Elrons Limited v Basil (Civil Appeal E890 of 2022)
[2024] KEHC 6614 (KLR) (Civ) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E890 OF 2022

WM MUSYOKA, J

JUNE 6, 2024

BETWEEN

ELRONS LIMITED ..... APPELLANT

AND

ROBERT NGUI BASIL ..... RESPONDENT

(An appeal arising from the judgment of Hon. DS Aswani, Magistrate/ Adjudicator, delivered on 17th October 2022, in Nairobi SCCC No. E1816 of 2022)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for compensation, arising from a road traffic accident, which allegedly happened on 10th July 2019, along Uhuru Highway, Nairobi, involving motor vehicles registration marks and numbers KCJ 806Z and KCF 806V, belonging to the appellant and the respondent, respectively. The case was that its motor vehicle was damaged in that incident, and it attributed liability, through negligence, on the respondent. It assessed its total loss at Kshs. 849,399.00. The respondent filed a response, in which he denied liability, and everything else pleaded in the statement of claim. He averred that the allegation of negligence was not particularised. He filed a counterclaim, but without any figures, for it only carried particulars of negligence.

2. No formal hearing was conducted. The matter was canvassed by way of written submissions, founded on directions given on 16th August 2022, essentially based on the proposals by the parties. In the end, a judgment was delivered on 17th October 2022, where the suit was dismissed, on grounds that negligence was not proved.

3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 31st October 2022, revolve around the trial court erring for dismissing the suit for lack of particulars of negligence, and not filing the driver's witness statement; the trial court failing to consider that the police abstract had blamed the respondent for the accident; the court failing to consider the appellant's documents in support of its claim; the trial court failing to consider the written submissions and authorities filed by the appellant; and the judgment not being supported by the law or the evidence tendered.

4. Directions were given on 1st September 2023, for disposal of the appeal by way of written submissions. It would appear that only the appellant filed written submissions. It founds its case on section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, Christine Kalama vs. Jane Wanja Njeru & another [2021] eKLR (Nyakundi, J), Morris Njagi & another vs. Beatrice Wanjiku Kiura [2019] eKLR (Gitari, J), Highchem Pharmaceuticals Limited vs. Lemuma Chemist Limited [2018] eKLR (JA Makau, J) and Franklin Maingi Nkunja vs. Rose Mutuma & another [2021] eKLR (PJ Otieno, J). Its principal argument is that the material it placed before the court was not adequately considered.

5. The statement of claim by the appellant alleged negligence, but provided no particulars. The evidence on record was that in the witness statement by a director of the appellant, who was driving the accident vehicle at the material time. She relied on a police abstract, where the respondent was blamed for the accident. The respondent, in his counterclaim, attributed negligence on the part of the appellant, and particulars were given, the principal one being that the appellant was driving too slowly in the circumstances.

6. In my view, the appeal herein falls or stands on the question relating to how much weight is to be given to the omission to particularise negligence, in cases of this nature, filed at the Small Claims Court.

7. Judicial opinion, on the import of the omission to particularise acts or facts of negligence in a claim or plaint, is divergent on the point. One school of thought is that failure to particularise negligence would be fatal; the other holds that particularisation of negligence is not mandatory, so long as the allegation of negligence has been made in the pleadings.

8. It was asserted, in Ogwari vs. Hersi [2023] KEHC 20111 (KLR)(Magare, J), that particularisation of acts of negligence is mandatory, and it was held that since no particulars of negligence had been pleaded, in that case, the trial court should not have proceeded with the matter. It was stated that the duty to plead negligence could not be surmounted, and that a claim without particulars of negligence was fatally defective, and untenable in law. In Kimbio & another vs. Nyaribo t/a IN Nyaribo & Company, Advocates [2024] KEHC 6120 (KLR)(Ong'udi, J), the court upheld a decision of the trial court where a suit had been dismissed for not particularising the acts or facts of negligence in the plaint. It was asserted that failure to particularise the acts or facts of negligence meant that the appellants were unable to prove their cases.

9. On the other hand, it was said, in Wachira & another vs. Attorney General & another [2003] eKLR (Ransley, J), that, although the Civil Procedure Rules sets out cases, where pleadings must contain certain particulars, those cases do not include negligence. The provisions, that the court referred to, are the equivalent of the current Order 2 rules 7, 8 and 10 of the Civil Procedure Rules, 2010, which do not mention the tort of negligence, amongst the cases where particularisation is required. It was noted, in that decision, that, whereas 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. On the facts of that case, the plaint accused the defendant of doing something negligently, but provided no particulars, and the court found that the said pleading was sufficient, for

all what was required was a pleading that put the rival party on notice of what it was likely to face at the trial.

