



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Macharia & another (Civil Appeal E096 of 2023)
[2025] KEHC 11898 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 11898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E096 OF 2023**

GL NZIOKA, J

APRIL 2, 2025

BETWEEN

HANNAH WAITHERA WAWERU APPELLANT

AND

HEZRON MACHARIA 1ST RESPONDENT

RICHARD ROADROK 2ND RESPONDENT

(Being an appeal from the decision of Honourable Eunice Kelly; Principal Magistrate delivered on 24th October 2023 vide Naivasha Chief Magistrate Civil Case No. 270 of 2020)

JUDGMENT

1. By a plaint dated 22nd June 2022 the plaintiff (herein “the appellant”) sued the defendants (herein “the respondents”) seeking for judgment against the appellants for: -
 - a. General damages for pain, suffering and loss of amenities.
 - b. Special damages – Kshs. 316,000/=.
 - c. Costs and interest om (a) & (b) above.
 - d. Any other relief this Honourable court may deem just to grant.
2. The respondent’s claim arose from a road traffic accident that occurred on or about 29th June 2018. She avers that on the material date, her motor vehicle registration No. KBV 126J Toyota Station Wagon was being driven along the Naivasha – Moi South Lake Road when the 2nd respondent negligently drove motor vehicle registration No. KAN 655T Toyota Saloon that he caused it to lose control and collide head-on with her motor vehicle. The particulars of negligence attributed to the 2nd respondent are tabulated at paragraph 6 of the plaint.



3. The appellant further avers that as a result of the accident, her motor vehicle registration whose pre-accident value was Kshs. 410,000 was declared a total loss and the salvage value assessed at Kshs. 100,000.
4. The appellant pleaded that the 1st respondent is sued under the doctrine of vicarious liability on the ground that, he is the registered owner of the vehicle driven by the 2nd respondent, his authorized driver and/or agent.
5. However, the claim was opposed vide a statement of defence dated 7th December 2021, wherein the respondents basically denied all the averments in the plaint, including the fact that the impugned vehicle is owned by the 1st respondent and/or was being driven by the 2nd respondent. The particulars of negligence attributed to the 2nd respondent and/or the alleged damage to the appellant's vehicle was also denied.
6. However, the respondents pleaded in the alternative and without prejudice basis that, if the accident occurred then it was solely or substantially contributed to by the negligence of the driver of the appellant's motor vehicle as per the particulars at 8 of the statement of defence.
7. Be that as it may, on 25th October 2022 the parties entered into a consent judgment on liability and apportioned in the ratio of 80:20% in favour of the appellant as against the respondents
8. The matter proceeded to full hearing with the appellant's case supported by two (2) witnesses. (PW1) Peter Gichuki an employee of Regent Valuers Ltd produced a valuation report prepared by Mwangi and assessed the pre-accident value at Kshs. 410,00 and a salvage value at Kshs. 100,000. That the appellant paid Kshs. 6,000 for the valuation report. The appellant in support of her claim, adopted her witness statement where she reiterates basically the averments in the plaint.
9. The respondents closed their case without calling any witness, and parties filed their written submissions. By a judgment delivered on 24th October 2023, the trial court entered judgment in favour of the respondent as follows: -
 - a. Liability on consent: 80:20 in favour of the plaintiff.
 - b. Special damages-----Kshs. 6,000
Less 20%
Total-----Kshs. 4,800
10. However, by memorandum of appeal dated 8th November 2023 and amended on 22nd January 2024, the appellant is appealing against that judgment on the following grounds:
 - a. The learned trial Magistrate erred in law and in fact in failing to find that the appellant specifically proved loss of motor vehicle registration number KBV 162J Toyota Station Wagon of Ksh 310,000.
 - b. The learned trial magistrate erred in law and in fact by shifting the standard of proof from a balance of probabilities to beyond reasonable doubt hence leading to wrong judgment on quantum.
 - c. The learned trial magistrate erred in law and fact in failing to put into consideration the appellant's submissions.
 - d. The Learned trial Magistrate erred in law and fact in failing to take into consideration the evidence adduced by the appellant hence arriving at an erroneous decision.



