



REPUBLIC OF KENYA



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Charles v Okuku (Civil Appeal E7 of 2020)
[2025] KEHC 1537 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1537 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E7 OF 2020
WM MUSYOKA, J
FEBRUARY 21, 2025

BETWEEN

DINDI OJWANG CHARLES APPELLANT

AND

SILVESTER OUMA OKUKU RESPONDENT

*(An appeal arising from the decision of Hon. TA Madowo, Resident Magistrate,
RM, delivered on 6th October 2020, in Busia CMCCC No. 71 of 2018)*

JUDGMENT

1. I have not had the benefit of seeing and perusing the original trial court records, for the purpose of this appeal, for the same were not made available to the High Court, despite the Deputy Registrar calling for them several times. I was forced to proceed with determination of the appeal without having sight of the original trial records in the circumstances. I have, however, seen a copy of certified typed proceedings and judgment. For some unknown reasons, the trial court failed to avail the original trial records, and did not even bother to respond to the letters from the Deputy Registrar, to explain why the said records could not be availed.
2. The appellant had been sued by the respondent, at the primary court, for a sum of Kshs. 720,900.00, special damages. The claim allegedly arose from material damage that had been caused to a vehicle belonging to the respondent, by that belonging to the appellant, following a traffic accident on 7th March 2017, along the road from Busia to Mumias, at a place called Daraja. It was alleged that the driver of the vehicle belonging to the appellant had failed to exercise control over his vehicle, hence the accident. The appellant filed a defence, denying the allegations made in the plaint, but arguing, in the alternative, that the mishap was caused by negligence on the part of the driver of the vehicle belonging to the respondent.



3. A trial was conducted. 4 witnesses testified for the respondent, none testified for the appellant. Judgment was delivered on 6th October 2020. Liability was assessed at 100%, and special damages were awarded at Kshs. 650,900.00, with interest.
4. The appellant was aggrieved, hence the instant appeal, lodged through the memorandum of appeal, dated 23rd October 2020. The appellant faults the trial court on several grounds: failing to apportion liability between the 2 parties; allowing the claim for Kshs. 650,900.00 despite evidence that the motor vehicle was purchased for Kshs. 500,000.00; awarding special damages on anticipated market value of the spares instead of what had been incurred on repairs; and making an award that amounted to unjust enrichment.
5. On 15th March 2024, directions were given, for canvassing of the appeal by way of written submissions. Both sides filed their respective written submissions.
6. The appellant has condensed his appeal to 2 grounds: on liability and quantum.
7. On liability, he picks on a statement made by the driver of the respondent, at trial, that he had seen the other vehicle while it was 10 metres away, and he could have evaded it. It is submitted that contributory negligence had been pleaded in the defence, hence the trial court ought to have concluded that the said driver had failed to keep proper lookout, and negligence could not be attributed on the appellant at 100%, in the circumstances. *Commercial Transporters Ltd vs. Registered Trustees of the Catholic Archdiocese of Mombasa* [2015] eKLR [2015] KEHC 509 (KLR) (Aburili, J) and *Chemwolo & another vs. Kubende* [1986] KLR 492 (Platt, Gachuhi & Apaloo, JJA), are cited in support.
8. On quantum, it is submitted that the respondent had testified that he had bought the vehicle, some 2 years before the accident, at Kshs. 550,000.00. It is argued that the value of the vehicle had depreciated. It is submitted that the applicant had produced evidence where the spares were valued at Kshs. 436,600.00, including the cost of repair. Based on that, it is submitted that the award of Kshs. 650,900.00 amounted to unjust enrichment.
9. On his part, the respondent submitted on the same issues, liability and quantum. He argues that the recorded evidence turned around the driver of the vehicle belonging to the appellant overtaking dangerously, and in the process causing the accident. It is asserted that the testimonies of the witnesses presented by the respondent were not controverted by the appellant, as the appellant did not testify.
10. Burden of proof lies on the party alleging a certain fact. See sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya, *Muriungi Kanoru Jeremiah vs. Stephen Ungu M'Mwarabua* [2015] eKLR (Gikonyo, J), *Alice Wanjiru Ruhiru vs. Messiac Assembly of Yahweh* [2021] eKLR (Ong'udi, J) and *Stanley Maira Kaguongo vs. Isaac Kibiru Kahuthia* [2022] eKLR (C. Kariuki, J). The standard of proof, in civil cases, is on a balance of probability. See *Samuel Ndegwa Waithaka vs. Agnes Wangui Mathenge & 2 others* [2017] eKLR (GBM Kariuki, Sichale & Kantai, JJA), *Ahmed Mohammed Noor vs. Abdi Aziz Osman* [2019] eKLR (Mrima, J), *James Muniu Mucheru vs. National Bank of Kenya Ltd* [2019] eKLR (Musinga, Makhandia & Ouko, JJA). It is also referred to as proof on a preponderance of the evidence. See *BM vs. RM & another* [1989] eKLR (Bosire, J), *Bernard Kibor Kitur vs. Alfred Kiptoo Keter & another* [2018] eKLR (Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and *Hydro Water Well (K) Limited vs. Sechere & 2 others* (Sued in their representative capacity as the officers of Chae Kenya Society) [2021] KEHC 22 (KLR) (Mativo, J). It is about which of the rival versions, presented by the parties, should be considered more believable, or more probable.
11. The question of liability is resolved by looking at the circumstances of the accident. Of the 2 drivers, only the driver of the vehicle belonging to the respondent took to the witness stand. He adopted his



