



**Ngidongi & another v Mwai & another (Civil Appeal E007 of 2022)
[2024] KEHC 401 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E007 OF 2022
SN MUTUKU, J
JANUARY 19, 2024**

BETWEEN

SANING'O MILLIARY NGIDONGI 1ST APPELLANT

ANNELIE MARIE LOUISE BLINN 2ND APPELLANT

AND

DAVID MWAI 1ST RESPONDENT

BRUSPHIRE COMPANY LIMITED 2ND RESPONDENT

JUDGMENT

Background

1. The case in the lower court, Civil Case No. 328 of 2017, arose out of a road traffic accident that occurred on 25th January 2015 along Namanga Road at Isinya. The motor vehicle registration number T102 AVS, being driven by the 1st Appellant with the 2nd Appellant as a passenger, collided with motor vehicle registration number KAE 540F belonging to the 2nd Respondent and being driven by the 1st Respondent.
2. The Appellants blamed the 1st Respondent for causing the accident and the 2nd Respondent for vicarious liability. The Appellants filed a Plaint dated 16th August 2017 claiming against the Respondents general damages; special damages in the sum of Kshs 3,281,572 and USD 21,000; damages for future medical expenses and costs of the suit with interest.
3. The matter was heard and the trial court found for the Appellants and awarded Kshs 300,000 for general damages for the 1st Appellant, Kshs 850,000 for general damages for the 2nd Appellant and Kshs 1,095,264.80 after factoring in 20% liability attributed to the 1st Appellant and USD 1,594 after factoring in 20% liability attributed to the 1st Appellant. The trial court also awarded interest in pecial damages from the date of the judgment and costs.



4. This aggrieved the Appellants who have preferred this appeal.

The Memorandum of Appeal

5. The Memorandum of Appeal is dated 26th January 2022 and was filed on 27th January 2022. It raises the following grounds of appeal:

- i. That the Learned Magistrate erred in law and in fact in her award for Special Damages and Interest in terms of paragraphs 11 and 12 of the Judgment by failing to enter judgment for the 1st Appellant for the sum of Kshs 2,900,000 together with interest at court rates from 16th August 2017 when the suit was filed, for loss of the motor vehicle registration number T102 AVS which sum was specifically pleaded and strictly proved at the hearing of the lower court suit.
- ii. That in all the circumstances of the case, the Learned Magistrate erred in law and in fact by failing to consider the applicable law and to evaluate the evidence tendered in this suit in support of the prayer for Special Damages in terms of paragraphs 10, 11, 12 and 13 of the Plaintiff judiciously before arriving at her judgment and/or failed to do justice before her.
- iii. That the Learned Magistrate erred in law and in fact by awarding interest on special damages from the date of judgment whereas the interest was awardable from 16th August 2017 when the primary suit was filed.

6. The Appellants pray that the judgment of the trial court on the issue of loss of motor vehicle registration number T102 AVS be set aside, and judgment be entered in favour of the Appellants for the sum of Kshs 2,900,000 with interest at court rates from the date of filing the suit, 16th August 2017; that judgment of the trial court on the applicable date of judgment on interest of special damages be set aside and be substituted with judgment that interest on special damages should apply from 16th August 2017 when the primary suit was filed while interest on general damages should apply from 28th December 2021 when judgement on the primary suit was delivered and that the other awards on special damages of the trial court be maintained as assessed by the trial court save as on the issue of interest and the awards affected by this appeal.

7. There is a Cross Appeal dated on 8th February 2022 and filed on 10th February 2022. I have noted that it raises issue with the damages awarded as being excessive. All the grounds are based on the errors of the trial court in awarding excessive damages by either failing to consider the medical reports on the severity of injuries or failing to consider the submissions of the Respondents leading to an award in excessive damages. The Respondents pray for allowing of the Cross Appeal, setting aside the judgment on quantum, reduction of damages awarded and assessment of the damages payable afresh as well as costs for the Cross Appeal and any other order this court may deem just to award.

8. On 14th December 2022 Mr. Kivuva appeared for the Appellants while Mr. Mahugu appeared for the Respondents. Mr. Mahugu was having problems with connectivity and therefore did not address the court. Mr. Kivuva addressed the court that the Record of Appeal had been filed and was complete and that there was also a Cross Appeal. I have noted that a Record of Cross Appeal was not filed. I issued directions that the Appeal be canvassed through written submissions. I will address both the Appeal and the Cross Appeal. Both the Appellants and the Respondents have filed submissions.

