



**Wayego v Hamisi (Civil Appeal E153 of 2024)
[2025] KEHC 10688 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E153 OF 2024
FN MUCHEMI, J
JULY 17, 2025**

BETWEEN

KEVIN MWANGI WAYEGO APPELLANT

AND

JOSEPH NGURE HAMISI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)
delivered on 20th May 2024 in Ruiru Small Claims Court SCCC No. E165 of 2024)*

JUDGMENT

Brief facts.

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCC No. E165 of 2024 whereby the trial court dismissed the appellant’s claim for a sum of KShs. 400,000/- from a material damage claim on grounds of want of proof to the standards required.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 6 grounds of appeal summarized as follows:-
 - a. The learned adjudicator erred in law and in fact in finding that the claimant had failed to prove that the accident was caused by the negligent actions of the respondent contrary to the evidence on record.
 - b. The learned trial magistrate erred in law and in fact by failing to appreciate that the omission by the claimant to plead the particulars of negligence is not fatal as per the provisions of Section of the *Small Claims Court Act*.
 - c. The learned trial adjudicator erred in law and misdirected herself in her assessment of damages awardable to the claimant.



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

The Appellant's Submissions.

4. The appellant submits that he produced and adopted his pleadings during the hearing of the claim particularly a police abstract, motor vehicle assessment report, vehicle assessment fees receipt, photographs of the damaged vehicle, a demand letter, breakdown receipt from Day and Night Service Company Limited and a copy of vehicle search records for motor vehicle registration number KCV 984R and payment receipt from NTSA.
5. The appellant submits that the police abstract indicated that an accident occurred on 1st March 2024 between motor vehicle registration number KAS 172F and KCV 984R. The respondent was confirmed as the registered owner of motor vehicle registration number KCV 984R which was blamed for the accident. Furthermore, the motor vehicle search records confirmed that the respondent was the owner of the said motor vehicle.
6. The appellant refers to the case of *Wellington Ng'ang'a Muthiora v Akamba Public Road Services & Another* [2010] eKLR and argues that without a rebuttal thereof, the police abstract was prima facie evidence that a road traffic accident involving the two motor vehicles had occurred. Further, the police abstract was sufficient to prove that because of the accident, his motor vehicle was extensively damaged and that the respondent was to blame. Despite denying the occurrence of the accident in his response, the respondent did not challenge this fact and neither did he cross examine him on it. To support his contentions, the appellant relies on the case of *Jotham Mugalo v Telkom (K) Ltd* (2005) eKLR.
7. Relying on the cases of *Blyth v Birmingham Water Works Co* [1856] and *Nadwa v Kenya Kazi Ltd* (1988) eKLR, the appellant argues that it is prima facie that there was negligence on the respondent's part which led to the occurrence of the accident. The respondent owed a duty of care to him and there was a breach of the said duty on the material day of the accident. Thus, the appellant argues that he proved liability against the respondent on a balance of probability and the respondent being the owner of motor vehicle registration number KCV 984R owed a duty of care to him and breached the same leading to the damage to his motor vehicle.

Having established the occurrence of the accident and the respondent's negligence at the trial court, failure to particularize negligence was not fatal. The breach of duty spoke for itself. To support his contentions, the appellant relies on the case of *Mungai v Texcal House Service Station* [1999] KECA 94 (KLR).

8. The appellant submits that the learned adjudicator erred in dismissing his claim as being a material damage claim, he demonstrated the extent of the damage on his motor vehicle and what it cost him to restore his motor vehicle to the condition it was in before the damage by producing an assessment report which report was unchallenged and uncontroverted. The appellant refers to the case of *Nkuene Dairy Farmers Co-operative Society Limited v Ngacha Ndeiya* [2010] eKLR and submits that he has aptly proved and particularised his claim and thus the court ought to allow the appeal and discharge the trial court's decision.

The Respondent's Submissions.

