



REPUBLIC OF KENYA



KENYA LAW
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**Itotia v Tipper Hauliers Limited (Civil Appeal E155 of 2024)
[2025] KEHC 4583 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E155 OF 2024
FN MUCHEMI, J
APRIL 3, 2025**

BETWEEN

AUGUSTINE MBURU ITOTIA APPELLANT

AND

TIPPER HAULIERS LIMITED RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)
delivered on 19th April 2024 in Ruiru Small Claims Court SCCC No. E058 of 2024)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCC No. E058 of 2024 arising from a material damage claim whereby the trial court dismissed the appellant's claim for lack of merit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact by finding that the appellant had failed to prove that the accident was caused by the negligent actions of the respondent contrary to the evidence on record.
 - b. The learned trial magistrate erred in law and in fact by failing to appreciate or consider that the omission by the appellant to plead the particulars of negligence is not fatal per the provisions of Section 34 of the *Small Claims Court Act*.
 - c. The learned trial magistrate erred in law and misdirected herself in her assessment of damages awardable to the appellant.



3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that he faults the trial court for dismissing his claim for failure to plead the particulars of negligence in the manner in which the accident occurred leading to the damage of his motor vehicle registration number KCQ 249A. During the hearing of the claim in the trial court, the appellant submits that he produced and adopted his pleadings filed in court as evidence in support of his claim seeking special damages against the respondent for damages caused and expenses incurred in replacing and respraying parts of his motor vehicle registration number KCQ 249A due to their driver's negligent and careless driving on 4th February 2022. The appellant submits that he adopted his list of documents dated 5th February 2024 producing as part of his evidence a police abstract, photographs showing the extent of damages to his motor vehicle and a demand letter.
5. The appellant submits that it was his testimony that the driver of motor vehicle registration number KBR 907K/ZD7560 was to blame for the accident as indicated in the police abstract dated 7th March 2023 which also confirmed that the respondent is the registered owner of the said motor vehicle. The appellant refers to the case of Muhambi Koja Said vs Mbwana Abdi [2015] eKLR and submits that a police abstract is sufficient to establish ownership of a motor vehicle. The contents of the police abstract notwithstanding, the respondent did not rebut, controvert or challenge his claim against them or the contents of the police abstract which gave salient facts of the occurrence of the accident as ascertained by the police from their own investigations.
6. The appellant submits that in the absence of any contrary evidence, the police abstract was sufficient enough to prove, at least on a balance of probability that indeed a road traffic accident involving motor vehicle registration number KCQ 249A and KBR 907K/ZD7560 along Nairobi Naivasha Highway had occurred.
7. The appellant argues that Section 8 of the Traffic Act provides that the person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle. Thus the registration in the register of motor vehicles is prima facie and conclusive proof of ownership of a particular vehicle and where there is no contrary evidence, the person indicated in the abstract as the owner of the vehicle is presumed to be the owner.
8. The appellant argues that the respondent did not object to the production of the police abstract and neither did it produce any evidence to contradict its contents hence establishing 100% liability on its driver who failed to exercise duty of care to other road users. To support his contentions, the appellant relies on the case of Kansa vs Solanki [1969] EA 318.
9. The appellant relies on the cases of Blyth vs Birmingham Water Works Co [1856] cited in Onkoba vs Karonjo & Another [2023] eKLR and Nadwa vs Kenya Kazi Ltd (1988) as quoted in Daniel Mbeche Sero vs Husseina Enterprises & Hussein Gulamali Saiger [2020] eKLR and submits that negligence on the respondent's part led to the occurrence of the suit accident. The appellant submits that he proved liability against the respondent on a balance of probability and the respondent being the owner of motor vehicle registration number KBR 907K/ZD7560 owed a duty of care to him which he breached leading to damage of his motor vehicle. Thus having established the occurrence of the accident and the respondent's negligence at the trial court, failure to particularize negligence was not fatal. The breach of duty spoke for itself.
10. The appellant relies on the case of Dominion Farm Limited vs African Nature Stream & Another HCCC 21/2006 as cited in Bariu vs Kenya Wildlife Services [2023] eKLR and submits that rules of



procedure cannot be allowed to become mistresses of justice and thus courts ought to strive to do justice and exercise their discretion in a manner that will salvage the situation in line with Article 159 of *the Constitution*, Section 1A & 1B of the *Civil Procedure Act* and Section 34 of the *Small Claims Court Act*.

