Last Mile Carrier Limited v Kimanzi & another (Civil Appeal 133 of 2024) [2025] KEHC 9999 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9999 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 133 OF 2024

RC RUTTO, J

JULY 4, 2025

BETWEEN

LAST MILE CARRIER LIMITED .... APPELLANT

AND

JOSEPH MBINDYO KIMANZI .... 1ST RESPONDENT

JAMES KAMAU KIHARA .... 2ND RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate/ Adjudicator B.A Luova delivered on 8th April 2024 in the Small Claims Court at Machakos in Small Claims Civil Case No. E288 of 2022)

JUDGMENT

Background

1. This appeal arises from the judgment in *Machakos Small Claims Civil Case No. E288 of 2022* delivered on 8th April 2024. In that case, the 1st respondent through an amended Statement of Claim dated 15th August 2022 sought damages of Ksh.522,232/= being cost of repair, Special damages of Ksh.5,550/-, compensation for loss of user of the motor vehicle, cost of the Claim and interest on all these from the date of filing the Claim.

2. The 1st respondent's Claim was that on 10th August 2021, the appellant's driver/servant/ agent managed motor vehicle KCH 294N so recklessly, carelessly and / negligently that he lost control of the vehicle allowing it to ram into the 1st respondent's vehicle KCX 958T causing extensive damage.

3. The appellant herein, did not file a Memorandum of Appearance nor a response to the Statement of Claim. An interlocutory judgment was entered and the matter proceeded pursuant to section 30 of the *Small Claims Act*, 2016.

4. By a judgment delivered on 14th September 2022, the adjudicator found in favour of the respondent. The appellant was held 100% liable for the accident. The respondent was awarded as follows; special damages of Ksh.5,550/=, the estimated cost of repair was Ksh.522, 232/=, loss of user at Ksh.150,000/=. The total award was Ksh.677, 782/= together with costs of the suit and interest thereto.

5. The 1st respondent proceeded to extract a decree and served it on the appellant. This led the appellant to file a Notice of Motion Application dated 10th November 2023 seeking, inter alia, a stay of execution of the decree.

6. As per the record, and on directions of the trial court, the appellant, filed its Response to the Statement of Claim dated 21st December 2023 denying the Claim in toto and putting the 1st respondent to strict proof thereof and alleging contribution on the part of the claimant and the driver of KCX 958T.

7. The appellant sought leave from the trial court to issue and serve a third-party notice upon one James Kamau Kihara (the 2nd respondent herein) and the Cooperative Bank of Kenya Limited on grounds that they were the registered owners of motor vehicle registration KDA 275L, Isuzu Lorry, and on the basis that this intended third party was vicariously liable. The Cooperative Bank of Kenya Limited sought to be and was struck out of the Claim as it was a financier. The 2nd respondent failed to file a response.

8. In its judgment dated 8th April 2024, the trial court framed two issues for determination; who was liable for the accident and whether special damages had been proved. On liability, the trial court was of the view that had the appellant's driver maintained a safe distance he would not have collided with the respondent's vehicle. Thus, the trial court found the appellant's driver 100% liable for causing the accident and 100% vicariously liable. The trial court dismissed the claim against the third party on the basis that no proof of negligence had been substantiated against him.

9. On the issue of quantum, the trial court noted that the 1st respondent had provided an assessment report from Renwin Auto Valuers and Assessors Ltd which was permissible under Rule 5(1) of the *Small Claims Court Rules*, 2019 and that the estimated cost of repair was Ksh, 522, 232, which the court awarded.

The appeal

10. This decision triggered the appeal before me. This appeal is premised on twelve (12) grounds to wit:

    1. That the Learned Magistrate/Adjudicator erred in Law and in Fact in finding the Appellant herein 100% liable contrary to the facts and the overwhelming evidence of the case;

    2. That he Learned Magistrate/Adjudicator erred in Law and Fact in failing to consider the appellant's submissions on liability/negligence and thereby arriving at an erroneous conclusion;

    3. That the Learned Magistrate/Adjudicator erred in Fact in Paragraph 3 on page 2 of her Judgment by contradicting RW1 witness statement and oral testimony by stating that the 1st respondent's Motor Vehicle was being driven at a high speed;

    4. That the Learned Magistrate/Adjudicator erred in Fact in Paragraph 3 on page 2 of her Judgment by stating that RW1, the appellant's driver testified that the accident occurred from the acts of both the 1st and 2nd respondents' drivers braking instantly;

