



**Marete v Kathurima (Civil Appeal E129 of 2021)
[2022] KEHC 15861 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E129 OF 2021
EM MURIITHI, J
NOVEMBER 28, 2022**

BETWEEN

LILIAN GAKII MARETE APPELLANT

AND

STANLEY KATHURIMA RESPONDENT

*(Being an appeal from the Judgment of Hon. L.N Juma (SRM)
delivered on 21/8/2021 in Meru CMCC No. 199 of 2020)*

JUDGMENT

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant vide a plaint dated August 13, 2020 seeking General damages, Special damages of Ksh 303,000 and costs of the suit plus interest at court rates. The Respondent pleaded that on March 24, 2020, he was herding his dorper sheep on his parcel of land located along Kisima-Kibirichia road, when the Appellant's employee, agent and/or servant drove Motor Vehicle Registration No KCB 772 S Volkswagen Toureg so recklessly, carelessly and negligently that it completely veered off the road and knocked down eleven of his dorper sheep leading to their immediate death. He averred that prior to the accident, the herd of sheep was his main source of livelihood as he reared them for commercial purposes, had deeply invested in monetary terms and some ewes were in lamb. As a result of their death, he suffered immense loss and damage.
2. The Appellant strongly denied the claim through her statement of defence dated October 27, 2020, and prayed for the claim to be dismissed with costs.
3. Upon full hearing of the case, the trial court found the Appellant to have been 100% liable for the accident and awarded special damages of Ksh 302,000 together with costs and interest.



The Appeal

4. On appeal, the Appellant vide her memorandum of appeal filed on 29/9/2021 set out 5 grounds of appeal as follows:
 1. The learned trial magistrate erred in law and misdirected herself when she failed to consider the Appellant's submissions on both law and facts.
 2. The learned trial magistrate erred in law and fact by failing to put into consideration the fact that the appellant participated in the suit and adduced evidence.
 3. The learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of the law and has occasioned a miscarriage of justice.
 4. The learned trial magistrate erred in law and fact when she failed to consider the provisions set out in the Traffic Act.
 5. The learned trial magistrate erred in law and fact in finding the Appellant 100% liable for the accident.

Duty of the court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1, Stanley Kathurima, the Respondent herein, adopted his statement recorded on 13/8/2020 as his evidence in chief. He then produced the Veterinary Report, Demand Notice, Photography and Receipts as exhibits in court.
7. On cross examination, he stated that, "I was feeding the sheep on my farm. I reported at Subuiga. I was not read the Police Abstract. I just made a report at Subuiga. I put the sheep on the road after being hit for doctor to come. I was not herding sheep on the road. I was not near the sheep that is why I was not hit. I saw the motor vehicle while swaying so I moved away to avoid motor vehicle knocking me. Then I think the driver was drunk from how he was controlling motor vehicle. The value of sheep is per my previous sale. My sheep was big and they weigh 40 kgs. Due to size."
8. PW2 PC Alice Ndinda, attached at Subuiga Police Station performing traffic duties, testified that, as per the OB dated March 24, 2020, the accident occurred on March 24, 2020 at 16.30 hours along Kisima-Kibirichia road, involving motor vehicle registration No KCB 772 A. The driver, Kennedy Kimaita, lost control of the motor vehicle and veered to the right side thereby hitting 11 sheep belonging to the Respondent. The driver, who was found to have been drunk, was taken to Isiolo and found with alcohol 1.07 milligrams. He was charged with driving under the influence of alcohol, careless driving and failing to remain at scene. The driver was blamed for the accident. She produced the police abstract as PEXH 4.
9. DW1 Lilian Gakii, the Appellant herein, adopted her statement filed on February 28, 2021 as her evidence in chief.



10. On cross examination, she stated that, “I was driver of KCB 742 S two passengers including me in the motor vehicle. I was driving the motor vehicle. It is my car. I was with Kenneth Kimaita. Accident occurred at 4.30 pm. I was driving along Kibirichia road. I was going to my grandfathers place. It was drizzling, sheep grazing. I saw one sheep come to road and because they were many sheep on the road I veered off the road and ran over the sheep. The sheep came suddenly on the road. It is the sheep to blame for accident. The sheep were being escorted. The sheep were walking along the road not on the tarmac road but off the road.”
11. On re-examination, she stated that, “The sheep were not grazing, they were being escorted there. The owner of the sheep was with them.”

