



REPUBLIC OF KENYA



KENYA LAW
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**Chege & another v Njane (Civil Appeal E13 of 2020)
[2022] KEHC 10540 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E13 OF 2020**

**GMA DULU, J
JUNE 22, 2022**

BETWEEN

BENSON KAMAU CHEGE 1ST APPELLANT

OBAMA ENTERPRISES LIMITED 2ND APPELLANT

AND

LAZARUS MATERI NJANE RESPONDENT

((Being an appeal from the original judgment of Hon. A. Ndungu in Makindu Senior Principal Magistrate's Court SPM Case No.158 of 2017 pronounced on 29th April, 2020).))

JUDGMENT

1. In a judgment delivered on April 29, 2020, the learned trial magistrate found the appellants to be 100% liable for a motor vehicle traffic accident, and concluded as follows –

“I will award:

- 1) Material damage assessed Kshs 1,167,540/=
 - 2) Assessors fee Kshs 10,000/=
 - 3) Towing fee Kshs 30,000/=
 - 4) Loss of vehicle for 3 months @150,000 per month Kshs 450,000/=
 - 5) Assessors attendance fee Kshs 10,000/=
 - 6) Total Kshs 1,667,540
- Costs of the suit”



2. Aggrieved by the above judgment and award of the trial court, the two appellants, who were the 1st defendant and 3rd defendant respectively in the trial court, have come to this court on appeal through counsel M/s M N M Advocates LLP on the following grounds –
 - 1) The learned magistrate erred in law and fact in finding and holding the appellants 100% liable.
 - 2) The learned magistrate erred in law and fact in awarding damages to the 1st respondent amounting to Kshs 1,667,540/=
 - 3) The quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the 1st respondent considering the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - 4) The learned trial magistrate erred in law and fact and misdirected herself in failing to consider submissions by the appellants together with the authorities relied upon by the appellants.
 - 5) The magistrate erred by disregarding established principles in awarding damages in the case before her.
3. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the written submissions filed by M N M advocates LLP for the appellants and those filed by Shem Kebongo & Company for the respondent. I note that both counsel relied on decided court case authorities.
4. This being a first appeal, I have an obligation to reconsider the evidence on record and come to my own independent conclusions. Several court cases have addressed this obligation of a first appellate court. It will suffice in my view if I cite the case of *Selle v Associated Motor Boat Company* [1968] E A 123 at page 126 wherein the court stated as follows-

“... this court must reconsider the evidence, evaluate it and draw its own conclusions though shall always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect”.
5. I have to state at the beginning that the respondent had sued four defendants in the trial court. He withdrew the suit against the 4th defendant Kenya Commercial Bank. Judgment was also entered against the 2nd defendant Stewa Ventures for failure to enter appearance and file defence. Thus those who defended themselves and against whom a judgment was delivered by the trial court, which is the subject of this appeal, were the 1st and 3rd defendants, the two appellants herein.
6. At the trial, the respondent called four witnesses and the counsel for the appellants cross-examined them. The appellants however, did not call any witnesses and just relied on written submissions.
7. I have considered the grounds of appeal, and the written submissions on both sides. I have perused and considered the evidence on record and the judgment.
8. In a civil case like the present one, the burden is always on the plaintiff to prove his/her claim on the balance of probabilities. The plaintiff has the legal burden under section 107, and 108 of the *Evidence Act* (cap 80) to prove what they allege or claim, and the common law standard for such proof in civil cases applicable in Kenya is on the balance of probabilities.



9. The appellants complain that the magistrate erred in finding the appellants liable in negligence to the extent of 100%. In my view, from the evidence of the driver of the motor vehicle on record herein Pw4 James Githiore, and the police officer Pw1 PC Rahab Theuri, which was not shaken by any contra evidence, the trial court was justified in finding the appellants 100% negligent. This is so because in my view, the cross examination did not shake the respondent's witnesses evidence on how the accident occurred, which was strengthened by the consequent decision reached in the traffic case brought against the driver of the offending vehicle, wherein he pleaded guilty to the charge. Secondly, the fact that the appellants did not bring any contra evidence which the trial court would consider was also a factor in justifying the finding by the magistrate of 100% liability in negligence against the appellants. The allegations of contributory negligence contained in the defence remained mere allegations, and the magistrate was thus correct to treat the same as such, as the defence did not form part of the evidence on record. I dismiss that complaint.
10. On the quantum of damages awarded, I note that this is primarily a case of proof of special damages, since there was no allegation of a claim for general damages for pain, suffering and loss of amenities. It was a claim for costs incurred for repairs, towing, police abstract, and lost business in regard to the respondent's damaged motor vehicle.
11. It is a cardinal principle of law, that such special damages must be specifically pleaded and strictly proved.
12. With regard to the costs of repairs for the vehicle, the appellants complaint against the award appears to be that only pro-forma invoices were relied upon in court and not receipts. They rely on the case of *Wakim Sodas Ld v Sammy Aristos* [2017] e KLR and the case of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] e KLR.
13. In my view, where a genuine technical report like motor vehicle inspection report has been prepared and tendered in evidence, and pro-forma invoices provided in evidence, and such assessed cost of repair is traceable to the offending party as to its causation, that is adequate proof of special damages that can be awarded to the offended party payable by the offending party. In the present case, with the pro-forma invoices having been stamped as paid, in my view, unless the appellants had tendered evidence that the sum was not paid, which they did not, the respondent proved the amount of special damages therein on the balance of probabilities. I note also that the magistrate was fully aware and addressed this aspect of proof of special damages, sufficiently in the judgment.
14. With regard to loss of business income, the respondent was required to prove the nature of business and the nature and amount of income that he lost, on the balance of probabilities.
15. I note that the evidence on record on the nature of business and the amount of income lost, is only that of the respondent,
and the motor vehicle assessor Pw3. There is no evidence on record from any independent person or business associate of the respondent. Not even the driver of the subject motor vehicle described in evidence the nature of business his employer was involved in relating to that vehicle.
16. In my view, from the evidence on record, the respondent did not prove on the balance of probabilities, the amount that he was awarded by the trial court for loss of business income. I will thus vary the award to that extent. I will reduce the award by disallowing the Kshs 450,000/= awarded for loss of use of the vehicle.
17. Consequently, and for the above reasons, I allow the appeal in part, and disallow the Kshs 450,000/= awarded for loss of use of the vehicle. The award will thus be as follows-



1. Material damages assessed Kshs 1,167,540/=
 2. Assessors fee Kshs 10,000/=
 3. Towing fee Kshs 30,000/=
 4. Assessors court attendance fee Kshs 10,000/=
- Total Kshs 1,219,540/=

Interest will accrue until payment in full.

The appellants will pay the respondent 60% of the costs of the appeal.

DELIVERED, SIGNED & DATED THIS 22ND DAY OF JUNE, 2022, VIRTUALLY AT MAKUENI.

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GEORGE DULU

JUDGE

