Kiarie v Shadrack and Sons Limited & another (Civil Appeal E762 of 2024) [2025] KEHC 10017 (KLR) (Civ) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E762 OF 2024

AC MRIMA, J

JULY 11, 2025

BETWEEN

ANTHONY KIAMA KIARIE ..... APPELLANT

AND

SHADRACK AND SONS LIMITED ..... 1ST RESPONDENT

SIMON ANDIKI OWINO ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Hon. R.N Kimeu (RM & Adjudicator) in Nairobi [Milimani] SCCC No. E5211 of 2023 delivered on 26 th January 2024))

JUDGMENT

1. Anthony Kiama Kiarie, the Appellant herein, being the owner of motor vehicle registration number KCQ 666Y, instituted Nairobi [Milimani] SCCC No. E5211 of 2023 [hereinafter referred to as 'the suit'] against Shadrack and Sons Limited and Simon Andiki Owino, the 1st and 2nd Respondents herein claiming that his motor vehicle was hit from behind by motor vehicle registration number KCT 025T whilst lawfully stopping to a red traffic light signal at Juja Road Junction within Nairobi County.

2. In isolating the particulars of negligence against the Respondents, the Appellant pleaded that the 2nd Respondent drove at an excessive speed, failed to exercise the requisite care and skill, failed to slow down and to observe the highway code and the *Traffic Act* thus ramming into his vehicle. On special damages, the Appellant pleaded for repair charges, assessment fees, re-inspection fees, tracing fees and spares totalling Kshs. 138,790/-. The Appellant further pleaded that at the time of the accident, his motor vehicle was insured by M/s UAP Insurance Company Limited which fully indemnified him. He, therefore, sought to recover its outlay under the principle of subrogation.

3. The Respondents denied any liability for the accident. They denied proof of payment of Kshs. 85,870/= and Kshs. 9,790/= on the basis that they were invoices and not payment receipts. In its judgment, the trial Court was of the assessment that the documents presented by the Appellant were enough proof of how the accident occurred and that it was caused by the 2nd Respondent, the driver. As regards the claimed amounts, the trial Court was of the finding that no proof, in terms of receipts, were availed, to prove that the Appellant settled the repair costs.

4. However, based on the Court of Appeal decision in Nkuene Dairy Farmers Co-op Society Ltd & Anor -vs- Ngachia (2010) eKLR, which observed that special damage in a material damage claim need not be shown to have occurred, the trial Court allowed the repair costs, assessment fees and inspection fees of Kshs. 85,870/-, Kshs.9690/- and Kshs.2,850 respectively. The Court declined the prayer for the cost of the tracing and investigation report to ascertain the whereabouts of the offending vehicle of Kshs. 26,380/- as a remote and unnecessary claim as well as the cost of Kshs. 14,000/- for repair costs based on some discrepancies in a receipt in support thereof. Since the Appellant was partially successful, it awarded half the costs.

5. The Appellant was aggrieved by the part of the judgment declining the two prayers and preferred the appeal subject of this judgment.

The Appeal:

6. Through a Memorandum of Appeal dated 5th April 2024, the Appellant, who was particularly aggrieved by the award on the quantum of damages, preferred the following grounds of appeal: -

    1. The Honourable court erred in fact and in law by failing to properly evaluate the evidence on record thus reaching an erroneous decision on the issue of quantum of damages.

    2. The Honourable court erred in fact in failing to base its decision on the fact and evidence of record and instead based on irrelevant matters thereby reaching a wrong decision.

    3. The Honourable court erred in fact and in law by finding that the investigation conducted to trace the Respondent's current location and status were unnecessary while the same provided crucial and useful information.

    4. The Honourable court erred in law and in fact by failing to award the costs for tracing and for purchasing spares as sought by the Appellant despite the same being pleaded and specifically proved.

    5. The Honourable court erred in fact and in law in failing to follow and uphold the legal parameters and binding precedent in similar circumstances on issues of damages in recovery claims.

7. In its written submissions, the Appellant urged that the investigation done by Sunray General ServiceLimited, to establish the financial status and physical address of the registered and beneficial owner of the motor vehicle KCT 025T was crucial. As such, the trial Court erred by finding that it was not necessary. In asserting that the cost of investigation and purchasing spare parts were sufficiently proved, that Appellant cited that authority in Charles Kipkoech Leting -vs- Express (K) limited & another (2018) KECA 187 (KLR) and claimed that he specifically claimed and proved tracing fees of Kshs. 26,380/- and costs of spare parts of Kshs. 14,000/- and was entitled to recover it from the Respondent.

8. He prayed that the appeal be allowed with costs.

9. Despite being in Court on 18th March 2025, the Respondents did not respond to the appeal.

Analysis:

10. Having considered the appeal, the only issue for determination is whether the trial Court properly directed itself in the assessment of damages more so on the cost of the investigation report.