Appellants' Submissions

9. The duty of this court while sitting on first appeal is fresh in my mind. I am required to reconsider the evidence afresh with a view to arriving at an independent conclusion. That independent conclusion



can be in tandem with the findings of the trial court or can fault the trial court if this court were to find errors of judgment in respect of the trial court.

10. The evidence on record shows that the Appellants, husband and wife, were travelling to Arusha from Nairobi with the husband, the 1st Appellant driving his motor vehicle registration number T102 AVS on 25th January 2015. On arriving at Isinya near Moi Girls School, when motor vehicle registration number KAE 540F belonging to the 2nd Respondent and being driven by the 1st Respondent hit another vehicle and lost control and hit the Appellants vehicle causing extensive damages to it and injuries to the Appellants. The 1st Respondent escaped from the scene after the accident.
11. The Appellants were assisted by members of the public to get out of their damaged car. They were treated in hospitals in Kajiado and Nairobi hospital. The 1st Appellant caused his motor vehicle to be assessed. One Joseph Mwangi, PW3, a private motor vehicle assessor assessed the 1st Appellant's motor vehicle and found 60% cost of damages and that it was damaged beyond repair. The assessment report dated 24th February 2015 shows the pre-accident value of the motor vehicle as Kshs 3,250,000 and salvage value as Kshs 350,000.
12. I have noted that the Respondents, who were the defendants in the lower court, did not call any witnesses during the trial.

Appellant's Submissions

13. The Appellants submitted on the damages for the loss of motor vehicle registration number T102 AVS by stating that the the Appeal is against the failure of the trial court to award damages for loss of the motor vehicle as a result of the accident. That the Appellants specifically pleaded at paragraphs 10, 11 and 13 of the Complaint and special damages are clearly particularized in paragraph 13(i) of the Complaint. That the Appellants claimed for the difference of the pre-accident value of Kshs 2,900,000 which is the difference between the pre-accident value of the motor vehicle and the salvage value of Kshs 350,000. That this evidence was supported by the assessment report which was produced in court as evidence. That the salvage was not sold because the Appellants were foreigners who reside in the United States. That the Respondents did not challenge the motor vehicle assessment report that was produced by the expert. That the trial court did not explain why the expert report was not taken into account.
14. The Appellants cited *Mutonyi v. Republic* (1982) KLR 203 on the issue of expert evidence and that the Respondents cannot raise the issue that the salvage was not sold since this is not contained in their Statement of Defence given that each party. is bound by his pleadings.
15. The Appellants relied on *Jimnah Munene Macharia v John Kamau Erera Civil Appeal No. 218 of 1998* where the Court of Appeal stated that:

“Where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value.”
16. It was submitted that the nature of damages for loss of motor vehicle registration number T102 AVS are special damages which must be specifically pleaded and strictly proved (see *Zacharia Waweru Thumbi v Samuel Njoroge Civil Appeal No. 445 of 2003*). It was submitted that the Respondents did not challenge the expert evidence by calling an expert to controvert the evidence of PW3. It is submitted that the Appellants proved their case on a balance of probabilities on the amount of for loss of motor vehicle and therefore the trial magistrate erred in her award of special damages failing to enter judgment for the Appellants for the sum of Kshs 2,900,000.



17. On the issue of special damages or general damages, it was submitted that interest on general damages ought to run from the date of judgment while interest on special damages ought to run from the date of filing of the suit. The Appellants cited *Lei Masaku v. Kalpana Builders Ltd* [2014] eKLR, and *Oluoch Eric Goga v Universal Corporation Ltd* [2015] eKLR, among other authorities, to support their submissions on this issue.
18. It was submitted that the trial magistrate erred in her award of special damages and interest by failing to enter judgment for the Appellants for the sum of Kshs 2,900,000 together with interest at court rates from 16th August 2017 when the suit was filed for the loss of the motor vehicle registration number T102 AVS. They urged this court to set aside the judgment of the trial court on the issue of loss of motor vehicle and judgment be entered in favor of the Appellants for the sum of Kshs 2,900,000 with interest from 16th August 2017.