11. The appellant relies on the case of *Mungai vs Texcal House Service station* [1999] KECA 94 (KLR) and submits that failure to plead particulars of injuries is not a reason to hold that there is no cause of action.
12. The appellant further submits that his failure to particularize negligence was not fatal and the award of costs therefore was erroneous and inaccurate. Further, the appellant submits that his claim was one of material damage and he proved his case beyond the balance of probability by production of receipts and supportive documents which showed the damaged parts of his motor vehicle and the value of the repairs that would be given. The appellant submits further that he called an assessor to testify and he produced an assessment report and no contrary report was filed by the respondent, thus the report was unchallenged and uncontroverted.
13. The appellant relies on the case of *Nkuene Dairy Farmers Co-operative Society Limited vs Ngacha Ndeiya* [2010] eKLR and submits that he proved his claim as he was only required to show the extent of damage on his motor vehicle and what it would cost to restore the motor vehicle to as near as possible the condition it was in before the damage complained of.

The Respondent's Submissions.

14. The respondent refers to Section 38 of the *Small Claims Court Act* and submits that the trial court dismissed the claim on the basis that there was no assessment report to back the claim for damages to the appellant's motor vehicle, which is a question of fact and not law. The respondent argues that the appellate court is being invited to interrogate whether there was sufficient evidence to support the claim and the court ought to desist from delving into the arena of facts. To support its contentions, the respondent relies on the cases of *Wachira vs Mwai* [2024] KEHC 3173 (KLR) and *Rugano Books Limited vs Mabiria* [2024] KEHC 6281 (KLR).
15. The respondent submits that the claim was brought under the auspices of Section 12(1)(c) of the *Small Claims Court Act* and Rule 5 of the Small Claims Court Rules, 2019 provides that a claim for the recovery of damages for loss of damage to succeed, an itemized estimate of the cost of repair by a certified motor assessor or licenced mechanic ought to be tendered in evidence. Thus the trial court was right when it held that without the assessment report, the claim was ripe for dismissal. The respondent argues that in the appellant's list of documents, the appellant did not produce any documentary evidence in support of his claim for Kshs. 700,000/-, no assessment report, no receipts from a mechanic and no itemized breakdown of the repair costs despite the appellant testifying during the hearing that his vehicle was assessed by Quantum Motor Assessors and valuers Ltd.
16. The respondent relies on the case of *Linus Fredrick Msaky vs Lazaro Thuram Richoro & Highlands Mineral Water Company Limited* [2016] KEHC 5907 (KLR) and submits that oral evidence of quotation for repairs without a valuation or assessment report on the actual accident damages do not amount to sufficient evidence for the trial court to award damages for the repair costs. The respondent thus submits that the learned magistrate rightfully declined to award the claim for repair costs since in the absence of any evidence of the extent of damage, the repair costs would be an irrelevant consideration.
17. The respondent refers to the decision in *Daniel Kaminja & 3 Others (Suing as Westland Environmental Caretaker Group) vs County Government of Nairobi* (2019) eKLR and submits that the other grounds in the memorandum of appeal are moot and the instant court ought to down its tools. The



respondent argues that determining the other issues will have no effect and shall definitely not revive the instant appeal which is dead.

18. Relying on the case of *Stephen Wasike Wakhu & Another vs Security Express Limited* [2006] eKLR, the respondent submits that the appellant only pleaded that an accident occurred which by itself is not sufficient to input negligence on the part of the respondent. The appellant ought to have pleaded what it is that he complained that the respondent did or omitted to do that constitutes negligence. Thus, the claim before the court was terse and has no particulars of negligence.
19. The respondent argues that although the appellant seeks to rely on Section 34 of the *Small Claims Court Act* on his failure to fully plead his claim, the Small Claims Court lacks strict rules of evidence and procedure but issues for determination in a suit generally flow from the pleadings and the court is bound by the pleadings and evidence of the parties as they are themselves. Negligence must first be pleaded before being proved.
20. The respondent refers to the cases of *Wareham t/a Af Wareham & 2 Others vs Kenya Post Office Bank* (2004) 2 KLR 91 and *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* (2014) eKLR and submits that parties are bound by their pleadings and failure to plead a case is not a mere issue of rules of evidence, it is the crux and cornerstone of litigation. The failure in the pleadings goes to the root of the claim warranting an order striking out the claim. To support its contentions, the respondent relies on the case of *Ogwari vs Hersi* (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment).

Issue for determination

21. The main issue for determination is whether the appellant proved his claim to the required standard.

The Law

22. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

23. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below



considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

24. Points of law include exercise of discretion of the court as well as decision based on no evidence. Wrongful exercise of discretion is not a matter of fact but a point of law. This principle was enunciated in the Court of Appeal decision in Peter Gichuki King'ara vs IEBC & 2 Others Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek JJA) of 13.02.2014:-

It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer for scrutiny is exercising judicial discretion. The Court concluded that it would be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence arrived at a correct determination that is supported by law and evidence- with the caveat that the appeal court did not see the witness demeanor is an issue of law.