9. The respondent submits that it is trite law that negligence must be pleaded and established for the court to award any damages for negligence. The appellant failed to plead and particularise allegations of negligence nor did the appellant plead any cause of action. There was no assertion that the appellant's claim was founded on negligence or on breach of contract or any other such claim rendering the entire



- claim fatally and incurably defective. The respondent further relies on the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* (2017) eKLR and submits that parties are bound by their pleadings.
10. Relying on the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2004] eKLR, the respondent argues that the appellant failed to prove negligence on his part. The appellant's witness statement did not bear any account of the facts that were witnessed by the appellant that established the facts of negligence on his part. Further, the appellant in his testimony confirmed that his witness statement did not explain to the court how the accident occurred. Additionally, PC Peter Ndiege was not present to witness the occurrence of the accident and he did not produce any evidence of the investigation that he purportedly conducted but solely relied on the police abstract and a copy of the occurrence book entry.
 11. The respondent further submits that the evidence tendered by the appellant in support of the allegations contained in the Statement of Claim did not prove negligence on his part. The appellant sought to rely on the fact that his vehicle was damaged but failed to establish a causal link of negligence on his part. To support his contentions, the respondent relies on the case of *Statpack Industries v James Mbiti Munyao* [2005] eKLR.
 12. Relying on the case of *African Line Transport Company & Another v Sylvester Keitany* (2017) eKLR, the respondent argues that the appellant pleaded special damages of Kshs. 400,000/- but failed to particularise a breakdown of how he arrived at the figure.
 13. The appellant's witness, CW3 produced an assessment report dated 6th March 2024 which confirmed that the motor vehicle was a write off. The respondent refers to the decision in *Permuga Auto Spares & Barclays Bank of Kenya Ltd v Margaret Korir Tagi* [2015] KEHC 3406 (KLR) and argues that once a vehicle has been written off the only compensation is the pre-accident value less salvage value as assessed and other reasonable consequential expenses that are subject to proof. The respondent submits that the appellant made no claim for recovery of special damages based on the pre-accident value less the assessed salvage value. Thus the same ought not to be awarded in the circumstances.

Issues for determination

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

The Law

15. 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 v 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.
16. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd v 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 v 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.

17. 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.

18. The Court of Appeal in *Mwangi v 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.

19. Similarly in *Peter Gichuki King'ara v 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.

20. I have perused the grounds in the memorandum of appeal and noted that all the grounds touch on issues of fact save for ground number 2 which the appellant argues that the failure to list the particulars of negligence did not render the claim fatally defective and untenable in law. It is trite law that negligence must be pleaded first before being proved. This principle was enunciated in the case of *East Produce Kenya Limited v 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 where negligence is alleged the position was well laid in the case of *Kiema Mutuku v 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.



21. Similarly in *Dharmagma Patel & Another v T. A (A minor suing through the mother and next friend H.H.)* [2014] eKLR, the court held:-

I also take note of the fact that in our legal system, there is no liability without fault. In this regard see *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* (1991) 2 KAR 258 where the Court of Appeal held:-

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.

The fault has to be pleaded and proved by evidence at the hearing.

22. The issue here is whether the claim was valid in law before the Small Claims Court for the reason that a party failed to plead the particulars of negligence. Section 3(3) of the *Small Claims Court 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.

23. The learned 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 Statement of Claim dated 7th March 2024 the appellant stated:-

“The claimant’s principal claim against the respondent is for Kshs. 400,000/- being damages to motor vehicle as a result of accident between the claimant’s motor vehicle registration number KAS 172F and the respondent’s motor vehicle registration number KCV 984R that occurred on 1st March 2024 along Limuru Kwambira Road at Slaughterhouse Area.

The accident was reported at Tigoni Police Station on 4th March 2024 and motor vehicle KCV 984R that was being driven by the respondent herein was blamed.”

24. The claim giving rise to the appeal was filed under the *Small Claims Court Act* where 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.

25. Musyoka J in *Elrons Limited v Basil* (2024) KLR 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.”

26. 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 v 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 in my view, is in tandem with the spirit relaxed and simple procedure of the *Small Claims Act*.

27. 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 statement of claim spelt out clearly and in simple language 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 Court Act*. I therefore find that the appellant's claim was valid and properly before the court.
28. The court below proceeded to assess the damages it would have awarded had the claim been successful. The court relied on the assessment report which recommended that it would be uneconomical to repair the motor vehicle as it was considered a total loss. Thus the trial court awarded Kshs. 220,000/- being the pre accident value of Kshs. 315,000/- less the salvage value of Kshs. 95,000/-. The total special damages proved before the court below was Kshs. 220,000/-. This amount has not been challenged by the respondent on appeal.
29. Thus the judgment by the learned adjudicator dismissing the claim is hereby set aside and substituted with judgment on liability in favour of appellant against the respondent and an award of Ksh. 220,000/= special damages is awarded to the appellant. The respondent shall meet the costs of the suit in the lower court of ksh.5,000 in favour of the appellant.
30. I take cognizance that it was not the mistake of any of the parties that this appeal had to be preferred. As such, I hereby order that each party meets its own costs of this appeal.
31. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 17TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE

