Macharia v Wandera (Civil Appeal E166 of 2024)
[2025] KEHC 6943 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6943 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E166 OF 2024

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

DAVID KIHANG'A MACHARIA ..... APPELLANT

AND

STEPHEN WANDERA ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M. W. Kamau (RM/Adjudicator) delivered on 13th June 2024 in Thika Small Claims Court SCCC No. E1453 of 2023)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E1453 of 2023 arising from a motor vehicle accident whereby the court found the respondent fully liable in favour of the respondent and awarded the respondent special damages of Kshs. 406,769/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds of appeal summarized as follows:-

    a. The appellant did not agree to proceed under Section 30 of the *Small Claims Court Act*.

    b. The learned trial magistrate erred in law and in fact in failing to appreciate that a police abstract cannot be used as conclusive evidence of the accident.

    c. The learned trial magistrate erred in law and in fact in finding liability based on a witness statement by the respondent and lack of witness statement by the appellant.

    d. The learned trial magistrate erred in law and in fact in failing to appreciate the respondent did not adduce evidence for payment of spare parts as no receipts are attached for the same and where invoices are produced they are not supported by ETR receipts as required by law.

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

The Appellant's Submissions

4. The appellant refers to Section 107, 108 and 109 of the *Evidence Act* and the case of Bwire vs Wayo & Sailoki (Civil Appeal E032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) and submits that the burden of proof rests with the respondent to prove that the alleged injury was caused by his action or inaction while the appellant bears the burden of proving affirmative defence.

5. The appellant submits that the trial magistrate placed liability on him based on a police abstract, a witness statement filed by the respondent and on the fact that he did not file a witness statement. The appellant relies on the cases of Wangogu vs Kithinji *& 2 Others (Civil Appeal 293 of 2023*) [2024] KEHC 6272 (KLR) (30 May 2024) (Judgment) and Kennedy Muteti Musyoka vs Abednego Mbole [2021] eKLR and submits that a police abstract cannot be used as conclusive evidence of liability of an accident but only acts as proof that an accident was reported. Thus the appellant argues that the police abstract produced by the respondent as evidence of liability of the accident was not sufficient proof of liability on his part without any investigating report or evidence from the investigating officer or any other independent evidence to support the same. Similarly the appellant argues that the reliance on the respondent's witness statement in finding him liable for the accident was erroneous as there was no independent evidence to corroborate the respondent's witness statement which could only be taken as mere allegations unless the contrary was proved by additional evidence or evidence from an independent party.

6. The appellant submits that the fact that he did not file any witness statement should not have been inferenced as an acceptance of liability or proof of negligence by him who denied the respondent's allegations in his response dated 8th May 2024.

7. The appellant submits that the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent did not adduce sufficient evidence of the alleged costs incurred in repairing his motor vehicle. The appellant argues that the award of Kshs. 22,600/- as costs incurred on investigation was supported with an invoice from Midland Merchants Insurance dated 18th May 2023 but it is not supported by any ETR receipt therefore the said amount cannot be ascertained. The respondent was further awarded a sum of Kshs. 12,300/- as towing fees but the invoice from Concierge East Africa Ltd (Tax Invoice No. 2414) dated 31st May 2021 was also not supported by an ETR receipt to ascertain the amount spent on towing.

8. The appellant further argues that there are no invoices or ETR receipts attached to the assessment report or the re-inspection report as proof of payments for the spare parts and thus the amount of Kshs. 363,196/- awarded as repair costs is disputed.

The Respondent's Submissions

9. The respondent submits that the accident occurred at 1530 hours, on a dry tarmac road with clear visibility. The occurrence of the accident is supported by a police abstract which clearly indicates the place of the accident, the motor vehicles involved and the party blamed, information which was only denied by the appellant but not supported by documents. The respondent further submits that he produced documents in support of the accident such as the accident report form which captured circumstances leading to the occurrence of the accident together with a sketch map of the scene of the accident corroborating the version of events. The statement of claim outlined the particulars of negligence of the appellant's driver.

10. The respondent relies on the case of Nadwa vs Kenya Kazi Ltd (1988) eKLR and argues that at the trial stage, no evidence was tendered by the appellant challenging his version of events and the circumstances leading to the accident.

11. The respondent further relies on Section 107 of the *Evidence Act* and the cases of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334; William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526 and Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another (2015) eKLR and submits that the appellant did not challenge the authenticity of the police abstract or the testimony of the officer to the effect that the appellant's motor vehicle was to blame for the accident. The contents of the police abstract were not rebutted through any evidence by the appellant. The respondent relies on the case of Henderson vs Henry E Jenkins & Sons [1970] AC 282 at 301 and submits that he proved his case on a balance of probabilities through supporting documents that he adduced which was sufficient in the absence of evidence to the contrary.

12. The respondent submits that the appellant's driver's witness statement attached to the accident report showed that the accident was caused by the negligence of the driver of motor vehicle registration number KCA 825G who was blamed for the accident. the witness statement indicated that he had slowed down coming to a stop due to a traffic build up when the appellant's motor vehicle rear ended his vehicle leading to damages. Further, the appellant's driver indicated that the brakes of the truck were faulty.

13. The respondent relies on the cases of Elijah Ole Kool vs George Ikonya Thuo [2001] eKLR; Abdi Kadir Mohammed & Another vs John Wakaba Mwangi [2009] eKLR; Masembe vs Sugar Corporation & Another [2002] 2 EA 434; Embu Public Road Services Ltd vs Riimi [1968] EA 22 and Multiple Hauliers (E.A) Ltd vs Justus Mutua Malundu & 2 others [2017] eKLR and submits that the onus was on the appellant's driver to watch out for vehicles ahead of him to ensure that he had enough time swerve, apply brakes and avoid the accident pursuant to the *Traffic Act* which requires that vehicles keep a safe following distance from the car in front of them. The respondent further submits that from the analysis of the evidence provided by the appellant, he was in no position to avoid the occurrence of the accident since he was hit on the rear side of his vehicle while it had halted in traffic at the junction on the entry to quickmart. The respondent argues that the appellant never adduced any evidence in rebuttal to the overwhelming evidence that was adduced by him alluding negligence on the part of the appellant's driver leading to the accident. The appellant never adduced any witness statement with a different version of events or circumstances surrounding the occurrence of the accident. Therefore, the trial court's hands were tied as there was overwhelming evidence in support of his claim.

14. The respondent relies on the case of HCCA No. 154 of 2005 Nkuene Dairy Farmer Co-operative Society Ltd vs Ngacha Ndeiya (2010) eKLR and submits that it is not fatal that he did not produce ETR receipts as special damages in a material damage claim need not be shown to have actually incurred but the claimant is required to show the extent of damage and what would cost to restore the damaged items as near as possible. The respondent further submits that the appellant did not challenge the assessment report or even the tracing report and thus there is no basis for disturbing the award.

15. The respondent submits that his insurer instructed Concierge East Africa Limited to tow the vehicle from the accident scene to the police station and thereafter to the Britam assessment centre. They gave an invoice dated 1st April 2021 of Kshs. 12,300/- for towing services and his insurer's made payment vide a claims payment requisition voucher dated 23rd April 2021.

16. The respondent further submits that he was indemnified by the insurer to the tune of Kshs. 289,450/- which was the 1st cash in lieu settlement. The insured signed a discharge voucher dated 7th April 2021

which was effected vide a payment voucher from the insurer dated 9th April 2021. The respondent's insurer thereafter issued a 2nd cash in lieu settlement of Kshs. 123,650/- which he signed a discharge voucher dated 5th June 2021 which was effected vide a payment voucher from the insurer dated 7th June 2021.

17. The respondent submits that Midland Merchants & Insurance Investigators carried out investigations and the circumstances surrounding the accident, traced the negligent party and submitted a detailed report. The investigators submitted a detailed report dated 18th May 2023 with an invoice dated 18th May 2023 of Kshs. 22,600/-. The respondent's insurers made a payment vide a claims payment requisition voucher dated 6th June 2023.

18. The respondent argues that the issue of the ETR receipt is a non issue as the insurer paid the said fees as captured in the various fee notes and the same was subjected to taxation on the insurer's end. The lack of ETR receipts does not mean that the amount is conjured and if indeed the appellant was opposed to the said figures, he ought to have provided the trial court with contrary evidence. The respondent further argues that the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying them as every wrong must be remedied, and the court is duty bound to do the best in the circumstances no matter the difficulty. To support his contentions, the respondent relies on the cases of Nance vs British Columbia Electric Co Ltd in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 and Total Kenya Limited vs Janevams Limited [2015] eKLR.

19. The respondent submits that Section 32 of the *Small Claims Court Act* provides that the court is not bound by strict rules of evidence.

Issues for determination

20. The main issues for determination are:-

    a. Whether the appeal is defective.

    b. Whether liability apportioned by the trial court was against the weight of the evidence adduced.

    c. Whether the respondent proved his claim for material damage to the required standard.

The Law

21. 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.

22. 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.

23. I have perused the grounds 1-7 in the memorandum of appeal and noted that the grounds touch on the fact that the learned adjudicator failed to appreciate that a police abstract cannot be used as conclusive evidence of an accident; basing liability on a witness statement by the respondent and lack of witness statement by the appellant and the respondent did not produce evidence for payment of spare parts and where invoices were produced they are not supported by the ETR receipts. I have further perused the judgment of the learned adjudicator and noted that the trial court found that the respondent proved his claim to the standards required and entered judgment in his favour. The grounds as raised by the appellant touch on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. Section 38 of the *Small Claims Court Act* provides that appeals from the small claims court shall only be on matters of law. Looking at the grounds of appeal, the only matter of law raised by the appellant is that he did not agree to proceed under Section 30 of the Small Claims Court.

24. I have perused the record of appeal. The proceedings of the court of 2nd May 2024 show that the parties agreed to proceed with the hearing by way of tendering documents and filing of submissions pursuant to Section 30 of the *Small Claims Court Act*. It provides:-

    Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the court.

25. As such, the appellant cannot deny what he said through his counsel on record that "we can proceed under Section 30" to which the respondent's counsel said: "No objection". It was, therefore the choice of the parties to proceed with the hearing as per Section 30 of the Act. The appellant was represented by Ms Omwong'a for Muhoro from the firm of Mungai Kalande & Co. Advocates. Ms Wangui from the firm of VM & Co. Advocates LLP.

26. The other grounds based on matters of fact are hereby struck out of the memorandum of appeal for not being properly before the court.

27. This appeal lacks merit and is hereby dismissed with costs to the respondents.

28. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE