tell when the motor vehicle ownership is sold, the provisions of Sections 8 and 9 of the [Traffic Act](#) cannot come into play as follows:
 - “8. Owner of vehicle
The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.
 9. Change of ownership
 - (1) No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner thereof.....”
13. However, the police abstract record shows the plaintiff/respondent as the owner of the motor vehicle KAT 163G. At trial, the defendant/applicant did not challenge this information, which only comes up in this appeal. The court of appeal in the case of Thurairaja Karauri -vs- Agnes Mocheche (1997)



eKLR held as it did on this subject in the case of Joel Muga Opinja -vs- East African Sea Food Limited (2013) eKLR where it quoted in the case of Ignatius Makau Mutisya -vs- Reuben Musyoki Muli (2015) eKLR stating that:

“we agree that the best way to proof ownership would be to produce to the court a document from the Registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied.”

14. On this subject, the court of appeal established the following principles as discussed in the case of Benard Muia Kilovoo Vs Kenya Fresh Produce Exporters [2020] eKLR:

- i. That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.
- ii. Where there exists other compelling evidence to proof otherwise then the court can make a finding of ownership that is different from that contained in the logbook.
- iii. Each case must however be considered on its own peculiar facts.

15. Therefore, it is my view that the trial court was correctly guided by the police abstract in proving ownership of the motor vehicle.

16. On the second issue of whether the case was proved on a balance of probabilities, the burden was on the plaintiff to proof his case on a balance of probability. According to the 9th edition Black’s Law Dictionary, Balance of probabilities also means preponderance of the evidence meaning:

“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”

17. Sections 109 and 112 of the [Evidence Act](#), Cap 80 Laws of Kenya, provide 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 the 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 the fact is upon him.”

18. This standard of proof was also discussed in the case of Eastern Produce (K) Ltd- Chemomi Tea Estate Vs Bonfas Shoya (2018) eKLR where the court held:

“The burden of proof in civil cases on the balance of probability was defined in the case of Kanyungu Njogu Vs Daniel Kimani Maingi (2000) eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.”

19. The parties conceded to a 70:30 liability ratio and at the hearing, testimonies were presented in relation to the case. PW1 assessed the damage on the motor vehicle and stated that the costs of repairs of the



motor vehicle was Kshs. 563,760/=. That the vehicle was written off because the costs of repair exceed 70% of its value. He assessed salvage costs at Kshs. 50,000/=. PW2 was the plaintiff who stated the injuries he suffered and the treatment costs he incurred as well as future medical costs. He also stated that the vehicle was worth Kshs. 500,000/=. There was no evidence by the defendant at trial and he closed his case. In my view, the documents produced as well as proceedings of the trial court show that the facts were proved in favour of the plaintiff on a balance of probabilities.

20. On the issue of award of damages, I shall begin with special damages. Paragraph 6 of the plaint shows that the plaintiff/respondent specifically pleaded the special damages and he produced proof of each item except the costs of assessment which was not proved. The plaintiff/respondent was awarded the special damages relating to the motor vehicle as prayed except for the one not proved. He was also awarded medical expenses and future medical costs, rightly so. The trial court was guided in making its award on the special damages relating to the motor vehicle, by the case of *Eliud Maniafu Sabuni Vs. Kenya Commercial Bank (2002) eKLR* and it applied the doctrine of restitution since the motor vehicle could not be repaired. The trial magistrate also did not deduct salvage costs to the pre-accident costs and she added that this would go against the doctrine of restitution. I find no fault in the reasoning by the trial court on this as was stated in the case of *Kisumu CACA No. 163 of 2002 Concord Insurance Co. Ltd -vs- David Otieno Alinyo & Another* the court cited the case of *Harman LJ. In Darbshire -vs- Waran (1963) WRI 1067 PG 1070* where it was held that:

“the principle of restitution --- is to put the plaintiff in the same position as though the damage never happened...It has come to be settled that in general the measure of damages is the cost of repairing the damaged vehicle, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article...This arises out of the plaintiff's duty to minimize his damages...”

21. On general damages, the court awarded Kshs. 900,000/= after comparing previous decisions of the court where the plaintiffs had suffered similar injuries and the range of award was between Kshs. 850,000/= and Kshs. 1,000,000/=. I do not think this is inordinately high and therefore I find no reason to disturb the award, neither do I think that the award will unjustly enrich the plaintiff/respondent. In the case of *H. West & Son Ltd Vs Shepherd (1964) AC. 326* Lord Morris of Borth-y-Gest stated as follows;

“... 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 endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional

22. I share the sentiments of the court in the case of *Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR*, the court of appeal stated as follows:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that



the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

23. In the end, having found no reason to disturb the decision of the trial court in this matter, I find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

