



REPUBLIC OF KENYA



KENYA LAW
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**Fajin v Kahiga (Civil Appeal E016 of 2022)
[2023] KEHC 26160 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E016 OF 2022
DAS MAJANJA, J
NOVEMBER 27, 2023**

BETWEEN

TUNU FAJIN APPELLANT

AND

JAMES NDATHE KAHIGA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Mburu, SRM dated 25th January 2022 at the Magistrates Court, Naivasha in Civil Suit No. 758 of 2012)

JUDGMENT

1. The Appeal herein emanates from the judgment of the Subordinate Court dismissing the Appellant's claim and the Respondent's counterclaim. The Appellant claimed Kshs. 1,230,000.00 being, inter alia, material loss of her motor vehicle registration number KBH 552R Toyota RAV4 ("the RAV4") while the Respondent counterclaimed Kshs. 702,296.00 on account of cost of repairs to his motor vehicle registration number KBC 473F Toyota Carina ("the Carina"). The claim arose out of a road traffic accident that occurred on 18.10.2009 along the Naivasha Nairobi Highway at around Ihindu area involving both vehicles
2. According to the evidence before the court, the motor vehicles were travelling in opposite directions; the RAV4 towards Nairobi. The point of impact, according to the testimonies of the witnesses who testified before the trial court, and according to pictorial evidence availed in court, was not head on, but rather on the front right side of the respective vehicles, near the drivers' doors. Both the drivers blamed each other for negligence.
3. In its judgment, the trial court spelt out 3 issues for determination; first, whether the accident occurred, second whether the parties proved the damages claimed and third who was to blame for the accident. The trial court did not find any difficulty in holding that the accident took place and that both vehicles sustained damages.



4. On the main issue, the trial magistrate declined to apportion liability on either party. The court observed that the testimony of the private investigator was not helpful because it was biased in favour of the Appellant on the ground that he was instructed to conduct the investigation by the Appellant's driver and that he failed to interview the Respondent. That no eye witness was called to testify despite the private investigator having stated that he interviewed bystanders who had been at the scene of the accident on the material day and that he did not give reasons why he did not agree with the police abstract which blamed the driver of the RAV4 for causing the accident. That he was unable to tell the speed of the vehicles.
5. Regarding the counter claim, the court declined to apportion liability on the Appellant on the basis that the maker of the police abstract which blamed the driver of the RAV4 for the accident was not called to be examined. It held that the abstract remained a mere document without any probative value as regards liability.
6. The Appellant is dissatisfied by the decision of the trial court and appeals to this court based on the memorandum of appeal dated 22.02.2022. She imputed bias on the part of the court and complained that the court had erred in requiring a higher level of proof than what is required in civil cases. To her, the requirement for an eye witness was not needed because both herself and the driver witnessed the accident and thus their testimony was as good as that of an eye witness. She is also aggrieved by the trial court's reliance on a police abstract which was not produced in court by a police officer.
7. The Respondent on his part has urged the court not to interfere with the trial court's decision, hinging his argument on court's finding that the Appellant did not call any eye witnesses to aid her case. Both parties filed written submissions in support of their respective position.
8. Whether and who is liable is a question of fact and as I deal with the appeal, I am aware that I am required to re-evaluate and re-assess the evidence produced before the court of first instance. At all times recalling that I neither heard or saw the witnesses testify. (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
9. Having considered the evidence, I am of the firm view that the trial magistrate erred in failing to consider testimony of the key witness involved in the accident. The Appellant (PW 2) testified on her own behalf and called Stephen Omondi Owino (PW 1) as her witness. The Respondent (DW 1), who was driving his vehicle on the material day, also testified. These are witness who gave direct evidence as to what transpired on the material day. They were in fact eye witnesses as they were present when the accident took place. Section 63 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that oral evidence must be direct which means it is in reference to what the witness saw, heard or perceived. The testimony and report of John Machugu Mukige (PW 4), the private investigator, is part direct testimony to the extent of the fact that he examined the vehicles and the scene of the accident. The aspect of the report stating what the other people told him is hearsay and is inadmissible. However, his finding based on the facts established is admissible as opinion evidence is admissible if it meets the threshold of section 48 of the *Evidence Act*. Once admitted, the evidence presented by an expert witness is subject to be tested to establish its credibility and therefore determine the weight attached to it.
10. As regards the police abstract, I would only restate what the court stated in *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v Francis Karenga* [2021] eKLR that, "A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer.



There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents.”