- e. The Learned trial Magistrate erred in law and fact in failing to take into account the pre-accident value and the salvage value of motor vehicle registration number KBV 162J Toyota Station Wagon.
 - f. The Learned trial Magistrate erred in law and fact in holding that receipts are the only proof of total loss of motor vehicle when it was proved that the vehicle was a write off.
 - g. The learned trial magistrate erred in law and in fact in taking into account extrinsic matters hence arriving at an erroneous finding.
11. The appeal was disposed of by way of written submissions. The appellant's in submissions dated 6th February 2024, faulted the trial Magistrate for holding that she did not prove her claim in the sum of; Kshs. 310,000 to the requires standard.
 12. The appellant submitted that the standard of proof in civil cases is on a balance of probabilities and referred to the case of; Silas Mutua Mberia vs Muthoni Njue Veronica [2021] eKLR where the High Court stated that the balance of proof on the appellant (plaintiff in the trial court) was at all times on a balance of probabilities and not higher.
 13. The appellant further submitted that loss of a motor vehicle is proved by production of a certificate of test by the National Transport and Safety Authority (NTSA) and a valuation report. That she produced the certificate of examination and test of vehicle by the NTSA as P.exhibit 4, while (PW1) Peter Gichuki, an employee of Regent Valuers, produced the motor vehicle accident assessment report as P.exhibit 2 which detailed the damages the subject vehicles sustained.
 14. The appellant cited the case of; Kyoga Hauliers Limited vs Malindi Parcels Services & another [2018] eKLR where the High Court held that the plaintiff had proved special damages of Kshs. 3,750,000 as the estimated pre-accident value of the subject motor vehicle through the production by (PW2) the Principal of Kimbat Loss Assessors (E.A) Co. Ltd, a motor vehicle assessment report (P.exh 10) where the subject vehicle was constructive as a total loss.
 15. That in addition the High Court in the case of; Silas Mutua Mberia vs Muthoni Njue Veronica (supra) stated that the appellant is only required to prove the extent of damage to his motor vehicle and what it would cost to repair as the claim is not for a costs already incurred but a claim to restore the vehicle to its pre-accident state. That the court held that the report of the assessed damage produced was sufficient proof on a balance of probabilities and therefore the appellant was not legally required to specifically prove the claim by production of receipts.
 16. The appellant argued that (PW1) Peter Gichuki gave evidence on how the value of Kshs. 310,000 was arrived stating in cross-examination that the pre-accident value of the subject vehicle was Kshs. 410,000 and that it would cost the appellant Kshs. 385,000 to repair it which did not make economic sense. That the salvage value of the subject vehicle was Kshs. 100,000 thus loss of the motor vehicle was Kshs. 310,000
 17. The appellant further relied on the case of; Bungoma Line Sacco Society Limited vs Super Bargains Hardware (K) Ltd [2021] eKLR where the High Court held that where the vehicle has been declared a write off as it would not be economical to repair it, the only way to compensate the victim was to allow the pre-accident value less the salvage value.
 18. The appellant further submitted that, the respondents never called another assessor nor called any other evidence in their defence to challenge and/or controvert the evidence of (PW1) Peter Gichuki. That to the contrary, the respondents in their submission in the trial court admitted that the appellant had proved damage and prayed that judgment be entered in favour her for Kshs. 316,000 which



included the amount of Kshs. 310,000 being the loss of the motor vehicle and Kshs. 6,000 as fees for the assessment of the subject vehicle.

19. The appellant argued that she had proved on a balance of probabilities the total loss of Kshs. 310,000 and asked the court to allow the appeal as prayed in the amended memorandum of appeal.
20. However, the respondents in brief response submissions dated 22nd March 2024 stated that the issue of liability having been settled by consent, the appeal was purely on quantum and more specifically on the claim for special damages. That, the trial court in awarding special damages of Kshs. 6,000 being the assessor's fees was guided by the decision of; Jackson K. Kiptoo vs Attorney General [2009] eKLR where the Court of Appeal stated that a claim for special damages ought to be pleaded and strictly proved.
21. That, the appellant during cross-examination stated that the subject vehicle was duly insured however, she did not offer any reason why she did not claim for compensation from her insurer. The respondents argued that the trial court reached a fair determination and prayed that the appeal be dismissed with costs.
22. At the conclusion of hearing the appeal, I note that the parties indeed entered into a consent judgment on liability in the ratio of 80:20% in favour of the appellant as against the respondents, consequently the appeal herein is purely on quantum.
23. The law on quantum is settled that, while assessing damages at the appeal stage, the appellate court will not interfere with the trial court's decision on quantum unless in exercising that discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.
24. Further the Court of Appeal in the case of: Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (unreported) stated as follows: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257).”
25. In the pleadings before the trial court the appellant sought for general damages for pain, suffering and loss of amenities. It is not clear whether this particular prayer was ever canvassed at the hearing.
26. The appellant also sought for special damages in the sum of Kshs 316,000. The trial court in its judgment only awarded special damages in the sum of Kshs 6,000 less 20% to Kshs 4,800. I note that the trial court in dismissing the appellant's claim for loss of motor vehicle quoted the case of; Jackson K. Kiptoo vs Attorney General [2009] eKLR that special damages must not only be pleaded, but also be specifically proved and then stated as follows:

