Kioko v Karagu (Civil Appeal E848 of 2022)
[2025] KEHC 2072 (KLR) (Civ) (5 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E848 OF 2022

AM MUTETI, J

FEBRUARY 5, 2025

BETWEEN

CATHERINE MAKANDA KIOKO ..... APPELLANT

AND

JOSEPH MWAURA KARAGU ..... RESPONDENT

(Being an appeal from the judgement of the Honourable Magistrate M. Keyne G. Odhiambo (MR) Adjudicaator/ Senior Resident Magistrate delivered on 22 September, 2022 at Milimani Small Claims Court SCC Civil Case No. E1512 of 2022)

JUDGMENT

Introduction

1. The Appellant filed this appeal upon being dissatisfied with the judgment of the Honourable Magistrate Mr. Keyne G. Odhiambo delivered on the 22nd September,2023 in the following terms.

    I. The Claimant's claim for repair costs fails for failure to prove that jubilee insurance settled the invoice raised by Motor-care ltd. That the Claimant only proved a sum of Kshs. 550/=.

    II. The judgment is entered in favour of the Claimant against the Respondent in the sum of Kshs. 550/ plus costs and interest.

2. The Appellant filed the appeal and raising the following grounds;

    a. That the learned trial magistrate erred in Law and in fact in dismissing the Appellant's case in the Respondent's favour when there was evidence of record to support the Appellant's case.

    b. That the Learned Magistrate erred in law and in fact in holding that there was no proof of payment for repairs of motor vehicle KBS 944A.

c. That the Learned trial magistrate erred in Law and in applying wrong principles while dismissing the claim on repairs.

d. That the Learned trial magistrate greatly misdirected himself in treating the evidence tendered and the submissions of the Appellant very superficially thereby erroneously arriving a wrong conclusion on quantum

e. That the learned magistrate erred in law and in fact in not taking into consideration the evidence and submissions tendered in Court on behalf of the Appellant to the effect that the Appellant's insurer paid for the repair costs.

f. That the Learned trial magistrate erred in law and in fact in not making an award on quantum when the evidence on record proved that the Appellant incurred the amount claimed as repairs outlay.

g. That the Learned trial Magistrate erred in law and in fact in applying wrong principles on arriving at the said Judgment.

3. The issues for determination are;-

(a) Whether the Appellant proved the claim on the repair costs incurred;

(b) Whether the Appellant is entitled to the amount of Kshs.175,740/which was not awarded by the trial Court;

Background of the Claim

4. The Appellant herein instituted the lower court proceedings on 15- June-2022 by way of statement of claim dated 15th June, 2022 seeking for judgment against the Respondents for a sum of Kshs. 176,290.00/= tabulated as hereunder;

Repair cost Kshs. 175,740.00

Motor vehicle search Kshs. 550.00

Total Outlay Kshs. 176, 290.00/=

5. The facts of the case being that on or about the 16th June, 2019 the Appellant was lawfully driving her motor vehicle registration number KBS 944A along Langata road near Nyayo stage when the Respondent being the driver of motor vehicle KBE 091Y negligently drove, managed and/or controlled the said vehicle causing it to violently ram into the Claimant's motor vehicle from behind thereby occasioning extensive damage to it.

6. Following the accident, the Appellant's motor vehicle underwent extensive repairs which cost was paid by her Insurer, M/S Jubilee Insurance Company Limited (herein after "Jubilee or "the appellant's insurer"). The Appellant's Insurer, therefore, instituted this suit in the name of the Appellant for recovery of their repairs outlay under the insurance principle of Subrogation.

7. The Respondent filed his response to the statement of claim dated 11th July, 2022 which contained mere general denials.

Appellants Case

Duty of this Court

8. As a first appellate Court we submit that the Court has a duty to examine matters both of law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny before arriving at a conclusion from that analysis.

   In so doing, Court bears in mind the fact that it did not have See Selle and Another vs Associated Motor Board Corporation (1968) EA 123an opportunity to see and hear the witnesses first hand.

9. Section 78 of the *Civil Procedure Act* espouses the roles of the first Appellate Court which is to....' re- evaluate, reassess and re-analyse the extracts of the record and draw its own conclusions'. This was also buttressed by the Court of Appeal in the case of Peter Kariuki-v- Attorney General (2014) e KLR where it was stated that: -

   > " ...we have also, as we are duty bound to do as a first appellate Court to consider the evidence adduced before the trial Court and revaluate it to draw own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistence with the evidences".

Issues for Determination

10. On whether the Appellant proved the claim on repair costs incurred the appellant submitted that there was no dispute that the Appellant's vehicle was damaged as a result of the accident and underwent repairs after assessment was done thereafter re-inspection was done.

11. The Appellant's claim was filed under the doctrine of subrogation in which the Appellant was claiming for a sum of Kshs. 175,740/- being repairs costs and Kshs.550/- fees for motor vehicle search all totaling to Kshs. 176,290/-.