5. That the Learned Magistrate/Adjudicator erred in Law and Fact by apportioning 100% liability to the appellant on the grounds that the appellant's driver failed to keep a safe distance thereby disregarding the appellant's evidence, testimony and submissions;

6. That the Learned Magistrate/ Adjudicator erred in Law and in Fact by failing to consider the contribution of the 1st and 2nd respondents on a balance of probabilities thereby arriving at an erroneous conclusion.;

7. That the Learned Magistrate/Adjudicator erred in Law by awarding Special damages that were not specifically proven with documentary evidence as principally required by law;

8. That the Learned Magistrate/Adjudicator erred in Law and in Fact by awarding General Damages for the claim of Loss of User contrary to conventionally decisions in cases of similar nature which state:

   > This court has said time and again that when damages can be calculated to a cent then they cease to be general damages and must be claimed as special damages..
   >
   > It is trite law that a party is bound by its pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given…";

9. That the Learned Magistrate/Adjudicator erred in Law and in Fact in Paragraph 13 in page 5 of her Judgment by concluding that the claim of Loss of User for Thirty (30) days had not been proven but however proceeded to award damages for Loss of User for a maximum period of Fifteen (15) days;

10. That the Learned Magistrate/Adjudicator erred in Law and in Fact by being inconsistent in its reasoning when awarding Special Damages in complete reliance with the estimated costs of the Assessment Report while on the other hand unjustly exercising its discretionary powers in awarding General Damages for Loss of User for a period of Fifteen (15) days despite the said Assessment Report estimating the period of Loss of User to be Seven (7) days;

11. That the Learned Magistrate /Adjudicator erred in Law and in Fact in failing to consider the appellants Submissions and the authorities cited and thereby arrived at an erroneous conclusion; and

12. That the Learned Magistrate/Adjudicator erred in Law and in Fact by failing to set out her reasoning concisely with her findings hence resulting with an inconsistent and contradictory judgment that is unjust and prejudicial to the appellant.

11. Consequently, the appellant prays for the appeal be allowed, an order setting aside the Judgement of the trial court in its entirety and substituting it with an order dismissing the respondent's Claim, Costs of this Appeal and costs of the suit before the Subordinate Court and such further or other orders that this court may deem just and expedient.

12. The appeal was heard by way of submissions.

Appellant's submissions

13. The appellant sets out three issues for determination as follows; i) whether the appellant was entirely to blame for the accident; ii) whether the damages awarded by the trial court were specifically proven, and iii) whether the 1st respondent is entitled to the costs of execution.

14. The appellant contends that the learned Magistrate erred both in law and in fact by holding the appellant solely (100%) liable for the accident, without adequately considering the contributory negligence of the 1st and 2nd Respondents' drivers, as suggested by the evidence on record. It is further argued that no investigation report was produced in court to sufficiently clarify the circumstances and cause of the accident. Additionally, the appellant maintains that the trial court relied exclusively on the testimony of the Respondents' witness, while disregarding the appellant's witness, whose account presented a plausible and credible alternative explanation of how the accident may have occurred.

15. It is argued that although the Police Abstract attributes blame to the appellant's driver for causing the accident, the evidence presented does not constitute conclusive proof of how the accident actually occurred. The appellant urged the court to be guided by the decisions in *LWK (A minor suing through father and next friend SKD) v Kirigu Stanely & another* [2019] eKLR and *Welch v Standard bank Limited* [1970] EA 115.

16. On the second issue, it is submitted that that the Claim for material damages is in the nature of Special damages and they ought to have been specifically proven to entitle the 1st respondent to the said damages. The appellant relies on the decisions in *Okulu Gonchi v South Nyanza Sugar Company Limited* (2018) eKLR, *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* (Civil Appeal 154 of 2005) [2010] KECA 20 (KLR) (10 December 2010) (Judgment and *Ratcliffe v Evans* [1892]2QB 524to buttress this assertion.

17. It is submitted that Rule 5(1) (a) of the *Small Claims Court Rules*, 2019 dictates that the itemized estimate cost of repair should be prepared by a licensed mechanic or certified motor vehicle assessor, which was not the case in the trial court. The decision in *Maina v Kmamadi & another* [2025] KEHC 745 (KLR) at pages 5 & 6 is relied on to reinforce this assertion.