statement, dated 8th February 2018. In that statement, PW3 avers that the accident happened as the vehicle belonging to the appellant was overtaking a motorcycle. The driver of that vehicle is said to have lost control and rammed into the vehicle that PW3 was driving. He stated that he saw the said vehicle when it was 10 metres away, and if he had seen it earlier, he would have taken evasive action. He explained that he did veer off the road, but the said vehicle still came to his side, and he could not take more evasive action, as there was a ditch on the side of the road. The respondent presented a police officer, as PW2, who produced a police abstract report, which indicated that the vehicle belonging to the appellant hit that which was being driven by PW3, and that the driver of the said vehicle was charged with a traffic offence, of careless driving, and was discharged. The appellant did not offer evidence, in terms of calling defence witnesses. In the judgment, the trial court noted that the evidence adduced by the respondent had not been controverted, as the appellant did not testify.

12. Going by the witness statement and testimony of PW3, and that of PW2, was there material upon which contributory negligence could be attributed to the respondent? I do not find any. According to PW3, he was driving on his right side of the road, when the driver of the other vehicle left his lane, and entered his, to overtake, but in the process lost control and collided with his vehicle. The other driver did not testify, to contradict or controvert that testimony. This was a civil matter. Standard of proof, in such cases, is based on balance of probability. According to the driver for the respondent, the accident happened when the driver of the vehicle belonging to the appellant got into his lane, while overtaking, but lost control of the vehicle, and rammed into his vehicle. Upon that being established, the burden shifted to the appellant to demonstrate that that accident did not happen in the manner narrated by PW3, but differently, whereupon evidence would be led to establish how that collision happened, according to the appellant. That counterevidence was not adduced, and the only version before the court was that presented by the respondent. There would have been no other way of the trial court assessing liability, other than by the version narrated or presented by the respondent, for there was no other version before it.
13. Although the appellant did not offer any witness, the parties had, by consent, agreed on admission of a bundle of documents filed by the appellant. In that bundle of documents was an assessor's report, by Auto Gallery Assessors, dated 18th February 2019, which the trial court referred to. According to it, the vehicle belonging to the respondent had heavy front impact, which had penetrated out to the centre of the vehicle, heavily damaging its front parts. A similar finding had been made by the Automobile Association of Kenya, the assessors relied upon by the respondent, vide their report, dated 16th April 2017, a heavy frontal impact indirection from front to rear. The trial court was persuaded that, from the evidence tabled by the appellant, it appeared that the appellant was liable for the collision.
14. When the testimonies of PW2 and PW3 are taken together with the 2 assessment reports, there would be corroboration, that there was a frontal collision, and the only explanation of how it happened is that given by the respondent. It would be my finding and holding that the trial court did not err, in the assessment of liability, as it determined the matter based on the evidence that was placed before it. See *Wanjiru Githinji vs. Lucy Kanana M'Rukaria & another* (suing as Legal Representative of Ernest Gutuura Nabea (Deceased)) [2021] eKLR (Gitari, J).
15. Regarding quantum, the respondent claimed a sum of Kshs. 720,900.00, being the loss or special damage that he suffered because of that motor collision. He pleaded, in his plaint, that the vehicle was written off, and what he was claiming was the value of the vehicle immediately prior to the accident, less the salvage value, plus costs incurred post-accident, relating to towing and assessor's fees, which he claimed totalled, in all, Kshs. 720,900.00.