12. It is the Appellant's submission that in spite of her having proven through the evidence that, indeed, material damage was caused to her motor vehicle KBS 944A by Respondents' motor vehicle KBE 091Y and repairs were done to her motor vehicle, the insurance company i.e Jubilee paid for the repairs, and that the Respondent was to blame the court proceeded to find that the appellant had not discharged the burden of proving that the costs of repairs were settled by the insurer.

13. The Appellant contends that she discharged the burden of proof placed upon her by law. The ETR and invoice produced in evidence were sufficient prove of the cost of repairs done as a result of the accident.

14. The Appellant produced an assessment report. The assessment confirmed that indeed the vehicle was damaged.

15. The Appellant produced an invoice dated 20-November-2019 together with the receipt of payment for a sum of Kshs. 136,300/- being repairs costs

16. The Appellant also produced a satisfaction note confirming that the vehicle had been repaired.

17. The Appellant's 2nd witness one Beatrice Muriithi who worked with Jubilee insurance company also confirmed that the insurance paid for the repair costs.

18. The appellant therefore submitted that she proved on a balance of probability that material damage was caused to her motor vehicle KBS 944A by Respondent's motor vehicle KBE 091Y and that repairs were done to her motor vehicle.

19. On the strength of that evidence the appellant urged the court to find that the insurance company i.e Jubilee paid for the repairs.

20. The appellant further urged this court to find that the respondent having been liable for the accident, he ought to have be condemned to pay the whole of the amount claimed.

21. This being a material damage claim, the appellant relied on the Court of Appeal decision in the case of Nkuene Dairy Farmers Co-op Society Itd & another v Ngacha Ndeiya (2010) e KLR where the Court held in last paragraph on page 2, that

> " in our view special damages in a material damage claim need not be shown to have actually been incurred. The Claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of".

22. The appellant therefore urged this court to find that the Learned Magistrate erred in law and in fact in dismissing the Claimant's claim of Kshs. 175,740/- in light of the evidence adduced and in total disregard of the Appellant's written submissions.

23. It was clear that the Claimant's vehicle was repaired and the costs were shouldered by the insurer. On the re-inspection report it's disclosed that the repairs were done totaling to the sum of Kshs. 136,300/=.

24. The appellants also cited the case of Tamno V Simon & 2 others (Civil Appeal 22B of 2021) [2023] KEHC 1690 (KLR) (10 March 2023) (Judgment) court in allowing the appeal at paragraph 24 thereof stated as follows: -

> " ...in the circumstances it is clear that repairs were carried out and shouldered by the insurer. The assessment and re-assessment were done by professionals. On re- assessment repairs were done according to assessment".

25. The appellant also referred this court to the case of Gerda Maria Simon-v-Global Trucks Ltd (2020) e KLR court on appeal set aside the judgment of the trial Court dismissing the Appellant's material damage claim on the account that no receipts were produced.

26. In conclusion the appellants prayed that the amount incurred as repair costs be allowed and the judgment by dismissing it be set aside.

27. The appellant argued that the trial court failed to take into consideration the evidence and submissions tendered in court on behalf of the Appellant to the effect that the Claimant had proved the repair outlay costs incurred.

28. The appellant also submitted that the subordinate court failed to take into consideration the correct principles applicable in material damage claim filed under the doctrine of subrogation.

29. It is further urged on behalf of the Appellants that the trial court failed to consider the evidence adduced in Court thus the dismissal of the claim made by the appellant.

30. The appellants argued that had the trial court considered the documents tendered in evidence the claim made by the appellant would have been allowed.

Respondent's Case

31. On 7.09.2022, parties agreed to proceed with hearing of this Matter by production of documents and statements as provided under section 30 of the statute establishing this Honourable Court.

32. The Respondent submits that he was not wholly to blame for causing the accident.

33. The Respondent invited this court to consider his statement to determine who was to blame for the accident

34. It was his testimony that on the material day he was driving at a moderate speed of 40km/hr. or thereabout. It was around 6:00p.m and that the Claimant's Motor Vehicle was ahead of him.

35. According to the respondent he saw the Claimant through rear view screen of her vehicle driving while talking on her phone. Suddenly, while reaching Nairobi West PSV stage, the Claimant applied emergency brakes. That in trying to avoid the accident Respondent tried to apply emergency brakes but could not stop his vehicle on time thus colliding into the Claimant's vehicle from behind.

36. The respondent is basically arguing that the claimant in the lower court was responsible for the accident.

37. The respondent further argued that it was impossible for him to brake on time as the road was very slippery due to oil spills on the tarmac by another vehicle.

38. It is the respondents claim that taking into account the totality of the circumstances, the Claimant contributed into the occurrence of the accident for driving while on phone and therefore not paying attention and braking suddenly without warning.