11. The trial magistrate ought to have analysed the testimony of the PW 1, PW 2 and DW 1 against the other evidence and come to a conclusion on the issue of liability. This is the task that is now left to the first appellate court to which I turn.
12. PW 2 recalled that on the material day, she was driving the RAV4 towards Nairobi at about 3pm, she saw an oncoming vehicle coming toward her at high speed. The driver lost control, veered onto her lane and hit the right side of the RAV4 causing it to roll and lay on the driver’s side on the right side of the road. PW 2 recalled that when she saw the oncoming vehicle, she alerted PW 1. The other driver hit the vehicle on the driver’s side and it rolled over the right side. On his part DW 1 told the court that he was travelling at about 60kph. He saw a motor vehicle coming toward him whereupon he tried to swerve but the other vehicle hit his vehicle. He stated that the Carina remained on the left hand side of the road while the RAV4 landed on the left side of the road towards Naivasha.
13. Based on the available evidence, who was to blame? It is of course not in dispute that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 the Court of Appeal observed that, “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.”
14. Both parties agree that there was collision and both parties blame each other. It is also difficult to accept the version of either party based on their own perception of speed. However, there is direct evidence of the impact of the collision from the photographs produced by PW 4 and the Respondent’s assessor, Paul Muteti (DW 2). The photograph of the RAV4 corroborates the testimony of PW 1 and PW 2 that it was hit on the right side at the driver’s door and not directly as the head lamp was not impacted. On the other hand, the Carina was impacted on the right side close to the right hand side wheel also confirming the fact that DW 1 was hit. The photograph of the RAV4 damages on the top right hand side giving credence to the Appellant’s position that it rolled over on the right hand side.
15. While the point of collision is disputed, what emerges from the evidence is that Respondent is the one who hit the Appellant as the evidence shows that the RAV4 was pushed from its lane, overturned and landed on the driver’s side on the left side of the road. Although the trial court doubted on the investigator’s report, the Respondent did not dispute the photographs of the scene and the relative positions of the vehicles on the road and also the damages on the vehicles. From my assessment of the evidence, I hold that the only reason the RAV4 would have been pushed from the road from its lane and landed on the left hand side after rolling over, is it was hit while trying to swerve towards the left to avoid the oncoming vehicle. The fact that the RAV4 landed on the left side confirm the Appellant’s case that it is the Respondent who was driving fast and veered onto to its lane and hit the RAV4. This is not to say that the Respondent is wholly blameless. It is possible PW 2 was driving too fast to avoid the oncoming vehicle hence the collision but since the driver remained on his side, she is less blameworthy in the circumstances. I reject any assertion in the Police Abstract that the Appellant’s driver was to blame for the accident as the statement, being an opinion of an unknown person, is inadmissible as I have stated elsewhere. Doing the best I can in the circumstances, I would therefore apportion liability at 70:30 against the Respondent.