18. It is the appellant's case that the trial court misinterpreted the law by awarding special damages that were not specifically proven. It is urged that the respondent's testimony that Renwin Motors repaired his Motor Vehicle on credit, was not supported by any evidence such as a credit/loan agreement. The decision in *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR is relied on to buttress this assertion.

19. The appellant contends that the claim of Loss of User is in the nature of special damages and must be treated as such as espoused in *Equity Bank Limited v Gerald Wang'ombe Thuni* (2015) eKLR. It is urged that the work sheets relied on by the 1st respondent on the trips and earnings per day were flawed, not credible and their veracity could not be tested. The appellant relies upon the Court of Appeal decision in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR to buttress this assertion.

20. It is submitted that that the trial court misapplied its discretionary powers against the legal principles of 'parties are bound by their pleadings' in awarding Loss of User of Ksh.150,000 for 15 days while the same was not specifically proven.

21. On the last issue, the appellant urges this court to exercise its unfettered discretion to apply the principles of equity in determining that the appellant will be prejudiced if costs are awarded as the appellant had diligently deposited the security for costs as ordered by the court for the due performance of decree.

22. It is urged that the 1st respondent proceeded in bad faith to execute against the appellant despite having prior knowledge that the appellant had deposited the Security for Costs as ordered by the Court.

23. The appellant concludes by submitting that the prayer on costs of execution is unmerited and should be dismissed on grounds that he who seeks equity must do equity.

Respondent's Submissions

24. The respondent submits that there are five issues for determination;

    i) whether the trial court erred in holding the appellant 100% liable for the accident,

    ii) whether the award for special damages was justifiable,

    iii) whether the award for loss of user was properly assessed;

    iv) whether the execution costs were lawfully incurred, and,

    v) the appellant's conduct in delaying the proceedings.

25. On the first issue, it is submitted that the trial court reached its decision after conducting a thorough analysis of both the oral and documentary evidence presented. Notably, the appellant's driver admitted during cross-examination that his vehicle failed to stop in time, effectively conceding liability. Additionally, it is argued that the appellant failed to adduce any evidence to rebut the conclusions drawn by the police, the investigating officer, or the findings in the assessment report.

26. It is urged that there were no pleadings alleging negligence on third parties by the appellant, nor was there any evidence on the same thus no proof of negligence was established. The decisions in *John Wainana Kagwe v Hussein Dairy Limited* [2013] KECA 488 (KLR), *Vyas industries v Diocese of Meru* [1976] KECA 18 (KLR) and the doctrine of *res ipsa loquitur* are relied on.

27. On the second issue, it is urged that special damages were proved by way of a valuation/ inspection report. The decisions in *Nkuene Dairy Farmers Co-0p Society Ltd & another v Ngacha Deiya* [2010] KECA 20 KLR is relied on. It is urged that the appellant did not produce any evidence disputing or contradicting the valuation report or special damages claimed.

28. On the third issue, it is submitted that the loss of user is normally recognized under the head damages and a claimant must prove that the vehicle was income generating, the daily earnings were ascertainable and the duration of loss was reasonable and supported by evidence as captured in *David Bagine v Martin Bundi* [1997] eKLR. The decision in *Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa* [2018] KEHC 5672 (KLR) is relied on for this assertion. It is urged that the trial court was properly guided by the evidence on record to find in favour of the 1st respondent.

29. On the fourth issue, it is the 1st respondent's case that appellant was granted a conditional stay by this court but failed to comply with the conditions within the stipulated time and as such the 1st respondent proceeded with execution. It is the 1st respondent's case that the execution was proper and lawful and he is entitled to the costs of execution. The decision in *Ramogi v Great Lakes University Kisumu; Odhiambo t/a Jenks auctioneers (interested party)* [2025] KEELRC 437 (KLR) is relied on to buttress this assertion.

30. On the last issue, it is contended that the appellant has consistently engaged in procedural delays aimed at frustrating the expeditious disposal of this matter. It is submitted that the appellant is not entitled to any of the orders sought but instead, the 1st respondent is entitled to the costs of this suit and those in the trial court to serve as compensation for the injustice occasioned to him by the appellant.

31. The 1st respondent concludes by urging this court to dismiss the appeal in its entirety with costs to the 1st respondent.