10. A similar position was taken in Kenyatta National Hospital vs. Dorcas Odongo & another [2021] eKLR (Ong'udi, J), where it was held that particulars of negligence were not mandatory, so long as the allegation of negligence was made in the pleadings. It was observed that the objective of pleadings was to reduce or eliminate the element of surprise, by giving the other party a fair notice of what to expect at the trial. It was noted that there was a right to apply for particulars, and where what was supplied was inadequate, to ask for better particulars. On the facts of that case, the court was satisfied that, although the acts of negligence were not particularised, negligence had been alleged in the pleadings, and that that was sufficient.

11. I find the position, taken in Wachira & another vs. Attorney General & another [2003] eKLR (Ransley, J) and Kenyatta National Hospital vs. Dorcas Odongo & another [2021] eKLR (Ong'udi, J), more persuasive, particularly that the Civil Procedure Rules provide for cases and instances were particularisation of certain acts and facts are required, for certain categories of claims, and that those categories did not include negligence. Ogwari vs. Hersi [2023] KEHC 20111 (KLR)(Magare, J) and Kimbio & another vs. Nyaribo t/a IN Nyaribo & Company, Advocates [2024] KEHC 6120 (KLR) (Ong'udi, J) did not refer to any legislation or caselaw, as the basis for the assertion that a claim, founded on negligence, which was without particulars of negligence, was fatally defective and untenable in law.

12. For avoidance of doubt, Order 2 rules 7, 8 and 10 of the Civil Procedure Rules state as follows:

> "7. Particulars in defamation actions [Order 2, rule 7]
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> (1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.
>
> (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
>
> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.
>
> (4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.
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> 8. Particulars of evidence in mitigation [Order 2, rule 8]
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> In an action for libel or slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled at the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which

the libel or slander was published, or as to the character of the plaintiff, without the leave of the court, unless at least twenty-one days before the trial he has given the plaintiff particulars of the matters on which he intends to give evidence.

9. ...

10. Particulars of pleading [Order 2, rule 10]

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

(3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party—

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.

(6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings."

13. Related to the discussion above, is that about proof of negligence. Of course, Wachira & another vs. Attorney General & another [2003] eKLR (Ransley, J) and Kenyatta National Hospital vs. Dorcas Odongo & another [2021] eKLR (Ong'udi, J) are about negligence being established or proved by way of facts, even where the acts of negligence have not been particularised. The courts have exhaustively discussed about the burden and standard of proving negligence, in many decisions. It, of course, lies with he who claims that the other was negligent, and the standard is on a balance of probability, or preponderance of evidence, and sections 107, 108 and 109 of the *Evidence Act* are relevant. However, there is more, in that, in certain circumstances, the court may draw inferences of negligence, from certain facts or evidence adduced, even where no direct evidence of negligence is presented.

14. In Nandwa vs. Kenya Kazi Ltd [1988] KLR 488 (Platt, Gachuhi JJA, & Masime, Ag JA), it was held that in an action for negligence, the burden is always on the plaintiff, to prove that the accident was

caused by the negligence of the defendant. However, if in the course of the trial, there is proved a set of facts, which raises a prima facie inference, that the accident was caused by negligence on the part of the defendant, the issue would be decided in favour of the plaintiff, unless the defendant presents evidence which provides some adequate answer to displace the inference. On the facts of that case, an inference had been drawn, that the accident was due to the negligence of the defendant, in failing to keep the accident motor vehicle in a state of good mechanical repair, which inference the defence did not displace.

15. Similar remarks were made in Christine Kalama vs. Jane Wanja Njeru & another [2021] eKLR (Nyakundi, J), where it was noted that a court could presume existence of a fact from a common course of natural events. It was observed that, in the case of a collision of 2 motor vehicles, none of the motorists escapes liability, for either one of them is to blame, or both are to blame. Indeed, where no evidence, is given, the practice is to blame both drivers. See also Welch vs. Standard Bank Limited [1970] EA 115 (Madan, J), Lakhamshi vs. Attorney General [1971] EA 118 (Spry VP, Lutta & Mustafa, JJA) and Moiz Motor Limited & another vs. Muthoka & 2 others [2023] KEHC 26428 (Olel, J). Nzoia Sugar Company Limited vs. David Nalyanya [2008] eKLR (W. Karanja, J), discussed the relationship between pleading acts of negligence, and the application of the principle of res ipsa loquitar, so that, even in the absence of particulars of acts of negligence, and even proof of the negligence, the court may draw conclusions where the facts speak for themselves.

