



REPUBLIC OF KENYA



**Raicha Electro Services Limited v Karanja (Civil Appeal E147 of 2022)
[2023] KEHC 22732 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E147 OF 2022
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

RAICHA ELECTRO SERVICES LIMITED APPELLANT

AND

SAMMY NJAU KARANJA RESPONDENT

*(Being an appeal from the judgment in Thika Small
Claim Case No. E402 of 2022 by Hon. V. A. Ogutu)*

JUDGMENT

1. By a statement of claim dated March 8, 2022, the Respondent sued the Appellant for a judgment of kshs 201, 123/= plus costs and interest of the claim. The cause of action, as pleaded arose from a road traffic accident that occurred on April 6, 2019 along the Nairobi- Naivasha road at Rironi, area within Kiambu County. The Respondent avers that the Appellant's driver, agent and /or servant negligently and recklessly drove and controlled motor vehicle Registration number KCS 900D and caused the same to hit Motor Vehicle Registration number KBN 778R causing extensive damage. According to the Respondent, its insurance incurred losses in repairing and towing the motor vehicle to the tune of kshs 201, 123/= the suit was brought under the doctrine of subrogation on behalf of the insurer Madison General Insurance Kenya Limited.
2. The Appellant filed its statement of defence and counterclaim dated March 25, 2022, in which it denied the averments of the statement of claim and attributed the cause of the accident to the Respondent. The appellant submits the Respondent negligently caused the accident by ramming the rear of motor vehicle KCS 900D, and as a result the Appellant suffered losses of kshs 266, 236/= and prayed for judgment of the said amount.



3. After a full hearing, the trial court on June 13, 2022, found the appellant 100% liable for the accident, dismissed the appellant's counterclaim and awarded the Respondent damages of kshs 194, 743/= plus the costs and interest at court rates.
4. The appellant was dissatisfied with the judgment of the trial court and filed the memorandum of appeal dated July 5, 2022, citing the following 6 grounds:
 - i. The learned magistrate erred in law by making a determination which was against the weight of evidence adduced in court.
 - ii. The learned magistrate erred in law and in fact by failing to apply the applicable law and rules governing the highway code and traffic rules.
 - iii. The learned magistrate erred in law by failing to consider the appellant's counterclaim filed on the March 25, 2022,
 - iv. The learned magistrate erred in law and in fact by failing to properly review and consider the facts of the matter, for which it is clear that the Respondent's acts of negligence caused the accident due to failure to keep a reasonable distance and failure to apply breaks bringing the car to a stoppage.
 - v. The learned magistrate erred in law by relying fully on the statements of Pw2, PC Martin M Nyaga which was not supported by any evidence.
 - vi. The learned magistrate erred in law by relying on matters that were not led in evidence during the trial.
5. The appellant proposed to ask the court to allow the appeal, set aside the trial court judgement and allow the counterclaim dated March 25, 2022.
6. By the directions of this court the appeal was heard by way of written submissions. each party filed submissions, the Appellant's are dated April 14, 2022 and those by the Respondent are dated May 15, 2023.

Appellant's Submissions*

7. Mr. Kabugu submitted that the evidence adduced by Sammy Njau Karanja, that the driver of KCS 900D changed lanes without indicating and rammed into the rear of the motor vehicle KBN 778R was far from the truth as the evidence adduced by the parties proved the contrary. Counsel argued that the evidence tendered in court proved motor vehicle KCS 900D was rammed into the rear while KBN 778R was damaged at the front bumper. That the driver of KBN 778R caused the accident, for failing to brake and keep distance. And therefore, the trial magistrate erred in making a determination against the weight of the evidence adduced in court.
8. According to counsel, the claim was filed contrary to the gentleman's agreement entered between the parties for each party to repair their car. He called on the court to also consider the loss incurred by the Appellant in repairing its motor vehicle. That the appeal should be allowed, consider the appellant's counterclaim and set aside the trial court's judgment.



Respondent's Submissions

9. Mr Mwenda, on behalf of the Respondent submitted that as per Section 38 of the [Small Claims Court Act](#), appeals from the small claims court are purely on points of law, while the instant appeals raise grounds on the evidence.
10. Counsel submitted the Respondent had demonstrated before the trial court that the Appellant was liable for the accident as evidenced by the occurrence book from Tigoni Police station. That the appellant was in breach of the Highway Code provisions of the [Traffic Act](#), and the sketch plan for the accident demonstrated the appellant's motor vehicle cut into the Respondent's rightful lane as if entering a junction towards Mai Mahiu. The cut-in by the Appellant was so abrupt that it was unreasonable to hit emergency brakes. He contended that the Appellant failed to give an account of how the accident occurred and what measures he took to avoid the accident.
11. Mr Mwenda submitted the counterclaim was unmerited, an afterthought and ill-intended; and the Appellant had failed to prove the amount of 266, 236.24/=in the counterclaim.
12. Counsel disputed the existence of a gentleman's agreement for each party to repair its vehicle as no evidence was adduced. Mr Mwende urged the court to uphold the trial court finding that the Appellant was liable for the accident, and therefore dismiss the appeal with costs.