16. It has been held that even where the court dismisses a claim, it should proceed to assess damages. As the trial magistrate failed to proceed with assessment of damages, I am constrained to review the evidence that was presented. It is not in dispute that both motor vehicles were damaged as a result of the accident. The Appellant claimed Kshs. 1,230,000.00 being the pre-accident value assessed at Kshs. 1,480,000.00 less the sale proceeds of the salvage amounting to Kshs. 250,000.00. In addition, she claimed Kshs. 61,500.00 made up of Kshs. 25,000.00 being the cost of investigation, Kshs. 6,500.00 being the cost of the accident assessment and the cost of towing the vehicle from Naivasha to Nairobi amounting to Kshs. 30,000.00.
17. The Appellant called Christopher Kamau Thuo (PW 3) who visited Naivasha Police Station and prepared a report dated 27.01.2009 concerning the RAV4. He noted the extensive damages on the front right side extending to the rear and the roof. He listed all damaged parts and found that the repair costs amounted to Kshs. 1,041,042.00 which surpassed more than half of its pre-accident value assessed at Kshs. 1,480,000.00. He opined that the salvage would go for about 250,000 to Kshs. 290,000.00. He charged Kshs. 6,500.00 for his services. PW 2 stated that she eventually sold off the salvage at Kshs. 250,000.00 to one Richard Musumba as evidenced by the sale agreement dated 04.11.2010. She also produced the receipt for Kshs. 30,000.00 paid to Upeso breakdown which towed the vehicle from Naivasha to Nairobi and the receipt for Kshs. 25,000.00 paid to PW 4 for investigation services.
18. The Respondent's claim was for repair costs amounting to Kshs. 337,096.00, loss of user for 9 months amounting to Kshs. 360,000.00, Assessors fees of Kshs. 5,000.00 and Kshs. 200.00 for the police abstract. Alex Muteti (DW 2), a motor vehicle assessor employed by Uptown Loss Assessors (K) Ltd proceeded to examine the Carina. He prepared his report dated 12.11.2009. He put its pre-accident value at Kshs. 690,000.00 and the repair costs at Kshs. 337,096.00 while the salvage value was Kshs. 135,000.00. The Respondent produced an estimate quotation from Chinese Super Garage dated 28.10.2009 for vehicle parts valued at Kshs. 322,480.00. He also produced a Memorandum of Understanding dated 01.09.2009 between himself and Buddies Haven Tours and Travel showing that he had hired the vehicle for 6 months and was to pay a flat rate fee of Kshs. 40,000.00.
19. It is settled law that special damages must be pleaded and proved to the required standard (see *Hahn v Singh* [1985] KLR 716). As regards the Appellant's claim, I am satisfied that she proved that the actual loss, being the pre-accident value less the salvage value was Kshs. 1,480,000.00. In addition, she produced receipts to prove the money paid out.
20. On his part, the Respondent's assessor estimated the cost of repair to be Kshs. 337,096.00. In his testimony, he recalled that he used Kshs. 300,000.00 to repair the vehicle. He produced the Chinese Super Garage document titled "Estimate Quotation" and it is addressed to Monarch Insurance and it contained at the foot thereof, "Work will be done upon approval of the above client." The estimated quotation for parts was Kshs. 322,480.00. He further produced an Invoice dated 30.07.2010 for Kshs. 322,480.00 noting that it was total spares estimate. It is trite law that an invoice alone is not evidence of payment as it is only a demand for payment (see *Total Kenya Ltd formerly Caltex Oil (K) Ltd v Janevams Ltd* [2015]eKLR). Based on this evidence, I hold that there is nothing to show that the vehicle was repaired or that the Respondent expended the sum of Kshs. 322,480.00 as repair costs. This claim was therefore not proved.
21. The Respondent's other claim was for loss of user on the basis that he used to hire out the vehicle at a rate of Kshs. 40,000.00 per month and he lost the use of the vehicle for 9 months. The agreement produced was for a period of 6 months from 01.09.2009. The accident occurred on 18.10.2009 hence the agreement had run one month before the accident hence the claim could only be for the remainder of the contract which is 5 months and 13 days. The total amount for loss of use would therefore



amounts to Kshs. 117,000.00. The Respondent proved his claim for the Assessor's fee and for the police abstract.

22. I therefore find the Appellant proved that she was entitled to special damages amounting to Kshs. 1,291,500.00. The Respondent has also proved that it is entitled to Kshs. 122,200.00. Based on the apportionment of liability at 70:30 for the Appellant against the Respondent, the amount due to each party is as follows:

Appellant's Claim Kshs. 1,291,500.00

Less 30% Kshs. 387,450.00

Total due Kshs. 904,050.00

Respondent's Claim Kshs. 122,000.00

Less 70% Kshs. 85,400.00

Total due Kshs. 36,600.00

23. The Appellant is therefore entitled to judgment for the net amount being Kshs. 1,291,500 less Kshs. 36,600.00 making a total of Kshs. 1,254,900.00. Since the claim is one for special damages, the interest thereon shall accrue from the date of the filing suit until payment in full.
24. Based on the findings I have made above after reviewing the entirety of the evidence, I allow the appeal and make the following dispositive orders:
- a. The judgment of the Subordinate Court dated 25.01.2022 is set aside and substituted with the following judgment on liability for the Appellant against the Respondent apportioned in the ratio 70:20 against the Respondent
 - b. Subject to the apportionment, the Appellant claim succeeds and she is awarded Kshs. 1,291,500.00 and the Respondent counterclaim succeeds and he is awarded Kshs. 122,000.00.
 - c. Judgment is therefore entered for the Appellant against the Respondent for Kshs. 1,254,900.00.
 - d. The sum (c) above shall attract interest at court rates from the date of filing suit until payment in full.
 - e. The Respondent shall bear costs of the suit in the Subordinate Court and of this appeal which are assessed at Kshs. 120,000.00 all inclusive.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIVASHA THIS 27TH DAY OF NOVEMBER 2023.

G. K. NZIOKA

JUDGE

