



**Kassam Hauliers Limited v Chepngeno (Civil Appeal 10 of 2020)
[2022] KEHC 15427 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL 10 OF 2020
RL KORIR, J
NOVEMBER 18, 2022**

BETWEEN

KASSAM HAULIERS LIMITED APPELLANT

AND

ROSE CHEPNGENO RESPONDENT

*(Being an Appeal from the Judgment of Hon. K. Kibelion Principal Magistrate
in Civil Suit Number 57 of 2019 - Bomet delivered on 29th July 2020)*

JUDGMENT

1. The respondent (then plaintiff) sued the appellant (then defendant) for reconstruction costs, costs for demolition and debris collection, loss of income and general damages that arose when motor vehicle registration number KBT 419Q and trailer registration number ZE 0200 veered off the road and rammed into the plaintiff's building located on Kericho/Kongotik/1778 along Bomet-Narok road.
2. On July 29, 2020, the trial court delivered a Judgment in favour of the respondent and awarded damages of Kshs 2,659,225.
3. Being aggrieved by the decision of the trial court, the appellant appealed vide its Memorandum of appeal dated August 19, 2020 relying on the following grounds:-
 - I. That the learned trial Magistrate erred in law and in fact in awarding reconstruction costs of Kshs 3,470,000/= by relying on a Valuer's report with no Bill of Quantities hence adopting a blank figure.
 - II. That the learned trial Magistrate erred in law and in fact in awarding the respondent loss of rental income for one year amounting to Kshs 426,000/= which amount was not proved to the required standard.



- III. That the learned trial Magistrate erred in law and in fact in failing to consider adequately or at all the oral and documentary evidence of the appellant.
- IV. That the learned trial Magistrate erred in law and in fact in failing to consider the appellant's submissions on quantum and in so doing he arrived at an erroneous decision.
4. The appellant also filed a supplementary record of appeal dated June 28, 2022 which contained a Valuation Report dated February 2019 by Legend Valuers Limited.
5. The appellant prayed that the Judgment of the trial court be set aside and be substituted with an order dismissing the same.

The plaintiff's/respondent's case.

6. Through her amended pleadings and evidence in court, the respondent stated that the appellant's Motor Vehicle Registration Number KBT 419Q and Trailer Registration Number ZE 0200 was carelessly driven and veered off the road and rammed into her building on Kericho/Kongotik/1778 causing it damage.
7. It was her case that the appellant was negligent. The particulars of the negligence were listed in paragraph 4 of the Amended pleadings.
8. The respondent stated that as a result of the accident, a Valuation Report was carried out to ascertain the total cost of the damages. The respondent thereafter claimed for reconstruction costs, demolition and debris collection costs and loss of income for one year, particulars which were contained in paragraph 7 of the Amended pleadings.
9. It was the respondent's further case that her building was used for commercial and residential purposes and was occupied by tenants at the time of the accident. That the building used to fetch her monthly rent of Kshs 35,500/=.

The respondent's Submissions.

10. In submissions filed before this court on July 26, 2022, the respondent submitted that there were two conflicting Valuation Reports. That her valuation report carried out by legend valuers indicated that the property had suffered 75% damage. That the shops fronting the highway were all destroyed and that there were visible cracks in the rest of the building. It was her further submission that the expert witness, Geoffrey Kiprotich Koros testified that the 75% damage needed reconstruction and not repairs.
11. The respondent submitted that the appellant's report done by Universal Adjusters Kenya Ltd was abstract and opaque as they did not attach any photographs that showed the damage caused to the building. That the said report had confirmed that the tenants had scampered for their safety. It was the respondent's further submission that the valuer threw some figures without explaining how he arrived at such and that he testified during cross examination that he only measured the affected area and not the whole building.
12. It was the respondent's submission that the two reports differed on the scale of damage caused to the building. It was her further submission that at the very least, the building was half damaged and it was sensible whilst taking human life into consideration, that the building be reconstructed. She relied on the case of Eldoret Civil Case Number 164 & 254 of 2000 Toiyoi Investment Limited Vs Uchumi Supermarkets Limited to support this submission.