Analysis of the Trial Court's evidence

13. This being a first appeal, this court is duty bound to delve into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. This was appreciated in [Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira & Co Advocates](#) [2013] eKLR where the duty of a first appellate court was summarized as follows:- "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."
14. Further, in [Kenya Ports Authority vs Kuston \(Kenya\) Limited](#) [2009] 2 EA 212 the Court of Appeal held *inter alia* that: - "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."
15. In the instant case, PW1 - Sammy Njau testified in the lower court that he was driving KBN 778R from Limuru to Mai Mahiu. That he was in the inner lane when the driver of motor vehicle KCS 900D cut from behind while overtaking and suddenly stopped and he hit the vehicle on the rear right side. According to Pw1, he had kept his distance but the fact that the vehicle cut from behind he could not avoid hitting the vehicle from the rear right side.
16. Pw2 - Pc Martin Nyaga stated he was the investigating officer in the accident that happened on April 6, 2019 at Kamandura along the Nairobi-Naivasha highway. He assessed the accident scene and established that the driver of KCS 900D had cut in from the outer lane to the inner lane and hit KBN 778R. He blamed the driver of KCS 900D for the Accident. He produced a copy of the occurrence book excerpts and the abstract.
17. Pw3 - John Wanyoike produced the assessment report for KBN 778R dated April 10, 2019.



18. PW4 - John Wanjiku Kibiku of Madison Insurance testified that he pursued the recovery for vehicle KBN 778R which had been hit by the vehicle KCS 900D. That vehicle KBN 778R had already been repaired.
19. Dw1 - Jillan Raicha the Respondent's manager testified that on April 6, 2019 he was travelling to Nairobi when at Kamandura area, a probox vehicle registration number KBN 778R tried to overtake, saw oncoming traffic, swerved left and in the process hit Motor Vehicle KCS 900D from behind. He told the trial court he was also on the left lane but the blame was on the driver of KBN 778R who tried to overtake on the right but failed. According to him, they negotiated that each party should repair their vehicle, and that is the reason why the claim was not filed.

Determination

20. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did – See *Bashir Ahmed Butt vs Uwais Ahmed Khan* [1982 – 1988] I KAR 5.
21. It is not in dispute that an accident did happen on April 6, 2019 at Kamandura area involving Motor vehicles KBN 778R and KCS 900D. The issue in contention is who was to blame for the accident.
22. The trial court in considering the issue of liability found that the evidence of Pw1 and Pw2 was firm. The learned magistrate observed that had the driver of KCS 900D driven the motor vehicle with due care he would have been able to avoid the accident. She blamed the driver of Motor vehicle KCS 900D for the accident and apportioned him 100% liability.
23. A driver who overtakes without ensuring that the road is clear of oncoming traffic drives in a dangerous manner and is a danger to other road users. From the evidence adduced, the driver of the motor vehicle KCS 900D started to overtake without taking due consideration of on-coming traffic, cut in and braked in front of motor vehicle KBN 778R, thus causing the accident. I find that he was solely liable for the accident.
24. In the case of *Khambi & Another vs Mabithi and Another* [1968] EA 70, it was held that: “It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”
25. On the issue of the repair charges both the Appellant and the Respondent gave evidence of the repair charges incurred. the Appellant submitted he used kshs 226,236/= while the Respondent submitted he used repairs of kshs 201, 123/= the trial magistrate dismissed the counterclaim, and found the Respondent proved repairs of kshs 194,743/= but failed to prove payment of assessment fees of kshs 6,380/= and tracing fees of Kshs 44,565/=.
26. Special damages must not only be pleaded but must also be specifically pleaded. In the circumstances, this court finds that the trial magistrate did not err in finding the Respondent is entitled to an award of Kshs 194,743/=.
27. In *Joseph Obiero vs Stephen Kosgei Kwanbai & 4 Others* (2019) eKLR the court appreciated the doctrine of subrogation as discussed in ‘*Insurance Law*’ by *Mac Gillivay & Parkington* at page 471 as follows: “The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its rights 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 decides to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a person 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.”

28. It is my finding that there is no merit in the Appeal herein and the same is dismissed with costs to the Respondent.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua/ Duale – Court assistants

Mr. Kabugu - for the Appellant

Ms. Mutimba h/b for Mr. Issa - for the Respondent