Analysis and Determination

32. I have read through the Record of Appeal, pleadings and the written submissions by the parties. The grounds of appeal are based on issues of facts and law. It is prudent to note from the onset that appeals from the Small Claims Court are governed by the provisions of Section 38 of the *Small Claims Act* which provides as follows:

    38. Appeals

        (1) 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.

        (2) An appeal from any decision or order referred to in subsection (1) shall be final. (emphasis mine)

33. Thus, appeals from the Small Claims Court are limited matters of law only. In the case of *Wachira v Mwai* (Civil Appeal E022 of 2023) [2024] KEHC 3173 (KLR) (15 March 2024); the court at held at paragraph *4*: -

    " The jurisdiction of the Small Claims Court is set out in the *Small Claims Court Act*. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law."

34. What constitute a matter of law has since been defined. See the Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR ; and the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Petition 2B of 2014 [2014] eKLR.

35. Guided by the applicable legal principles, as set out in the above mentioned cases, this court will confine its analysis and determination strictly to issues of law. Upon careful examination of the Memorandum of Appeal, it is evident that Grounds 1, 2, 3, 4, 5, 6, 9, 10, 11, and 12 primarily raise matters of fact and evidence rather than questions of law. In these grounds, the appellant is essentially asking this court to reassess and re-evaluate the evidence presented at trial, including determining the credibility, probative value and weight of such evidence matters that fall within the jurisdiction of the trial court. An appellate court, however, is not tasked with revisiting factual determinations unless there has been a clear error of law. Moreover, the appellant has not convincingly demonstrated that the trial magistrate's findings lacked evidentiary support or were contrary to the established facts on record. Accordingly, these grounds, being grounded in factual disputes, do not qualify for determination on appeal and are hereby dismissed in limine.

36. Grounds 7 and 8 however raises a matter of law and I shall examine them in turn.

37. On ground 7, it is the appellant's case that the trial court misinterpreted the law by awarding special damages that were not specifically proven. On the other hand, the respondent urges that special damages were proved by way of a valuation/ inspection report.

38. In *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] KECA 20 (KLR), the Court of Appeal stated "In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which

were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.

> ...The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report.
>
> ... In the result we agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim. We dismiss this appeal with costs to the respondent."

39. I note that the trial court considered the assessment report produced by the 1st respondent from Renwin Auto Valuers & Assessors Ltd totalling to Ksh.522, 232. This report was not disputed or contradicted by the appellant. Based on this report, the trial Magistrate awarded Ksh.522, 232 as the cost of repair.

40. The trial court also took into account receipts and invoices amounting to Kshs.5,550 and awarded this sum as special damages. In my considered view, and guided by the cited Court of Appeal decision, the trial court cannot be faulted for granting this award. The amount was specifically pleaded, and its proof was supported by both the assessment report and the accompanying receipts.

41. On ground number 8, That the Learned Magistrate/Adjudicator erred in Law and in Fact by awarding General Damages for the claim of Loss of User contrary to conventionally decisions in cases of similar nature, the appellant is emphatic that the claim of Loss of User is in the nature of special damages and must be treated as such. The 1st respondent contends that he has provided clear evidence that his motor vehicle was a Public Service Vehicle with an average daily income of Ksh 10,000.

42. The Court of Appeal in *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] KECA 691 (KLR) states at paragraph

> 16. ...The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases....
>
> 17. ... In *Peter Njuguna Joseph & Another v Anna Moraa* (*supra*), this Court assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.
>
> 21. In *Jebrock Sugarcane Growers Co. Limited v Jackson Chege Busi*, Civil Appeal No. 10 of 1991 (Kisumu) (unreported) the court in allowing a claim for general damages for loss of user of a lorry relied on p.226 para 394 of *Halsbury's Laws of England* Vol. 11 3rd Edition which stated thus:
>
> > The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages".
>
> The authors continue to say in the same passage thus:
>
> > Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the

best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess…”

43. Going and bound by the above, it is my finding that the trial court was guided by the evidence on record to make its decision. Thus, I find no justification to interfere with the trial court’s award of Ksh 150,000 for loss of user.

44. On the issue of execution cost, this court notes that the same was not pleaded and only arose during submission. Accordingly, this court shall exercise restraint and will not make a determination on the issue.

45. Consequently, the Memorandum of Appeal dated 6th May 2024 is found to be unmeritorious and the same is dismissed with costs to the 1st respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025

RHODA RUTTO

JUDGE

In the presence of;

……………………………………….. Appellant

……………………………………….. Respondent