**Muricho & another v Buluma (Civil Appeal 133 of 2010)**
**[2022] KEHC 12073 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12073 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL APPEAL 133 OF 2010**

**SN RIECHI, J**

**JUNE 30, 2022**

**BETWEEN**

**BENARD MURICHO ..... 1ST APPELLANT**

**MIWA HAULIERS ..... 2ND APPELLANT**

**AND**

**MORRIS BULUMA ..... RESPONDENT**

***(An appeal from the Judgement and Decree of Hon R Nyakundi CM in Bungoma CMCC No 434/2006 delivered on 1/10/2010)***

## JUDGMENT

1. By a further amended plaint dated March 1, 2010, the respondent herein claimed Kshs 554,999/= in special damages, general damages for pain, suffering and loss of amenities, costs and interest from the appellants as a result of a road traffic accident which occurred on October 24, 2003 along Busia-Mumias road when the respondent hit the appellant's stationary tractor parked on the road.

2. It was averred that as result of the said accident, the respondent sustained; blunt trauma to the chest, cut wound on the left leg, bruises in the face, cut wound on the mouth, dislocation of the right knee joint and a cut wound at the back of the head. The respondent attributed the occurrence of the accident to the appellant's negligence.

3. The appellants filed their statement of defence stating that the accident, if any, occurred as a result of the respondent's negligence.

4. The suit proceeded with the respondent presenting his case thus;

> PW-1, the respondent stated that he was driving from Busia heading to Mumias when at Ekisumu Primary School, he found the appellant's tractor registration number KAH 974Q/

ZB 8091 parked on the left side of the road without warning signs. That as he tried to overtake, he noticed an on-coming truck which forced him to hit the rear tyre of the tractor to avoid a head on collision with the truck. He was rescued by passers-by ad taken to hospital and the vehicle later towed to Busia garage where it was assessed and declared a written-off.

5. PW-2, George Martin, a motor vehicle assessor stated that he assessed the vehicle in Busia on instructions of the respondent and his opinion was that the vehicle was written off. He produced the assessment report.

6. PW-3 Dr Samuel Aluda examined the respondent and prepared the medical report which was produced as Pexh 1(a)(b). He concluded that the respondent sustained sift tissue injury. PW-4, the base commander Busia produced the police abstract confirming the accident and the ownership of the motor vehicles involved in the accident.

7. Muswa Aggrey testified for the appellants stating that he works as field supervisor at Miwa. He stated that one of their tractors loaded with sugar cane got a flat tyre at Kisumu Ndogo at around 3.00 pm. That they placed safety triangles at 50 meters on either side as they sought alternative tractor from Nambale. On his way back from Nambale, a vehicle driving on his speed overtook him before ramming onto the tractor where it was extensively damaged. He participated in rescuing the driver. He baled the respondent for driving at a high speed.

8. By a judgement of that court, liability was apportioned at 10:90 between the respondent and the appellant, Kshs 150,000/= in damages for pain and suffering and Kshs 554,999.10/= in special damages, costs and interest. The respondents were dissatisfied thus this appeal which is based on the following grounds;

    1. The learned trial magistrate erred in law and fact when he overlooked evidence relating to special damages where no documents were tendered for material loss damages.

    2. The learned magistrate erred in law and fact when he failed to find that the plaintiff did not discharge the burden of demonstrating liability or establish negligence on the part of the 1st appellant.

    3. That the learned trial magistrate erred in law and fact when he awarded a large amount of money as general and material loss damages that was not fair and just in the circumstances.

    4. That the judgement is largely based on testimonials that was not properly supported by any documents and other cogent evidence.

9. The appeal was disposed of by way of written submissions. Both parties filed. On liability, Ms Ojina for appellants submits that the accident was caused by the respondent's negligence in that he failed to look out for other road users and only overtake when it was safe to, failing to take notice of the safety triangles placed by DW-1 and driving at an excessive speed. That had the respondent been on moderate speed, the impact on the vehicle would not be much. He states that failure by the respondent to call an eye witness was fatal and therefore, it was only prudent that the trial magistrate apportioned liability at 50% between the parties in the circumstances. On this limb, counsel cites the authorities in; *Cosmas Okoth & another v Charles Naumi Wamutu* [2006] eKLR and *Becley Stewart Ltd v David Cottler & Jean Susan Cottle V Lewis Kimani Wayaki* [1982-88] KLR 118.

10. On the quantum of damages awarded under special damages, counsel submits that there is variance in the figures sought and finally awarded by the court. That the respondent stated the value of the car to be Kshs 600,000/= and the salvage value as Kshs 110,000/=. That the motor vehicle assessor put the value at Kshs 490,000/= and the salvage value at Kshs 150,000/=and the proper compensation in the

circumstances as per the assessor's report could be Kshs 340,000/= hat the sum of Kshs 600,000/= as pleaded by the respondent was not supported by evidence.

11. As regards the sum of Kshs 22,828/= counsel submits that the same is not recoverable since the same is supported by an invoice as opposed to an official receipt as required by the law. It is further submitted that since the respondent sought the sums to compensate the insurer under the principle of subrogation, there is no documentary evidence showing that indeed the respondent was paid such money by the insurer. Counsel relies on the authorities in *Caltex Oil (K) Ltd v Auto Springs Manufacturers Ltd* [2004] eKLR, *Jimna Munene Macharia v John Kamau Erera* Civil Appeal No 218 of 1998 (Nrb CA), *Coast Bus Services v Sisto Murunga & 2 others* Nrb CA 192/1992 UR and *Eliud Maniafu Sabuni v Kenya Commercial Bank Ltd* [2002] eKLR.