11. The role of this Court, as per the dictates of Section 38[1] of the *Small Claims Court Act* is delimited to reconsideration of only matters of law. The said section provides as follows: -

> 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. When reconsidering matters of law, the Court of Appeal in Otieno, Ragot & Company Advocates -vs- National Bank of Kenya Limited [2020] eKLR, observed thus: -

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

13. Further, in Mwita -vs- Wood venture (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal spoke to the concept of reconsidering points of law as hereunder: -

> ... This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited -vs- Godfrey Odoyo [2010] eKLR in which it was held that:
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> ... 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.

14. Having laid out the parameters within which matters of law are considered, I now turn to the issue of quantum of damages which is the substratum of the appeal. As the suit was based on a material damage claim arising from a road traffic accident, the trial Court was properly so guided by the Court of Appeal in Nkuene Dairy Farmers Co-op Society Ltd & Another -vs- Ngacha Ndeiya (2010) eKLR where the Court affirmed that in such claims, a Claimant is only required to show the extent of damage and what it would cost to restore the damaged item to as near as possible the condition it was before the damage. Therefore, the Court of Appeal established the standard of proof in these cases to be that a Claimant must plead the sums and need not prove that he/she/it actually incurred the cost of the repairs, but to only show proof of the possible cost of the damaged parts. In that case, the costs of repairs as stated in an Assessors report were accepted to be sufficient proof of a claim under the doctrine of subrogation. On that score, the Learned Adjudicator allowed repair costs of Kshs. 85,870/- based on an invoice and assessment cost and re-inspection fees receipted at Kshs. 9,690/- and Kshs. 2,850/- respectively.

15. Returning to the gist of the appeal, the Appellant contended that the failure to award the investigation and tracing fees of Kshs. 26,380/- was erroneous. The Appellant strenuously contended that it was an expense worthy of compensation since it yielded the ownership status of the motor vehicle KCT

025T, information which could neither be obtained from the police abstract nor a company search. The Appellant further contended that the trial Court declined to award it based on irrelevant issues.

16. In deciding the issue, the trial Court was of the position that the damage did not meet the threshold set in Nkuene Dairy Farmers -vs- Co-op Society Ltd & Another -vs- Ngacha Ndeiya case (supra). It also observed that a mere motor vehicle search costing around Kshs. 550/- would have sufficed in the circumstances, a move that would have mitigated the Appellant's costs. The trial Court buttressed its findings on mitigation by citing the Court of Appeal in African Highland Produce Limited -vs- John Kisorio (2001) eKLR.

17. Having intently considered the circumstances of the case and the reasoning of the trial Court as well as the legal principles behind it, this Court is satisfied that the tracing and investigation fees was not only an unnecessary expense but also premature. In Civil Appeal 264 of 1999, African Highland Produce Limited -vs- John Kisorio [2001] eKLR, the Court of Appeal crystallized the concept of mitigation of losses as follows: -

> .... The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant.

18. Whereas it might appear to be a consequential expense of the accident, it ought not to have been incurred by the Appellant since there were other cheaper means, such as obtaining a Company Search, as observed by the trial Court, that would have yielded the same result. The Court of Appeal in African Highland Produce Limited -vs- John Kisorio case (supra), allowed the appeal where the Respondent was found to have failed to mitigate his losses. It made the following remarks: -

> ... It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. Being a man of considerable means he could have within 21 days, repaired his BMW car instead of incurring unnecessarily heavy hire charges. He did not act prudently. A prudent man would certainly not have acted in the way the plaintiff did. He acted, in our view, unreasonably. The learned judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff is entitled only to the loss of user for 21 days which period was necessary to effect in full all repairs on the BMW car. There was no justification whatsoever in law to allow him to enjoy and to harvest from an illegal territory.

19. The foregoing applies mutatis mutandis to the Appellant in this matter. The cost in issue was an unnecessary expense. He ought not to have incurred it simply because liability was on the Respondent.

20. Finally, on the aspect of part of the repair costs amounting to Kshs. 14,000/-, the trial Court disallowed it since the date in the receipt indicates that the transaction was done on 16th January 2018. I have keenly interrogated the receipt. There are two conflicting dates therein. One for 16th January 2018 and another one for 10th November 2020. In its submissions, the Appellant explained the discrepancy by stating that the date 16th January 2018 refers to the date of purchase of the machine producing the receipt and not the date of payment of the invoiced amount.

21. Since date in the receipt and the invoice tally, and in view of fact that the Respondents did not controvert the position, this Court is inclined to find that the trial Court considered an irrelevant factor in denying the cost of the spare parts. The explanation proffered by the appellant is plausible. In the premises, the costs of Kshs. 14,000/- is hereby allowed.

22. Having considered all the contentions raised by the Appellant in this appeal, the matter has to come to an end.

Disposition:

23. In the end, this Court now makes the following final orders: -

    (a) The appeal partially succeeds to the narrow extent of allowing the cost incurred on the spare parts of Kshs. 14,000/=.

    (b) For clarity, the claim on the tracing and investigation fees is hereby declined.

    (c) As the appeal has partially succeeded, each party to bear its own costs.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mokua, Learned Counsel for the Respondent

Amina/Abdirazak – Court Assistants.