16. In view of everything that I have discussed so far, it should be clear that the trial court erred in dismissing the case by the appellant only on account of its failure to particularise the acts of negligence. The statement of claim, dated 6th July 2022, at paragraph 4a, specifically alleged negligence against the respondent; and in the witness statement of Chelagat Tungo Aaron, dated 6th July 2023, at paragraph *6*, it was specifically stated that the respondent was blamed for the accident, for hitting the vehicle belonging to the appellant from behind, an act which was described as careless, negligent and reckless, and which displayed lack of due care for other motorists. So, there was sufficient pleading of negligence, and, therefore, there was adequate notice of what the respondent was to face at the oral hearing of the matter, were it to get there.

17. The averment, at paragraph 4a of the claim, reads as follows:

> " On or about 10th July 2019, while the Claimant's motor vehicle registration number KCJ 806Z was being driven along Uhuru Highway the Respondent, his authorised agent, driver and or servant so negligently and recklessly drove/controlled and/or managed motor vehicle registration number KCF 806V that he caused it to hit motor vehicle registration number KCJ 806Z thereby extensively damaging it."

18. How did the respondent deal with that allegation of negligence in the claim, and the facts stated in the witness statement filed by the appellant? In his response to the claim, dated 4th August 2022, the respondent made what he called a counterclaim, where he made allegations, which gave credence to the claim by the appellant, that its vehicle was hit from the rear by the vehicle belonging to the respondent. The allegation was that the vehicle belonging to the appellant was being driven too slowly along the said road, so much so that, according to witness statement filed by the respondent, dated 4th August 2022, it exposed his motor vehicle to risk.

19. The suit was not disposed of orally, and the parties did not have a chance to have the respective drivers presented for cross-examination. The parties opted for a summary trial, where the trial court was to rule, based on the pleadings, the witness statements, and the documents presented as evidence, by way of lists of documents. The only material before the trial court, which was to be used to determine the

matter, were those filings. The allegation by the appellant was that the respondent was negligent, as his vehicle hit its vehicle from behind, and the response by the respondent was that that happened because the appellant's vehicle was being driven too slowly. The document, that the appellant relied on, was a police abstract, which indicated that the respondent was to blame. As the matter was being disposed of without the benefit of a formal hearing, the material presented by the appellant provided adequate proof of negligence. The appellant presented preponderance of evidence, pointing to negligence on the part of the respondent, which the respondent did not displace by counter-evidence. Its vehicle was hit from behind, and an inference could be drawn that there was no proper lookout on the part of the respondent, for if due care was taken by his driver, it would have been noted that there was a vehicle ahead, and evasive action would have been taken, or instant brakes applied.

20. In Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), the court stated that there is a general "presumption that he who hits another from behind is ipso facto negligent." The court stated that the issues of due attention and look out come into play, even if the driver ahead suddenly applied brakes. On the facts of that case, the driver of the vehicle, that hit the other vehicle from the rear, was held fully liable. In Stanley Ogutu Attai vs. Peter Chege Mbugua [2019] eKLR (Ng'etich, J), where a pedestrian was hit from behind by a vehicle, it was said that the driver of a vehicle, driving behind another vehicle or a pedestrian, had a duty of care for other road users, especially those ahead of him, and, that, from behind, such a driver would have a better view of what is ahead of him. It was noted, in that case, that there was no evidence of any evasive action taken by the driver, in terms of either braking or swerving, to avoid the collision. In Samuel Stephen Were vs. Sukari Industries Ltd [2018] eKLR (Majanja, J), where a motorcycle was hit from the rear, by a speeding tractor, it was held that, since the motorcycle was hit from behind, it would have been very difficult, if not impossible, for the rider to avoid the accident. See also Christine Mwigina Akonya vs. Samuel Kairu Chege [2017] eKLR (J. Ngugi, J).

21. I am alive to decisions, such as Mwanasi Righa vs. Mwakidoi Archpas Mwamengi [2019] eKLR (Okwany, J), where it was stated that pleadings are not evidence, but mere allegations, and that proof is the foundation of evidence, and CMC Aviation Ltd vs. Cruise Air Ltd [1978] KLR 103 (Madan, J), where it was said that when admissions are made in pleadings, the admission, must be submitted in proof, and parties ought to testify on how the accident happened, for liability to be proved. In Mwanasi Righa vs. Mwakidoi Archpas Mwamengi [2019] eKLR (Okwany, J), it was stated that a police abstract, where the police blame one of the drivers, was not adequate proof of negligence, for basis had to be laid. I agree with the positions stated in those decisions. However, they relate to proceedings conducted under the *Civil Procedure Act*, Cap 21, Laws of Kenya, and the Civil Procedure Rules. The case that was before the trial court was founded on the *Small Claims Court Act*, Cap 10A, Laws of Kenya.

22. In terms of procedure, section 17 of the Small Claims Act provides that the Small Claims Court shall have control of its own procedure, in the determination of claims before it. Part of that procedure is that set out in section 30 of the Act, of proceeding by documents only, where, subject to agreement of all parties to the proceedings, the court may determine any claim, and give such orders as it considers fit and just, on the basis of documents and written submissions, statements or other submissions presented to the court. Regarding the framing of pleadings, the applicable provision is section 24 of the Act, which does not require that allegations of negligence must be particularised.

