



REPUBLIC OF KENYA



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**Onkundi v Chege (Civil Appeal 37B of 2024)
[2025] KEHC 8913 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 37B OF 2024
FN MUCHEMI, J
JUNE 19, 2025**

BETWEEN

ABEL MOGAKA ONKUNDI APPELLANT

AND

FRANCIS MWAURA CHEGE RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)
delivered on 8th April 2024 in Ruiru Small Claims Court SCCC No. E134 of 2024)*

JUDGMENT

Brief facts.

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCC No. E134 of 2024 whereby the court dismissed the appellant's claim for a sum of Kshs. 629,910/- from a material damage claim on the grounds that the appellant did not prove his claim on a balance of probability.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-
 - a. The learned adjudicator erred in law and in fact in failing to take into account the totality of the pleaded facts before arriving at its decision.
 - b. The learned trial magistrate erred in law and in fact in dismissing the appellant's claims on the grounds that he had not pleaded particulars of negligence yet he did so in his amended claim.
3. Parties disposed of the appeal by way of written submissions.



The Appellant's Submissions.

4. The appellant submits that the trial court erred by finding that he did not plead any particulars of negligence yet he did do in his Amended Statement of Claim dated 26th February 2024. The appellant argues that judicial opinion on the import of the omission to particularise acts of negligence in a claim or plaint is divergent with one school of thought holding that failing to particularise negligence would be fatal and the other school of thought holding that it is not mandatory so long as the allegation of negligence has been made in the pleadings.
5. The appellant submits that it laid sufficient grounds in his Amended Statement of Claim to prove its claim against the respondent, the nature of the claim being a liquidated one that required evidence to be adduced by way of receipts which he provided. To support his argument, the appellant refers to the case of Wachira & Another vs Attorney General & Another [2003] eKLR.
6. The appellant submits that Section 24 of the *Small Claims Court Act* does not require that the allegations of negligence must be particularised. The appellant further refers to the case of Elrons Limited vs Basil (Civil Appeal E890 of 2022) [2024] KEHC 6614 (KLR) (6 June 2024) (Judgment) and submits that the significance of the *Small Claims Court Act* was to provide a simple and concise, devoid of complex rules of procedure and evidence which characterise the proceedings at the magistrates' court and the High Court.

The Respondent's Submissions.

7. The respondent submits that although Section 17 of the Small Claims Court allows the court to have control of its procedures, the doctrine of stare decisis is applicable to the court. Furthermore, the respondent argues that the decision of Elrons Limited vs Robert Ngui Basil [2024] was delivered on 6th June 2024 whilst the learned adjudicator delivered her judgment on 8th April 2024 thus she was not bound by the former decision as it was non-existent at the time. The respondent argues that the law does not act retroactively and the doctrine of recency does not apply in the particular case.

Issues for determination.

8. The main issues for determination are:-
 - a. Whether this appeal is defective.
 - b. Whether the failure to plead particulars of negligence rendered the claim defective.
 - c. If not, whether the respondent proved its case on a balance of probabilities.

The Law.

9. 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.

10. 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.

Whether the appeal is defective.

11. Section 38 of the Act provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

12. The Court of Appeal in *Mwangi vs Wambugu* [1984] KLR 453 commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown

demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed

on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

13. Similarly in *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

14. This is an issue of law and it is well within the ambit of Section 3B of the Small Claims Act. The appeal is therefore not defective. I have perused the grounds in the memorandum of appeal and noted that the grounds touch on the failure to list the particulars of negligence which led the magistrate to declare the claim as fatally defective and untenable in law.

15. It is trite law in civil cases that negligence must be pleaded and proved. This principle was enunciated in the case of *East Produce Kenya Limited vs Christopher Astiado Osiro* in Civil Appeal No. 43 of 2001 where the court held:-

It is trite law that the onus of proof is on he who alleges and 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.

16. I have further perused the lower court record and noted that there was an Amended Statement of Claim that was filed by the appellant. The Case Tracking system (CTS) shows that the Amended Statement of Claim was filed on 27.03.24. To the Record of Appeal on pages 37-39 the appellant attached the original Statement of Claim dated 26/02/2024.