25. In the instant case, the trial court dismissed the appellant's claim because the appellant did not prove his claim to the required standard of beyond probabilities as the appellant failed to plead particulars of negligence against the respondent and prove the same which the trial court held was fatally defective and untenable in law. Accordingly, this falls within the ambit of points of law and therefore the appeal is proper before the current court.

Whether the appellant proved his claim to the required standard.

26. The appellant argues that the failure to plead the particulars of negligence is not fatal to his case as he led evidence to prove that an accident occurred between his motor vehicle registration number KCQ 249A and the respondent's motor vehicle registration number KBR 907K/ZD7560 on 4th February 2022 along the Nairobi Naivasha Highway and as a result of the accident, his motor vehicle suffered damages.
27. From the record, the appellant filed his claim in the trial court vide his Statement of Claim whereby he sought damages in the sum of Kshs. 700,000/- as a result of extensive damage on his motor vehicle registration number KCQ 249A following an accident which occurred on 4th February 2022. The appellant further indicated in his claim that he blamed the respondent for the occurrence of the accident as was indicated in the police abstract. The appellant indicated that following the accident he took his motor vehicle to Quantum Motor Assessors & Valuers Ltd for assessment of the extent of damage occasioned by the accident and it is upon assessment of the motor vehicle that the pre accident value of the vehicle was assessed at Kshs. 700,000/-. The appellant filed his list of documents dated 5th February 2024 which he adopted in proving his claim for special damages. The respondent filed a Response to Statement of Claim on 21st February 2024 denying that it was the owner of motor vehicle registration number KBR 907K/ZD7560 and that an accident occurred on the material day. The respondent then proceeded to blame the appellant for the causation of the said accident and enumerated the particulars of negligence against the appellant.
28. The matter proceeded for hearing on 9th April 2024 and the appellant adopted his witness statement and list of documents in support of his claim.
29. It is evident that the appellant did not set out the nature of the negligence in his statement of claim. The appellant did not list the particulars of negligence he attributed to the respondent. The statement of claim only provides that an accident occurred between the appellant's motor vehicle registration



number KCQ 249A and the respondent's motor vehicle registration number KBR 907K/ZD7560 on 4th February 2022 along Nairobi Naivasha Highway which caused extensive damages to the appellant's motor vehicle and that the respondent was blamed for the said accident.

30. Although Section 32 of the *Small Claims Court Act* exempts the Small Claims Court from being bound wholly by the rules of evidence, it did not remove the duty to make and prove specifically the common law duty of care. Negligence must first be pleaded before being proved. In the case of *East Produce Kenya Limited vs Christopher Astiado Osiro Civil Appeal No. 43/01* the court held as follows:-

It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku vs Kenya Cargo Hauling Services Ltd [1991]* where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

31. It is noteworthy that the appellant's evidence was unopposed during the trial but it was not in support of any pleading for negligence. The appellant failed to list the particulars of negligence he attributed towards the respondent and thus it was hard for the respondent to respond fully to his claim. The appellant's case must be such that the respondent could answer it. In *Kenya Power & Lighting Co. Ltd vs Hadija Kazungu Ngala [2021] eKLR* the court held:-

The issue of whether or not the appellant's case was properly pleaded and proved, I am guided by the decision of the Court of Appeal in the case of *John Richard Okuku Oloo vs South Nyanza Sugar Co Ltd [2013] eKLR* wherein it observed:-

We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

32. The record shows that the appellant failed to plead and prove negligence on the part of the respondent and thus his claim stood dismissed. Thus, the appellant failed to discharge the burden of proof beyond probability.
33. On the issue of damages, the appellant pleaded for special damages of Kshs. 700,000/-. It is trite law that special damages must be both pleaded and proved, before a court of law can make an award. This was stipulated in the Court of Appeal decision of *Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716* where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

34. The appellant in the instant case filed a list of documents dated 5th February 2024 to support his claim. On cross examination, the appellant testified that his car was not assessed by Quantum Assessors and as such no damages were assessed. Furthermore, on re-examination the appellant testified that his motor vehicle was assessed by Quantum Motor Assessors after his counsel told him to say so. Despite giving that testimony, the appellant did produce any assessment report or receipts to show that his vehicle was damaged and that he incurred expenses to repair the said vehicle. The appellant produced a police abstract dated 7th February 2022, photographs of his damaged motor vehicle and a demand letter dated 16th November 2023.



35. It is therefore borne by the record that the appellant did not produce any evidence to support his claim of Kshs. 700,000/- as required by the law that he who alleges must prove. It is my finding that the appeal lacks merit and is hereby dismissed with costs.

36. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