12. Mr Ruto learned counsel for the respondent submits that the appellants acknowledge the fact that the tractor had indeed stalled on the road where there was slight bend that the respondent had swerved to his left to avoid the head-on collision with the on-coming truck but due to proximity, he hit the rear end of the tractor. That these admissions squarely puts them to blame for the accident. Counsel relies in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* cited in *Morris Njagi & anor v Beatrice Wanjiku Kuria* [2019] eKLR for the proposition that there is no liability without fault.

13. Citing *Kemfro Africa Limited & anor v Lubia & another (No 2)* [1987] KLR 30, counsel reiterates the grounds upon which an appellate court can interfere with an award of damages by a trial court.

14. On special damages, counsel submits that the respondent had pleaded and proved the sum of Kshs 544,999/= and the court awarded as such. That the trial magistrate exercised caution in arriving at the award.

15. This being a first appeal, the guiding principles are as enunciated in *Oluoch Eric Gogo v Universal Corporation Limited* [2015] eKLR, where the court held;

> "As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & another v Associated Motor Boat Co Ltd & another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect....."

16. The instant appeal revolves around the issue of liability the quantum of damages. The principles to be borne in mind by an appellate court while sitting on appeal against the award of damages by a trial court, it was held in *Catholic Diocese of Kisumu v Tete* [2004] eKLR that;

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a difference figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate."

17. The trial magistrate in this matter apportioned liability in the ratio of 10:90 in favour of the respondent against the appellants. The appellants indeed acknowledge and admit the fact that their tractor stalled on the left side of the road after it suffered a flat tyre while carrying sugar cane. DW-1 in his evidence

stated that immediately, he went to Nambale to make arrangements for a salvage tractor when he was overtaken by a motor vehicle being driven at a high speed. That the respondent was involved in the accident for over speeding and failing to take note of the safety signs mounted by the witness.

18. In apportioning liability, the trial magistrate held thus;

> "I take cognizance that the movement will not be affected if driving in a moderate speed. Had the defendant placed warning signs as required by law, the accident could have been avoided. The defendant should have made arrangements to move the tractor to a safe point within the road."

19. The appellants invites the court to find and take notice that passers by often tamper with the accident scene and the possibility of removal of the warning triangles in the process. The trial magistrate indeed discussed the issue and found that there were no signs produced in court to verify this fact. This court finds no fault in the trial court's finding on the issue.

20. From the circumstances herein, the accident could have been avoided had the appellants moved the tractor to a safer ground and or erected proper warning signs on the road to alert other road users of the stationary tractor. In this case, none of the said security steps were put in place by the appellants.

21. Having carefully reviewed the evidence on record, the court finds no merit on the appellants' contention on the issue and the trial court's finding n liability is hereby affirmed.

22. On quantum, the appellants challenged the sum of Kshs 22, 828/= awarded as storage charges. Upon perusing the proceedings, the court notes that the receipt was produced as Pexh 6 without any objection from the appellants. The respondent indicated that the receipt was with the insurance company. In the absence of objection to its production by the respondent, the court this limb to be an afterthought. Its production ought to have been objected to by the appellants at the trial court.

23. On material damage, the respondent particularized the special damages under paragraph 8 of the amended plaint as follows; pre accident value at Kshs 600,000/= and the salvage values was assessed at 110,250/=, towing charges at Kshs 26,500/=, assessor's fees, storage charges and the cost of obtaining police abstract at Kshs 13,000/=, 22, 829/= and Kshs 100/= respectively. The cost of procuring the medical was pleaded as Kshs 2,000/=. The receipts to these expenditures were produced at the trial as Pexh 4, 5, 6, 7 and 1(a)(b) respectively.

24. It is now settled law that special damages need to be specifically pleaded and proved and in the circumstances. There is ample evidence that the receipts in proof of the above were tabled before the trial court.

24. The doctrine of subrogation under an insurance contract is meant not to enrich the wronged party but to bring it into the position it was pre-accident. Guidance can be gained from the following authorities;

26. In *Egypt Air Corporation v Suffish International Food Processors (U) Ltd and another* (1999) 1 EA 69 it was held:

> "The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity then there is no juristic scope for the operation of the principle of subrogation."

27. It was held in *Indemnity Insurance Co of North America and another v Kenya Airfreight Handling Ltd and another* (2004) 1 EA 52 that:

> "Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured."

28. In the instant appeal, the trial court found that the motor vehicle's pre-accident value was Kshs 600,000/= and the salvage value was Kshs 110,250/=. Under the doctrine of subrogation, the respondent was then entitled to be paid the difference which translates to Kshs 489,750/=.

29. Having reviewed the evidence on record, the submissions herein and the law, I find that the only aspect of the trial court's judgement that need to be interfered with is as regards the finding on the value of the accident motor vehicle which is now awarded at Kshs 489,750/=.

30. On the issue of costs, each party shall bear its own costs as the appeal is partially successful.

**DATED AT BUNGOMA THIS 30TH DAY OF JUNE, 2022**

**SN RIECHI**

**JUDGE**