Submissions

12. The Appellant faulted the trial court for erroneously holding that she was wholly to blame without considering her evidence and testimony in court. She faulted the trial court for misapplying the case of *Searle v Wallbank* (1949) 1 ALL ER, which position has since been abolished. She blamed the Respondent for failing to take reasonable steps to prevent the accident, by having over ten sheep all by himself. She submitted that, by allowing the sheep to graze on the road, the Respondent caused danger and annoyance on a public road which was contrary to Section 88 and 89 of the *Traffic Act*. She faulted the trial court for failing to apply the provisions of the *Traffic Act* to determine the issue of liability. She faulted the Respondent for producing the veterinary report, yet he was not the author thereof, and for failing to call Dr Mutungi to show how he had arrived at Ksh 67,000 as the value of the lost sheep, and relied on *Stephen Kinini Wang’ongu v The Ark Limited* (2016) eKLR and *Christopher Ndaru Kagina v Esther Mbandi Kagina & Anor* (2016) eKLR. She faulted the trial court for failing to consider her submissions thus arriving at a wrong conclusion that the expert report was sufficient proof of the loss of the sheep. She submitted that there was no basis or analytical process in the report by Dr Mutungi to explain or justify the provision of Ksh 67,000. She urged the court to find that the quantifiable and ascertainable value of lost sheep was Ksh 215,000, in the event it found liability against the Appellant was proved.
13. The Respondent was of the view that the failure by the Appellant to attach a decree was fatal and rendered the appeal as defective, and relied on *Ndegwa Kamau T/A Sideview Garage v Fredrick Isika Kalumbo* (2016) eKLR. He submitted that the motor accident’s report filed by the Appellant contradicted the Appellant’s written statement. He maintained that he could not have exercised any extra reasonable caution or care to avoid the accident, and urged the court to uphold the trial court’s finding on liability and special damages. He relied on *National Social Security Fund Board of Trustees v Sifa International Limited* (2016) eKLR, *Macharia & Waiguru v Muranga Municipal Council & Anor* (2014) eKLR, *Provincial Insurance Co EA Ltd v Mordekai Mwangi Nandwa* KSM CACA 179 of 1995 (ur), *Bonham Carter v Hyde Park Ltd* (1948) 64 TLR 177 and *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* (2013) eKLR. He urged the court to dismiss the appeal with costs and order the decretal sum to be released to him forthwith.

Analysis and determination

14. The issues for determination from the grounds of appeal are (1) whether 100% liability was proved and (2) whether the Appellant’s submissions were considered.
15. Before delving into those issues, this court wishes to address the issue raised by the Respondent in his submissions that the appeal is defective for want a decree. It is true the Record of Appeal does not



contain the decree, although the same is in the lower court record. Order 42, Rule 13 (4) (f) of the Civil Procedure Rules provides that:

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say — (a) the memorandum of appeal; (b) the pleadings; (c) the notes of the trial magistrate made at the hearing; (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing; (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate; (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that— (i) a translation into English shall be provided of any document not in that language; (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

16. The Appellant duly attached the judgment appealed against. The Respondent ought to have moved the court to decline hearing of the appeal until the decree was supplied in terms of paragraph (f), instead of raising the issue of lack of decree or judgment belatedly in his submissions. As the Judgment itself was attached, no prejudice is conceivable. This court has previously ruled in that appeal to the High Court, unlike appeals to the Court of Appeal and the Supreme Court, may not be struck out for reasons of failure to attach a decree.
17. An issue was also raised by the Appellant in his submissions that the Veterinary Report ought to have been produced by the Doctor and not the Respondent. The record shows that on March 11, 2021, when the matter was, by consent, scheduled for further hearing of the Respondent’s case, the Appellant’s counsel did not attend court and the matter proceeded in their absence. After PW2 had testified, Mr Kirimi for the Respondent told the court that, “The doctor is on the way but the plaintiff can produce the veterinary report. I pray to re-open PW1 case to produce the same.” The trial court allowed the application to re-open the Respondent’s case, who then produced the veterinary report as PExh 5.
18. It appears that Dr Mutugi Timothy, the maker of the Veterinary Report never testified. The trial court solely relied on the findings on the Veterinary Report to award the special damages of Ksh 302,000. This court agrees with the Appellant that the maker of that document ought to have been called to testify to ascertain how he had arrived at the sum of Ksh 282,000 as cost of the sheep.
19. The Respondent in his witness statement dated August 13, 2020 stated that, “..I rear dorper sheep for commercial purposes. The accident has occasioned to me loss and damages as six of the ewes were pregnant valued at twenty thousand each, four non pregnant ewes valued at seventeen thousand each and one male mature ram valued at fifteen thousand.” When the Respondent was cross examined, he stated that, “the value of the sheep is per my previous sale.”
20. In view of the foregoing, this court finds that the value of the sheep ought to have been $Ksh 20,000 \times 6 = Ksh 120,000 + (Ksh 17,000 \times 4) = Ksh 68,000 + Ksh 15,000$ totaling to Ksh 203,000. A receipt for Ksh 20,000 from Dr Mutugi Timothy was produced as an exhibit in court. The sum of special damages awardable is, therefore, Ksh 223,000. The court would reject the valuation of the Doctor who was not called to testify before the court.



