



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.E038 OF 2021**

**BETWEEN**

**SUKARI INDUSTRIES CO. LIMITED.....APPELLANT**

**AND**

**TOM OKELLO KASERA.....RESPONDENT**

*(Being an Appeal from the judgment in Homa Bay Senior Principal Magistrate's SPMCC No. 134 of 2019 by*

*Hon. T.M. Olando –Principal Magistrate).*

**JUDGMENT**

1. Sukari Industries Co. Limited, the appellant herein was the defendant in Homa Bay Senior Principal Magistrate's SPMCC No. 134 of 2019. The Company had been sued for compensation for damage caused to the respondent's commercial building by their vehicle registration number KCR 715F veered and rammed into it. The trial court awarded damages to the respondent.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Okongó, Wandago & Company Advocates. The appellant raised the following grounds of appeal:

a) That the learned trial magistrate erred in law and fact in;

i) awarding damages for loss of rent for 3 months, amounting to Kshs. 270,000/= in the absence of any evidence or proof but only on the basis of the allegations contained in the pleadings and estimates which had been contained in the valuation report.

ii) awarding damages for loss of rent for 2(months) amounting to Kshs. 180,000/= allegedly for the time it took before repairs to the building were commenced which amount had not been pleaded and or claimed in the plaint and when no evidence was led in that regard during the trial and thus had no basis at all.

b) That the learned trial magistrate erred in law and fact in awarding Kshs. 319,593 as cost of repairing the building when there was no credible evidence that the building had been repaired at all, either before the suit was filed and or at the time of the trial and at that cost or at all.

c) That the learned trial magistrate erred in law in law and fact in relying on estimates which had been contained in valuation report dated 16<sup>th</sup> may, 2019 as a basis for awarding damages in the nature of special damages which had not been proved as by law required.

d) That the learned trial magistrate erred in law in deciding the case in favour of the respondent on no evidence and in disregarding the evidence tendered by the appellant, and the submission which the appellant urge before him, thereby arriving at a wrong conclusion on the case.

e) That the learned trial magistrate erred in law and fact when he used his discretion wrongly to awarded interest on the estimated costs of repairs and alleged loss of rent which he awarded to the respondent from the date of filing suit, when no evidence at all was led to prove that such amounts, as he awarded had either been lost and or spent by the time when the suit was filed and or at the time of the trial.

f) That the learned trial magistrate further erred by failing to hold that damages based on estimate can only be assessed after the trial and awarded by the court in the judgment and interest thereon usually run from the date of such judgment, if at all.

3. The respondent was represented by the firm of Nyauke & Company, Advocates who opposed the appeal for lack of merits.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The respondent contended that on 2<sup>nd</sup> April, 2019 the appellant's driver Edwin Kinanga Otieno-deceased, drove motor vehicle registration number KCR 715F carelessly. He veered off the road and caused the damage to the respondent's building. The appellant did not tender any explanation as to how the accident occurred. The defence was incoherent and pleaded in the alternative. Such kind of pleadings add no value to the case.
6. Parties are bound by their pleadings. This was emphasized by the Court of Appeal in the case of **Global Vehicles Kenya Limited v Lenana Road Motors [2015] eKLR** where it stated:

**Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution. Secondly it is through pleadings that the fair hearing that is promised by Article 50(1) of the Constitution is actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law, the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which make known to each party the exact case it has to prove or rebut.**

**Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.**

*Jessel M. R. articulated this view very well in THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639, as follows:*

*The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.*

The learned trial magistrate had only one version of the accident; that by the respondent. He cannot be faulted by making the finding on liability.

7. The respondent adduced evidence that he lost rent for a period of three months. This was conceded by Charles Ragot (DW1) who also conceded that there was an accident that gave rise to the damages complained of.
8. Charles Ragot (DW1) described himself as an insurer investigator and loss adjuster. He conceded that he was not a construction engineer nor was he a Quantity Surveyor. His "expertise" was therefore very rudimentary and could not be of any assistance to the court.
9. I therefore find that the learned trial magistrate had every reason to disregard Charles Ragot's opinion. The learned trial magistrate based the award of Kshs. 319,593 as cost of repairing the building on credible evidence. I am fully persuaded by the sentiments by the Court of Appeal in **Nkuene Dairy Farmers Co-op Society Ltd & another vs. Ngacha Ndeiya [2010] eKLR** when they stated:

**In the result we agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim.**

10. From the foregoing analysis of the evidence, I find that the appeal lacks merit. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**