39. The *Traffic Act* outlaws use of mobile phones to make calls, text or browse the Internet while driving.

40. Section 59A (1) of the *Traffic Act*, Cap 403. "No driver of any class of vehicle shall, while the vehicle is in motion, use a mobile phone or any other communication equipment not permanently fixed to the vehicle, which distracts or is likely to distract the driver from driving,"

41. Further, but for the slipperiness of the road due to the oil spoilage, the respondent might perhaps have managed to break on time and avoid the accident all together.

42. The respondent submitted that weighing one thing against another he would only have been liable for the accident upto 50% if at all.

Quantum

43. The respondent urged the court to consider the law on special damages in determining quantum.

Analysis and Determination

44. The lower court in this matter found the respondent 100% liable for the accident after analyzing the evidence tendered by both parties. In particular the learned Honorable magistrate found the respondent not to have kept a safe distance between him and the motor vehicle belonging to the claimant.

45. The respondent has not filed a cross appeal in this matter thus his plea to this court that liability be apportioned at 50/.50 is not sustainable and he intended to have the issue of liability revisited by the court he certainly could have cross-appealed. For that reason is not inclined to interfere with the learned Honorable magistrate's decision on liability since unlike this court, the learned honorable magistrate

had the opportunity to hear and see the witnesses thus the finding of facts as to who was liable for the accident are upheld by this court.

46. In any event, the respondent having hit the appellant's vehicle from behind cannot be hard to argue that it was as a result of the claimant applying emergency breaks. The duty to keep a safe distance cannot be overlooked. See George Kaniaru Kanyutu vs. Francis Muhoho Ngugi[2004] eKLR, the court held that;

> It is well established in law that any driver of a motor vehicle should ensure that the distance between his/her motor vehicle and others should be such that it would enable him/her to control/manage the vehicle in a manner that would prevent a collision from occurring. I find that the respondent's driver and/ servant/ agent failed in keeping a safe distance between his motor vehicle and the appellant's vehicle such that he was unable to avoid the collision.

47. The lower court's finding in regard to liability was therefore well funded in law.

48. On Quantum, the learned Honorable magistrate observed : " In this case, Jubilee insurance did not avail any evidence to prove that it settled the repair costs as per the invoice raised by Motor care Ltd. Attached to the invoice was an ETR receipt from Motor Care. An invoice and ETR receipt do not prove the repair costs of Kshs 136,300. The claimant was required to provide payment vouchers, remittance advice, or any other document to show that Motor Care Ltd was paid for the repair services."

49. It is surprising that the court having been given the evidence of an invoice an accompanying ETR Receipt found that as a matter of fact Jubilee Insurance had not availed any evidence to prove that it had settled the repair costs.

50. An Electronic Tax Register is an online cash register that keeps records of all business between a supplier and buyer and is used to record sales and provide ETR Receipts to customers. The system links the customer to the tax man and is meant to avoid Tax Frauds on the part of business people and entities who are under duty to collect tax such as Value Added Tax. It follows therefore an ETR Receipt is issued upon payment as evidence that the businessman providing a service or providing a good has sold the service or good and in return thereof received payment inclusive of tax.

51. It is the view of this court that there cannot be any better piece of evidence of payment other than the ETR receipt. In this case the ETR receipt was issued by Motorcare Limited who had issued the invoice tendered by the appellant.

52. It is therefore that the invoice being a demand of payment was satisfied and as a consequence thereof the ETR receipt was issued.

53. The learned Honorable magistrate therefore erred in law by finding that the appellant ought to have provided payment vouchers and remittance advice or any other documents to show that Motor Care limited was paid for the repair services. That was a material misdirection by the court on the evidence on record which this court must interfere with.

54. Jubilee's insurance claim to crystalize against the respondent, it must be proved that it paid the repair costs or compensated the insured.

55. In Gahir Engineering Works Limited v Rapid Kate Services Limited & another [2018] eKLR, it was held that

> Under the doctrine of subrogation, when the insured risk crystalizes and the insurer pays or compensates the insured for financial loss arising from an insurance claim against a 3rd party, the insurer is in law entitled to step into the shoes and enjoy all the rights, privileges

and remedies accruing to the insured including the right to seek indemnity from the 3rd party. The only qualification to this general principle is that the indemnity must be sought in the name of the insured.

56. In this case Jubilee Insurance did step into the shoes of the insured ands sought to recover from the respondent the sum expended on the repairs. The lower court having that the respondent was 100 % liable for the accident should have proceeded to enter judgment against the respondent for the sum proved through the documents tendered in court being Kshs. 136, 300. In addition to, the Kshs. 550 paid for the motor vehicle's search.

57. Consequently, the order by the learned Honorable magistrate dismissing the claim for the repair costs is hereby set aside and in substitution therefore this court enters judgment in favor of the appellant for the sum of Kshs. 136,850 plus costs and interests at court rates from the date of judgment.

58. The appellant shall have the costs of this appeal.

59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Makori for the appellant

Respondent is represented my Minimis & Chege Advocates