Proof of liability

21. The Appellant contends that the trial court did not take into consideration the provisions of the Traffic Act, thus arriving at a wrong conclusion.
22. Section 88 of the Traffic Act provides that, “Any person driving or conducting any cattle, dog or other animal who, on any road, fails to exercise reasonable care to keep it or them under proper control, or allows such cattle, dog or animal to become a danger or annoyance to the public, shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings.”
23. The issue of section 88 of the Traffic Act fell for consideration before the trial court which, relying on the position in Wambui Wairia v George Mburu Kioi & Another (2007) eKLR, rendered itself as follows:

“As such being guided by the above authority there was no evidence tendered at all by the defendant that the animals were on the wrong with the plaintiff’s notice as such the plaintiff cannot be held liable for the accident. I find the defendant 100% liable for the accident.”
24. The section does not prohibit animals by a road but failure to reasonably care or keep them under control so as to become a danger etc. Every case must depend on its facts.
25. The Appellant faults the trial court for failing to note that she participated in the suit and adduced evidence. The trial court erred when it observed that, “the defendant did not call witnesses” yet she testified as DW1. It would appear that the court was referring to independent persons to support the evidence of the DW1. The question that begs is whether, after due consideration of the entire evidence on record, it was established that liability was proved.
26. PW1 testified during cross examination that he was feeding his sheep on his farm, away from the road when the Appellant knocked them down. His testimony is buttressed by the photographs produced in court showing that the sheep was not on the road.
27. The Appellant, DW1 herself testified on cross examination that, “..I saw one sheep come to the road and because they were many sheep on the road I veered off the road and ran over the sheep. The sheep were being escorted. The sheep were walking along the road not on the tarmac but off the road.”
28. According to the OB dated March 24, 2020, the driver of the motor vehicle namely Kenneth Kimaita was the one to blame for the accident, as he was drunk at the time of the accident. The driver of the subject motor vehicle recorded in the Motor Accident Report Form from ICEA Lion General Insurance that, “I was driving to Nanyuki through Ntirimiti Road along Kisima where I was obstructed by a motor cycle at sharp corner. I veered off the road and run over eleven sheep.”
29. There is therefore evidence from the plaintiff that the sheep were off road; that the defendant or drunk driver of the defendant’s vehicle veered of the road and ran over 11 sheep against the Defendant’s evidence that one sheep came on to the road and she veered off the road. On a balance of probability, the court believes it more likely as testified by the plaintiff and his witness police officer that the driver of the motor vehicle while drunk veered off the road and ran over the sheep. The driver’s report to the Insurer that he was obstructed by a motor cycle contradicts DW1 evidence of one sheep coming suddenly onto the road. The inconsistency in the defendant’s case as regards the immediate cause of the veering off and the improbability of the fact that, according to her evidence, she unreasonably veered off the road to avoid hitting one sheep and hit 10 others, makes the defence evidence unbelievable.



30. This court finds that the Respondent proved, on a balance of probabilities, that the Appellant was wholly to blame for the accident, and the trial court's apportionment of liability at 100% was proper. It is further evident that the sheep were not on the road, and therefore the provisions of the Traffic Act were inapplicable to this case.

Consideration of the appellant's submissions

31. The Appellant contends that the trial court did not consider her submissions. This court finds this allegation to be unfounded as the trial court considered both parties submissions when it observed that, "Parties filed submissions. The plaintiff's submissions on March 26, 2021 while the defendants submissions were filed on August 12, 2021. I have considered the pleadings, evidence and written submission and the main issue to be considered by this court are on liability and quantum of damages."

32. I respectfully note the decision in Charles Mutuma M'Kanake v Diocese of Meru Trustees Registered [2021] eKLR, where the Court (Patrick J.O Otieno J) considered a complaint about non-consideration of a party's submissions, and said "this court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision."

In any event, as the court on first appeal considers the evidence and submissions before the court afresh by way of a rehearing, the truth of a complaint that the trial court did not consider a party's submissions should be clear in the course of the appeal court's consideration of the appeal.

Orders

33. Accordingly, for the reasons set out above, this court allows the Appeal to the extent that the award of special damages of Ksh 302,000 is set aside and substituted with an award of Ksh 223,000/= only.

Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF NOVEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Munene Wambugu & Kiplagat Advocates for the Appellant.

M/S. Hiram Kirimi & Co. Advocates for the Respondent.