“In a nutshell, the plaintiff proved Kshs. 6,000 in special damages, which I award less 20% as per the for the consent on liability which is Kshs 4,800.



I enter judgment for the plaintiff against the defendants, jointly and severally, and award Kshs. 4,800 in damages. I award course of the suit and interest from the date of filing of the suit.”

27. Notably from the above, the trial court did not address itself as to why the other claim of Kshs. 310,000 was not proved and/or awarded. A perusal of the judgment, reveals a summary of the plaintiff's case and/or chronology of events, basically the plaintiff's pleadings, the defendants' response, a reply thereto and the hearing of the matter on 13th June 2023.
28. The judgment then gets into the analysis of the evidence of the witnesses' evidence in chief, cross examination and re-examination, and then submission filed by the parties. The trial court then states that it has considered the evidence and determined the issue for determination is whether the plaintiff proved the case on the balance probability was proved. The court then finds as stated above.
29. Pursuant to the afore, it is clear that the judgment does not give any reason, why the appellant's claim of Kshs. 310,000 was not proved and/or not awarded. Consequently, this court is not able to appreciate why the claim was dismissed.
30. Be that as it were, I note that this court as the first appellate is inclined to re-evaluate the evidence adduced in the trial court afresh and arrive at its own decision.
31. In that regard I note that during hearing of the case the appellant supported his case inter alia by the evidence of (PW1) Peter Gichuki who produced a motor vehicle assessment report as (P.Exhibit 2) prepared by Regent Valuers. There is no indication in the judgment whether this report was ever considered or not and if so why it was it was not taken into account.
32. Furthermore, it is evident that the Kshs. 6,000 awarded by the trial court was paid for the report which then confirms that the motor vehicle was assessed as per the report produced as P.exhibit 2. In addition, I note from the submissions filed by the defendants and/or respondents dated 12th July 2023 that they submitted as follows: -

“The motor vehicle assessment report was produced by the assessors and hence the plaintiff demonstrated the extend of loss following the damage occasioned motor vehicle registration No. KBV 162J.”

The defendants went on to say this: -

“The plaintiff produced receipts for assessment in the sum of Kenya shillings. 6000. We thus humbly submit that Kenya shillings 316,000 be awarded to the plaintiff under the head subject to the ratio of liability.”
33. Pursuant to the aforesaid, it is clear the report produced in support the value of the loss was not contested and neither was any other report to the contrary. The court by awarding the service fee for the same validated it and in my considered opinion could not be dismissed.
34. Further the respondents having conceded to the claim, there is no basis for them to be heard as done in their submissions in this court that the appellant did not offer any reason why she did not claim compensation for the loss of motor vehicle from insurance.
35. The consequence thereof is that, I set aside the judgment of the trial court dismissing the appellant's claim and substitute it with judgment in favour of the appellant as prayed for in prayer (b) in the plaint



dated; 22nd June 2029 against the respondents jointly and severally as pleaded in the sum of Kenya shilling 316,000 less 20% contributed negligence.

36. Notably, prayer (a) relates to general damages for pain, suffering and loss but through the entire pleadings, the evidence in court, one wonders whether that prayer was ever canvassed.
37. Further, the appellant will have costs of the suit in the trial while each party to bear its own costs for the appeal. Interest on the sum awarded will accrue from the date of this judgment until payment in full.
38. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 2ND DAY OF APRIL 2025.

GRACE L. NZIOKA

JUDGE

In the presence

Ms. Kariuki for the appellant

Mr. Migiro H/B for Ms. Ochola for the respondents

Ms Hannah: Court Assistant