The Respondent's Submissions

19. The Respondents submitted that during the hearing the 1st Appellant testified that his motor vehicle was a write-off after the accident and called an expert to adduce evidence to that fact but on cross examination he conceded that he had no evidence that he had disposed off the salvage. It was submitted that loss of a motor vehicle cannot be awarded while the salvage has not been disposed of. It was submitted that trial court did not misdirect herself by not awarding Kshs 2,900,000 and that the trial court rightly found that since the salvage had not been disposed of the loss of the motor vehicle could not be ascertained and that without proof of the sale of the salvage, the salvage value could not be ascertained. The Respondents asked the court to find the Appeal without merit and dismiss it with costs.
20. On Cross Appeal which raised issue about excessive damages, the Respondents cited *Swiss Contract Ltd & Peter Mungalo Keith v. Esther Mumbi Muthee* [2019] eKLR where the Plaintiff was awarded Kshs 200,000 in general damages for soft tissue injuries and *Gogni Construction Company Ltd v. Francis Ojuok Olewe* [2015] eKLR where the Court awarded Kshs 350,000 for a fracture of the left distal and ulna.
21. The Respondents urged that the Cross-Appeal has merit and ought to be allowed.

Analysis and Determination

22. I have evaluated the evidence adduced in the lower court. It bears repeating that the Respondents did not adduce evidence to controvert the evidence of the Appellants. I understand the case for the Appellants that they are questioning failure by the trial court to award special damages of Kshs 2,900,000 being the difference between the pre-accident value of the motor vehicle number T102 AVS of Kshs 3,250,000 less the salvage value of Kshs 350,000 and failure to award interest on special damages from the date of filing the suit instead of from the date of the judgment.
23. On the other hand, the Respondents are contesting the award of special damages for the loss of the said motor vehicle for the reason salvage value cannot be ascertained given that the salvage has not been sold.
24. I have considered the issues raised by both sides. The judgment of the trial court does not contain reasons for the decision made, especially why that court did not award damages for the loss of the motor vehicle. The evidence of the assessor was not challenged by the Respondents. The evidence of the assessor, PW3, is that the motor vehicle was a write-off and set the salvage value as Kshs 350,000.



25. It is trite that an appellate court will not interfere with the exercise of discretion of the trial court unless it is satisfied that the court in exercising its discretion misdirected itself. In *Mbogo & Another vs Shah*, [1968] EA, this principle was set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

26. Further, in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, the court had this to say on the issue:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

27. With the above caution in mind, it is my finding that the trial court was in error in failing to award damages for the loss of the motor vehicle number T102 AVS and failing to explain that decision. It is my finding, after considering the Plaintiff and evidence tendered, that the Appellants specifically pleaded special damages for the loss of the said motor vehicle and strictly proved it on a balance of probabilities by calling the evidence of PW3 who had assessed the motor vehicle and found it a write-off.

28. On my own assessment of the evidence on record, I make the finding that the Appellants had proved the loss of the motor vehicle. It is true that the salvage of that motor vehicle had not been sold for reasons that the Appellants are foreigners. Therefore, the prudent thing to do is to award damages for the loss of the motor vehicle less the assessed salvage value of the same.

29. After due consideration of the Appeal and Cross Appeal and submissions by the Appellants and Respondents, it is my considered view that the Appeal has merit and must be allowed. I find the Cross-Appeal without merit and hereby dismiss the same. I find no merit in interfering with the award of general damages awarded by the trial court. I do not find the award excessive as argued by the Respondents.

30. I proceed to set aside paragraph 11 (j) of the judgment which stated that: “Prayer for loss of motor vehicle fails for lack of proof of sale of salvage as argued by the Defendants”. In its place, I enter judgment for the Appellants for the sum of Kshs 2,900,000 being the difference between the pre-accident value of the motor vehicle and the salvage value of Kshs 350,000.

31. Secondly, I hereby set aside paragraph 12 of the judgment and in its place, issue order as follows:



- i. Interest at court rates on general damages shall apply from the date of the judgment of the trial court being 28th December 2021 until payment in full.
 - ii. Interest at court rates on special damages shall apply from the date of filing the suit in the lower court, being 16th August 2017 until payment in full.
32. The rest of the judgment remains as pronounced by the trial court.
33. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY 2024.

S. N. MUTUKU

JUDGE