17. It is not in dispute that the main issue herein is whether the particulars of negligence must be pleaded in a case of this nature before the Small Claims Court to render the claim valid in law. Section 3 (3) of the Small Claims Act provides that the court shall adopt such procedures as the court deems appropriate to ensure among other things, simplicity of procedure.

Section 24 provides that every statement of claim shall contain the nature of the claim, the summary of the claim among other particulars and that such statement shall be sufficient to inform the claim. Section 34 (1) provides that a claim before the Small Claims Court shall be concluded within sixty (60) days, this being one reason for a simplified procedure of determining cases and giving the claimants access to justice as well as ensuring expeditious disposal of cases.

18. The adjudicator in her judgment stated that the appellant did not plead the particulars of negligence as against the respondent and as such it rendered the claim defective. In the Amended Statement of claim dated 26th February, 2024, the appellant stated: -

“The claimant alleges that the respondent allowed a defective motor vehicle on the road, one without braking system and the driver did not control the said motor vehicle so as to avoid the accident.”

The appellant relies of the case of *Wachira & Another vs Republic vs Attorney General & Another* 2003 eKLR where Ransley J in dealing with a civil case under the Civil Procedure Rules, 2010 observed:

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Where it is advisable to plead negligence, where particulars are missing in the pleading, the other party is entitled to apply for particulars, and if the same are not provided, apply for dismissal of the suit.

19. In the foregoing case of *Wachira & Another* (supra), the plaintiff accused the defendant of doing something negligently, but provided no particulars, and the court found that the said pleading was sufficient.” It is noted that in that case, the suit was filed under the *Civil Procedure Act* which provides an elaborate manner of framing claims as opposed to the *Small Claims Court Act* which provides for a simplified procedure.

20. In the case giving rise to this appeal, the matter was filed under the Small Claims Act whereas the procedure is relaxed and flexible. Section 17 of the Act gives the Small Claims Court control of its own procedure in hearing and determining claims before it. Section 30 of the Act allows parties during hearing of their case to choose to proceed by way of documents only without giving oral evidence before the court.

21. The appellant relies on the case of *Elrons Limited vs Basil* (2024) KLR where Musoka J emphasized on the need to adopt a relaxed and simplified nature of proceeding before the Small Claims Court as provided for by the Act. The honourable judge went further to observe that the simplified procedure in the Small Claims Court was aimed at “moving away from the complexities of procedure and evidence



to enable ordinary citizens with small claims to have an easier access and time in the courts”. He further stated: -

“It could spell doom to the Small Claims Court, reducing it to just another Magistrates Court, or High Court for that matter, bound as they are, by the layers of complex procedure and rules of evidence.”

22. The adjudicator herein found that the claim of the appellant was not proved for the reason that the particulars of negligence had not been pleaded. The court relied on the case of Mombasa High Court Civil

Appeal No. 223 of 2022 Jerusha Ogwari vs Ibrahim Hersi in which the court upheld the dismissal of the appellant’s claim due to failure to plead particulars of negligence before the Small Claims Court. In my considered view, this decision went outside the letter and spirit of the *Small Claims court Act*. On the other hand, I find the case of Elrons Limited carried on the spirit of the Small Claims Act.

23. In this appeal, I find that the adjudicator erred in dismissing the appellant’s claim for the reason that it was not proved. In my view, the Amended statement of claim spelt out clearly the alleged negligence against the respondent and it was not a requirement of the law to list particulars of negligence so long as the claim was filed under the Small Claims Act. I therefore find that the appellant’s claim was valid and properly before the court.

24. The court below proceeded to assess the damages it would have awarded had the claim been successful. The court relied on receipts of the repair cost of KSh.446,600, KSh.150,000/= for loss of use, KSh.20,000/= for towing charges, KSh.550/= for copy of records and KSh.12,760/= being cost of assessment report. The total special damages proved totaled to KSh.623,530/=.

25. The record shows that the appellant had proved the claim to the total of KSh.623,530. In this appeal, the amount has not been challenged by the respondent.

26. I therefore set aside the judgment of the magistrate dismissing the case and hereby substitute it with judgment on liability in favour of appellant against the respondent and give an award of KSh.623,530/= special damages to the appellant.

27. The appeal is therefore successful and is hereby allowed in the foregoing terms.

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

29. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF JUNE 2025.

F. MUCHEMI

JUDGE