13. The respondent submitted that her expert witness explained how he arrived at his estimation. That he used the direct cost approach which he explained as the cost involved in constructing a similar building. It was her further submission that the building covered an area of 138 square meters and that the cost of reconstructing one square meter was estimated to be Kshs 25,000/=. That the appellant's expert witness did not object to this method and confirmed to the trial court that he was familiar with it.
14. It was the respondent's submission that the appellant's expert witness stated that he only measured the affected area and not the back area. That the authenticity of the appellant's Valuation Report was called into question as it did not contain and/or capture all the facts that would aid the court in determining the case. She relied on *Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another* (2016) eKLR to support this submission.
15. The respondent submitted that DW1 testified during cross examination that he did not take part in drafting of their Report. That it was safe to conclude that the said Report was given in bad faith. It was her further submission that the appellant sought a counter Report to mislead the court. That the appellant was being disingenuous to the court on the issue of quantum of damages.
16. It was the respondent's Submission That DW1 (Joseph Wilson Nandi Odhingo) testified that he relied on the inquiries and an interview of the respondent when calculating the loss of rent. That the records of the inquiries and the interview were not produced before the trial court. It was her further submission that upon cross examination, it was confirmed that no interview had been conducted on the respondent and that the figures captured in their Report were speculative.
17. The respondent submitted that the appellant had not proved the costs that they presented in their Report. That the said Report was tainted with irregularities as it failed to take into account factual evidence. She relied on *Stephen Kinini Wang'onduru vs The Ark Limited* (2016) eKLR to support this submission.
18. It was the respondent's submission that the award of Kshs 476,000 as loss of rental income was just and sound in law. That both Reports indicated that tenants had since vacated the building owing to its destruction and that the only issue was quantum. It was her further submission that she agreed with the quantum awarded by the learned Magistrate.

The defendant's/appellant's case

19. Through its Statement of Defence, the appellant admitted to the accident which occurred on February 7, 2019. It however denied the allegation of negligence and stated that the accident was as a result of factors beyond its control.
20. It was the appellant's case that the suit premises were constructed in an area that was earmarked for road use and as such there was a voluntary assumption of risk by the owner of the premises. That the respondent's claim was grossly exaggerated as the respondent had a duty to mitigate her loss.
21. The appellant stated that the premises were not permanent and that they were constructed with bricks. That the claim by the respondent if granted would lead to a profit from an unfortunate event.

The appellant's submissions

22. The appellant submitted that the trial Magistrate erred when it disregarded its Report on the basis that it did not have photographs. It directed this court to page 111 of the Record of appeal where the Report had set out the extent of the damage caused. That the assessor had a holistic view of the property when



- he gave his opinion and that the trial court was wrong when it stated that the Report did not cover the entirety of the structure.
23. It was the appellant's submission that the respondent's valuation of Kshs 3,470,000 as the cost of reconstruction was without basis and it did not specify what the sum would cover. It relied on the case of *Mary Margaret Wejuli & 3 Others Vs Kenya Power & Lighting Company Limited* (2019) eKLR to support this submission. It was its further submission that the respondent's witness did not present an analytical process on how they reached their conclusion rather it was just a round sum figure.
 24. The appellant submitted that its expert gave an analytical basis of their opinion and summed up each and every item that needed to be done. That the building's foundation was intact and that the bricks were still there to be salvaged.
 25. It was the appellant's submission that the respondent failed to prove her claim for loss of rent. That it was a special damage and she failed to produce receipts, bank or Mpesa statements to indicate that she received income from the tenants.
 26. The duty of the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to its own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of appeal case of *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR.
 27. I have read through and considered the Record of appeal dated November 26, 2021, the Memorandum of appeal dated August 19, 2020, the appellant's Written Submissions dated July 22, 2022 and the respondent's Written Submissions dated July 26, 2022. I find that the appeal raises two issues for my determination as follows:-
 - i. Whether the quantum awarded by the trial court was fair, just and reasonable.
 - ii. Whether the claim for loss of rental income was proved.
 - i. Whether the quantum awarded by the trial court was fair, just and reasonable.
 28. This suit was initially filed against the appellant herein, Kenya Commercial Bank Limited and Cynus Holdings Limited. On June 13, 2019, the respondent filed a Notice of withdrawal of suit dated June 12, 2019 against Kenya Commercial Bank Limited and Cynus Holdings Limited.
 29. It was not in dispute that on February 7, 2019, Motor Vehicle Registration Number KBT 419Q and Trailer Registration Number ZE 0200 rammed into a building (hereinafter referred to as the suit premises) located on Kericho/Kongotik/1778 causing damage to it. It was also not in dispute that the said Motor Vehicle belonged to the appellant.
 30. It is important to note that on January 22, 2020, the parties recorded a Consent where liability was apportioned at the ration of 85:15 in favour of the respondent.
 31. The point of divergence in this case was the amount of quantum awarded by the trial court being Kshs 2,659,225. In trying to assist the trial court in determining quantum, both parties filed Valuation Reports ie the appellant's/Defendant's Valuation Report by Universal Adjusters Kenya dated January 20, 2020 and marked as D Exh 2 and the respondent's/Plaintiff's Valuation Report by Legend Valuers Ltd dated February 2019 and marked as P Exh 5. It now falls on this court to reassess the quantum based on the evidence produced in the trial court.
 32. Section 48 of the *Evidence Act*, cap 80 provides for the admissibility of expert opinion as follows:-



- (1) 1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
 - (2) Such persons are called experts.
33. The principles relating to expert evidence were elucidated in the case of [Stephen Kinini Wang'ondu Vs. The Ark Limited](#) (2016) eKLR where Mativo J. (as he then was) stated that:-

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this:

- (a) Firstly, expert evidence does not ‘trump all other evidence’. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
- (b) Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
- (c) Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
- (d) Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”

(See also [Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another](#) (2016) eKLR)



34. In *Kagina v Kagina & 2 Others* (Civil appeal 21 of 2017) [2021] Keca 242 (KLR) (3 December 2021) (Judgment), the Court of appeal cautioned on the application of expert evidence thus:-

“..... in instances in which a court is confronted with issues of admissibility or otherwise of expert opinion evidence, the Court is enjoined to apply caution before accepting and acting on such expert evidence. It should only do so in instances where there is sufficient demonstration that the expert opinion is the independent product of the expert’s own work arrived at in a manner uninfluenced by any extraneous factors as to the form or content. It is also objective and an unbiased opinion, arrived at on matters within the expert’s own expertise, and lastly, that the report contains the truth and nothing but the whole truth.”

35. In the present case, the court is faced with two Reports which are in conflict in terms of assessment and valuation of the damage caused to the suit premises. The Report by Legend Valuers Ltd (P. Exh. 5) produced by PW1 recommended complete reconstruction of the building and the other Report by Universal Adjusters Kenya Limited produced by DW1 recommended repairs to the affected areas. In such a case this court has to test the Reports against all the other evidence in order to decide which expert evidence and/or Report is to be relied on and the weight placed on such a report.
36. The respondent’s Valuation Report by Legend Valuers (P Exh. 5) indicated that the suit premises were inspected for valuation on February 9, 2019, two days after the accident. The findings contained in the Report were that:-

“This is a commercial cum residential plot that is situated in Longisa Trading Centre within Bomet County. The development in this property is alleged to have been destroyed by a parked lorry (Transit Lorry) crashing down the property. The property is largely destroyed (75%). Shops fronting the highway were all completely destroyed (see photos) and cracks are evident on the walls separating the shops and the residential rooms. Also beams were affected. All tenants have vacated the property and the property requires to be fully brought down and carted away to pave way for reconstruction. The hotel and butchery were recently renovated.”

37. In arriving at the Market Value of the suit premises, the Report stated that they used the Cost Approach which was the reinstatement cost of the structural improvements. The Market Value of Kshs 4,000,000 (Four Million Kenyan Shillings Only) was broken down as Kshs 3,470,000 being reconstruction costs, Kshs 100,000 being demolition and debris collection costs and Kshs 430,000 being loss of rent for one year.
38. PW2 who produced the Valuation Report stated upon cross examination that they inspected the entire structure and found that residential and commercial buildings were connected and that the 25% which was not damaged had cracks. PW2 further stated that in arriving at the figure of Kshs 3,470,000, they used the rate of Kshs 25,000 per square meter and that the suit premises covered 138 square meters. That this was the direct cost approximate formula and it was accurate.
39. The appellant’s Valuation Report by Universal Adjusters Kenya Limited (D.Exh. 2) was dated January 20, 2020. There was no indication on the Report when they inspected the suit premises. The reasonable assumption was that the suit premises were inspected on January 20, 2020, almost a year after the accident.



40. The aforementioned Valuation Report (D Exh 2) stated:-

“We noted the affected building accommodated four single residential rooms in the rear and four shops at the front as per photos already in your possession. From our inspection, it was observed that only the front shops were damaged by the impact, with the foundation remaining intact. The dividing wall between the shops and the rear residential rooms also developed major cracks forcing students occupying the rooms to vacate. The affected surface area measures about 13 X 6.5 square metres inclusive of an open veranda measuring about 13 X 2.5 square metres. In view of the damage noted, the estimated cost of repair (detailed workings attached) was assessed at Kshs 630.048. . . .”

41. DW1 who produced the Valuation Report (D.Exh. 2) by Universal Adjusters Kenya Limited stated that the costing included materials, labour, profits and overheads of the contractor. That it was their recommendation that the suit premises be restored to the state it was before the accident.