16. The appellant contested that figure, on the basis that the respondent had just bought the vehicle, 2 or so years, prior to the accident, at Kshs. 550,000.00, arguing that the vehicle ought to have had depreciated in value instead of appreciating.
17. The respondent sought to establish his loss by having his motor vehicle assessed by the Automobile Association of Kenya, who prepared a report, wherein the pre-accident value was assessed at Kshs. 750,000.00, and the salvage was assessed to have a value of Kshs. 60,000.00. A witness was availed from the Automobile Association of Kenya, who testified as PW4. He said that he charged Kshs. 5,900.00 for that assessment. He estimated the repair of the vehicle would cost Kshs. 467,132.00.
18. The appellant also subjected the same vehicle to assessment, by Auto Gallery Assessors, who also prepared a report, which was placed before the trial court. According to the second assessment, the pre-accident value was assessed at Kshs. 700,000.00. The salvage value was estimated at Kshs. 80,000.00. The cost of repair was estimated at Kshs. 506,456.00.
19. For the purposes of working out the quantum, the trial court, citing *Commercial Transporters Ltd vs. Registered Trustees of the Catholic Archdiocese of Mombasa* [2015] eKLR[2015] KEHC 509 (KLR) (Aburili, J), relied on the assessment done by the assessors contracted by the appellant, Auto Gallery Assessors, and concluded that the pre-accident value was Kshs. 700,000.00, and the remains of the vehicle were valued at Kshs. 80,000.00. The difference between the 2 figures came to Kshs. 620,000.00; to which were added the assessors fee of Kshs. 5,900.00 and the breakdown services fee of Kshs. 25,000.00, making a total of Kshs. 650,900.00.
20. The trial court relied on the assessment report that the appellant himself had filed in court. I am having difficulty understanding why the appellant has issues with that award, given that it was based on an assessment done by a service provider commissioned by himself and based on a report that he himself tabled before the court. I doubt that he should be allowed to turn around and argue against his own evidence on appeal.
21. He raises argument about the vehicle having been bought at Kshs. 550,000.00 2 years prior, and, therefore, suggesting that its value ought to have been less than what the court found. I reiterate what I have stated above, the appellant placed on record a document where his assessor put the pre-accident value at Kshs. 700,000.00, and that was the value that the trial court adopted. He surely cannot now complain that there was another value, whose evidence he did not produce. There could be many explanations for a value higher than the price at which the vehicle was bought. One explanation could be that the buyer improved the vehicle, thereby raising its value. It could also be that the seller sold the vehicle at a throwaway price, following a forced sale, arising from an urgent need to raise money quickly.
22. There was an argument that the trial court based its judgment on the anticipated market value of spare parts, instead of what the respondent incurred in reinstating the accident vehicle to the condition it was in prior to the accident. This ground or argument eludes me. The accident vehicle was not repaired. It was written off, as in it was a total loss, beyond repair. So, the question of what was incurred in repairing it would not arise at all. The claim, in the plaint, was not for recovery of the moneys expended in repairing the vehicle, but the difference between its pre-accident value and the salvage value. Secondly, the trial court did not assess special damages based on the anticipated market value of spare parts, but on a report of an assessor that the appellant had himself commissioned, Auto Gallery Assessors. The court, therefore, relied on evidence that the appellant himself adduced. The appellant cannot now, on appeal, walk away from evidence that he placed before the trial court, which that court then fully relied upon. In any case, it was held, in *Nkuene Dairy Farmers Co-op Society Ltd & another vs. Ngacha Ndeiya* [2010] eKLR (Bosire, Onyango-Otieno & Nyamu, JJA), that special damages, in a material



damage claim, need not be shown to have actually been incurred, and that all that is necessary is to show the extent of the damage and what it would cost to restore the damaged item.

23. On whether the award made by the trial court amounted to unjust enrichment, I note that it was not in dispute that the vehicle in question belonged to the respondent. It was not disputed that there was an accident in which the said vehicle was damaged. It was not disputed that both sides filed assessment reports, which ascertained the value of the said vehicle, both pre-and-post the accident, and both of which assessed the vehicle as damaged beyond economic repair. The trial court was persuaded, for reasons given, that the assessment report, lodged by the appellant, represented a fairer assessment of the correct situation, regarding the damage wrought on that vehicle, its value pre-and -post the accident, and what it would cost to repair it and restore it to its pre-accident condition. The amount, awarded in the judgment of the trial court, was based on the document relied on by the appellant in his defence. The argument, that an award, based on that assessment, was unjust enrichment, would make no sense at all, in the circumstances.
24. I find no merit in the appeal herein, and I hereby dismiss the same, with costs to the respondent. Orders accordingly.

DELIVERED VIA EMAIL, AND DATED AND SIGNED, IN CHAMBERS, AT BUSIA, THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the appellant.

Mr. Luchivya, instructed by Marisio Luchivya & Company, Advocates for the respondent.