23. For avoidance of doubt, sections 17, 20 and 30 of the *Small Claims Court Act* provide as follows:

"17. Procedure of Small Claims Court

Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice."

"24. Form of statement of claim

Every statement of claim shall contain the following particulars—

(a) the name and address of each claimant and, in the case of a representative claim, the name and address of each person represented;

(b) the name and address of each respondent;

(c) the nature of the claim;

(d) the sum of money claimed by each claimant or person represented;

(e) the relief or orders sought; and

(f) other particulars of the claim as are reasonably sufficient to inform the respondent of the ground for the claim and the manner in which the amount claimed by each claimant or person represented has been calculated."

"30. Proceeding by documents only

Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.

24. It is of significance that the *Small Claims Court Act* designs a process which is simple and concise, devoid of the complex rules of procedure and evidence that characterise proceedings at the Magistrate's Court and the High Court, and the courts whose status is equal to that of the High Court. Unfortunately, despite the law prescribing simplicity, it would appear that the Small Claims Court itself still suffers from the hangover of the complexities associated with the processes of the other courts, for, from the way the trial court handled the claim that was before it, clearly pointed to that. The court opted for a documents-only approach to the litigation, but, at the end of the day, still expected to find material, on the record, which could only come by way of oral evidence, yet the material before it was adequate for it to make determinations using the tools of admissions and inferences.

25. The approach, by the trial court, echoes the thoughts in Ogwari vs. Hersi [2023] KEHC 20111 (KLR) (Magare, J), which, in a way, with utmost respect, claws back on the design to move away from the complexities of procedure and evidence, meant to enable ordinary citizens, with small claims, have an easier access to, and time in, the courts. It could spell doom to the Small Claims Court, reducing it to just another Magistrate's Court, or the High Court for that matter, bound, as they are, by layers of complex rules of procedure and evidence.

26. I find merit in the appeal herein, for I am persuaded that the trial court had before it adequate material, which, in the language of Nandwa vs. Kenya Kazi Ltd [1988] KLR 488 (Platt, Gachuhi JJA, & Masime, Ag JA), raised a prima facie inference that the accident, the subject of the claim, was caused by negligence on the part of the respondent or his driver. There was prima facie proof that an accident happened, between the vehicles owned by the parties, and, even in the absence of any other evidence, the trial court could still have apportioned blame or liability between the 2 parties, without having to dismiss the claim in its entirety. See Welch vs. Standard Bank Limited [1970] EA 115 (Madan, J) Welch vs. Standard Bank Limited [1970] EA 115 (Madan, J), Lakhamshi vs. Attorney General [1971] EA

118 (Spry VP, Lutta & Mustafa, JJA), Hussein Omar Farah vs. Lento Agencies [2006] eKLR (Omolo, Tunoi & Githinji, JJA), Domitila Wangui Karugu & another vs. Dagu Hidris Haide [2020] eKLR (Majanja, J), Amani Kazungu Karema vs. Jackmash Auto Ltd & another [2021] eKLR (Nyakundi, J), Christine Kalama vs. Jane Wanja Njeru & another [2021] eKLR (Nyakundi, J), Ndatho vs. Chebet [2022] KEHC 346 (KLR)(Gitari, J) and Moiz Motor Limited & another vs. Muthoka & 2 others [2023] KEHC 26428 (Olel, J), on the principle that where there is evidence of a collision, but it is unclear who was to blame for it, both sides have to take equal blame. The prima facie inference raised, from the evidence tendered by the appellant, of the negligence of the respondent, on account of the hit from the rear, was not displaced, by the material that the respondent had placed on record, and the trial court ought to have found the respondent 100% liable. See Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J) and Samuel Stephen Were vs. Sukari Industries Ltd [2018] eKLR (Majanja, J).

27. The claim was in the nature of material damage. The appellant placed documents on record to prove it. The respondent did not provide any documents to counter those submitted by the appellant, and, in the circumstances, it ought to be concluded that the material loss suffered by the appellant had been established to the required standard.

28. In the end, I find that the appeal herein is merited, and I hereby allow it. The consequence is that the order made on 17th October 2022, by the trial court, to dismiss the claim by the appellant, is hereby set aside, and it is substituted with an order allowing the claim by the appellant in its entirety. The appellant shall have the costs of this appeal, and at the Small Claims Court. It is so ordered.

JUDGMENT IS DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 6TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Khisa, instructed by Kiruki & Kayika, Advocates for the appellant.

Ms. Nzuki, instructed by Nzuki & Nzuki, Advocates for the respondent.