42. In my analysis, it is not in dispute that the suit premises suffered damages, the extent of the damage is the issue in question. The respondent’s Valuation Report by Legend Valuers Limited (P Exh. 5) stated that the building was 75% damaged and that the 25% that was not damaged had cracks. That the beams in the suit premises were also affected. PW2 (Robert Oloo) confirmed the same during cross examination. He also stated during cross examination that the commercial side of the building and the residential side were connected.

43. The appellant’s Valuation Report by Universal Adjusters Kenya Limited (D Exh 2) stated that the dividing wall between the shops and the residential area had developed major cracks which forced the students residing there to vacate. DW1 (Joseph Wilson Nandi Odhingo) stated upon cross examination that the suit premises had ring beams and columns and they were affected. He also stated that they measured the affected area only.

44. It is clear to me based on the holistic evaluation of the evidence adduced before the trial court that the suit premises were affected way beyond the commercial side which fronted the highway. It is also clear that residential area though not flattened was affected as the ring beams were affected. This made the suit premises uninhabitable as students and/or tenants were forced to vacate. I find it disingenuous for the appellant through his witness to recommend repairs to one affected area and leave the other affected area which their Report indicated had developed major cracks. The repairs they seek cannot restore the suit premises to its original state before the accident.

45. In *Drake vs. Thos Agnew & Sons Ltd* (2002) E.W.H.C. 294, it was held that:-

“It is my view it’s correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it.”

46. Also in *Stephen Kinini Wang’ondru vs. The Ark Limited* (Supra) the court held that:-

“The expert’s process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.”

47. Flowing from the above, I reject the appellant’s Valuation Report (D Exh 2) by Universal Adjusters Limited dated January 20, 2020. It is not supported by other evidence and its conclusions are not in tandem with the findings. I find the respondent’s Valuation Report (P Exh 5) by Legend Valuers more comprehensive as it covered the whole area of the suit premises and was more plausible.



48. I shall therefore rely on Kshs 3,470,000/= being reconstruction costs at this stage. I however agree with the trial court that the said Report (P Exh 5) did not factor in a salvage value. I also agree with the trial court's reasoning that the 25% that was not damaged be reduced from the reconstruction charges. The cost of reconstruction as correctly captured by the trial court would be Kshs 2,602,500.
49. In regard to the Kshs 100,000 being demolition and debris collection costs, DW1 agreed upon cross examination that the demolition and debris collection costs would be necessary. I therefore agree with the trial court's findings that:-
- “First, it is agreed that there would be expenses to be incurred in the removal of the debris. The figure of Kshs 100,000/= is agreed by both parties. I shall therefore not belabour that point but award the same as agreed.”
50. Flowing from the above, there is nothing that would make me disturb the two awards. I will therefore not disturb the amounts as awarded for reconstruction and debris removed. (See Court of appeal case of *Kitavi v Coastal Bottlers Limited* [1985] eKLR)
- ii. Whether the claim for loss of rental income was proved.
51. The respondent stated in her testimony that she earned Kshs 35,500 per month as rental income. During cross examination, she stated that her 4 shops fetched Kshs 3,500 each, 2 shops fetched Kshs 2,000 each and the 5 residential houses fetched a standard of Kshs 3,500 each. She further stated that she was paid in cash. It is trite law that he/she who alleges must prove.
52. Section 107 of the *Evidence Act* places the burden of proof on the respondent to prove the above. It provides:-
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
53. In the case of *Equity Bank Ltd Vs Gerald Wang'ombe Thuni* (2015) eKLR, Ngaah J. in stated that:-
- “It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given.”
54. There is no evidence on record to indicate that the respondent received rental income. Since she claimed that she was paid in cash, she should have produced receipts in support of her claim. Additionally, the respondent through her amended plaint dated June 12, 2019 claimed for loss of income but did not specify how much money she sought. Being a specific claim, the amount of rent received was within the respondent's knowledge at the time of filing the suit in the trial court.
55. Without the requisite evidence to back up the claim for loss of rental income, the said prayer is rejected.
56. In the final analysis, the award is therefore broken down as follows:
- Reconstruction Costs Kshs 2,602,500
- Demolition and Debris Costs Kshs 100,000
- Kshs 2,702,500



Less 15% contribution Kshs 405,375

Total Kshs 2,297,125

57. The appeal dated August 19, 2020 partially succeeds to the extent only that the sum payable by the appellant is reduced to Kshs 2,297,125.
58. Each party shall bear their costs on this appeal while the respondent is awarded costs of the suit in the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 18TH DAY OF NOVEMBER, 2022

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered virtually to the parties@
[Particulars Withheld].co.ke for the appellant
[Particulars Withheld].com for the respondent.

