



**Jetsam Distribution Limited & another v Kitau (Civil Appeal  
394 of 2019) [2024] KEHC 7900 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 394 OF 2019**

**DAS MAJANJA, J**

**JULY 2, 2024**

**BETWEEN**

**JETSAM DISTRIBUTION LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DENNIS OMARI MAYENDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARK KITAU ..... RESPONDENT**

*(Being appeals from the Judgment and Decree of Hon. B.J. Ofisi, RM dated 5th July 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 1504 of 2017)*

**JUDGMENT**

**Introduction and Background**

1. Both parties appeal against the Subordinate Court's findings on liability and quantum of damages rendered on July 5, 2019. The judgment stemmed from a suit in respect of an accident that occurred on March 12, 2014 along Mombasa Road involving the 1<sup>st</sup> Appellant's motor vehicle registration number KAW \*B that was at the material time being driven by the 2<sup>nd</sup> Appellant and the Respondent's motor vehicle registration number KBJ \*Y in which the Respondent was a passenger.
2. In his plaint, the Respondent claimed that both motor vehicles were driving towards the Nairobi direction on the Nairobi-Mombasa road when the Appellants' motor vehicle which was being driven negligently suddenly rammed the Respondent's motor vehicle from behind causing it to catapult and overturn thereby causing the Respondent to suffer grievous bodily injuries. The Respondent thus claimed general and special damages from the Appellants.
3. In their defence, the Appellants denied that they were negligent and urged the court to dismiss the claim. If anything, they stated that it is the Respondent who was negligent for failing to belt up,



boarding a defective motor vehicle, failing to take care and attention of his own safety and causing a reckless, unqualified driver and/or inexperienced driver to drive his motor vehicle hence being a danger to other road users and causing the said accident. They also claimed that the Respondent's driver was negligent and vicariously liable for the accident as he drove at excessive speed, failed to exercise any proper lookout and have due regard for other motor vehicles expected to be on the road, failed to observe or heed Traffic Rules and Regulations and the Highway Code, abruptly changing lanes and obstructing the path of the Appellants' motor vehicle and essentially causing the accident.

4. The matter was set down for hearing where the Respondent (PW 3) testified on his own behalf and also called PC Rachel Lahikan (PW 1) and his brother and driver of the motor vehicle on the material day, Antony Kiema (PW 2). The 2<sup>nd</sup> Appellant (DW 1) testified on behalf of the Appellants.
5. After hearing the parties, the court rendered judgment where it found that the Appellants' motor vehicle rammed into the Respondent's motor vehicle and that a careful and attentive driver following another motor vehicle would slow down hence the 2<sup>nd</sup> Appellant ought to have exercised caution if indeed he was not driving at high speed. Furthermore, that the Appellants did not adduce evidence to prove negligent acts of the Respondent that would have contributed to the occurrence of the accident and that in the absence of any contrary evidence to rebut the contents of the police abstract and copy of records tendered in evidence, the Respondent had proved on a balance of probabilities that the 2<sup>nd</sup> Appellant was driving without due care, hence he was liable for the occurrence of the accident. Therefore, the 1<sup>st</sup> Appellant was also held vicariously liable for the acts of its agent and liability was entered in favour of the Respondent at 100% against the Appellants jointly and severally.
6. On quantum of damages, the Subordinate Court awarded Kshs. 1,200,000.00 as general damages. On special damages, it noted that in as much the Respondent pleaded a sum of Kshs. 945,291.00, he only proved Kshs. 27,595.00. This decision by the Subordinate Court forms the basis of the instant appeals which the parties have grounded in their memoranda of appeal dated July 12, 2019 and September 30, 2019. The appeals have been canvassed by way of written submissions which are on record and which I shall make relevant references to in my analysis and determination below.

### **Analysis and Determination**

7. In determining this appeal, I am cognizant of the role of this court as a first appellate court which is to re-evaluate and re-assess the evidence before the court of first instance. At the same time, I have kept in mind the fact that the trial court interacted first hand with the parties (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
8. The Appellants are aggrieved with the Subordinate Court's findings on both liability and quantum of damages. The Respondent is aggrieved with the finding on quantum of damages. I propose to first deal with the appeal on liability where the Appellants fault the Subordinate Court for finding them fully liable for the accident. The Appellants submit that there was evidence on record of contributory negligence on the part of the Respondent, that there were obvious contradictions in his evidence and that the trial court did not take into account the evidence of DW 1.
9. A finding on liability is dependent on the facts and evidence available and in assessing liability, the court considers causation and blameworthiness (see *Isabella Wanjiru Karanja v Washington Malele* [1983]eKLR). PW 2, the Respondent's driver stated that the accident occurred at a place where the road had 3 one-direction lanes. He was driving and overtaking a lorry on the slow outer lane and the 2<sup>nd</sup> Appellant was driving on the right lane and a pick-up was on the left lane. He stated that he was on the middle lane of the road after overtaking the lorry when he was hit on the right rear side by DW 1 which caused the Respondent's vehicle to move to the left side and overturn in a ditch. The Respondent, PW



- 3 also testified that the 2<sup>nd</sup> Appellant hit his vehicle from behind and that the 2<sup>nd</sup> Appellant was driving at high speed. He also stated that the accident occurred on a 3-lane road and that PW 2 was driving at a speed of 80-100 kph on the slow-moving lane. However, he stated that PW 2 did not overtake the lorry and that he could be driving at 60-80 kph and that the accident happened so fast. He later stated that he did not see PW 2 overtaking the lorry and that they were driving on the same lane.
10. DW 1 stated that the point of impact occurred where there was no lane and that he collided with the Respondent's motor vehicle on his left side after PW 2 changed lanes and that the accident would not have happened if PW 2 had not changed lanes. DW 1 stated that PW 2 did not signal that is why DW 1 applied emergency brakes and that he tried to avoid the accident by applying emergency brakes. He stated that other vehicles would have been involved in the accident if he was overspeeding and confirmed that police officers visited the scene of the accident then they went to record statements at the police station. During cross-examination, DW 1 stated that the accident occurred where there were 2 lanes and that from his statement he was the one in the middle lane. He insisted that PW 2 overtook and entered his lane and that he did not see him overtake since he did not indicate. He confirmed that he hit the Respondent's motor vehicle from the back and that the lorry had already passed when he hit the Respondent's motor vehicle. He further admitted that he was blamed for the occurrence of the accident.
  11. On her part, PW 1 stated that it is DW 1 who changed lanes and hit the Respondent's motor vehicle at the rear and that as per the police abstract, the Appellants' motor vehicle was blamed for the accident. She also stated that from the inspection report the damages on the motor vehicles and the impact inform negligence on DW 1.
  12. I have gone through the entirety of the evidence produced and the testimonies I have highlighted above. From my analysis of the same, there is overwhelming evidence that it is DW 1 that was to blame for the accident. DW 1's evidence that it was PW 2 who changed lanes abruptly and caused DW 1 to hit the motor vehicle from behind is threadbare. I find that even though the drivers of the motor vehicles gave opposing versions of how the accident occurred, the police, through PW 1 gave independent and corroborative testimony after investigations and the motor vehicle inspections were carried out that it was DW 1 who was negligent and caused the accident. The trial court thus came to the correct finding that the Appellants were 100% liable for the accident and that this was based on the evidence on record and the absence of evidence of contributory negligence. This ground of appeal by the Appellants fails.
  13. Turning to the appeal on quantum of damages, the Appellants contend that the sum of Kshs. 1,200,000.00 awarded as general damages was manifestly high while the Respondent states that it was manifestly low. It is well established that an assessment and award of damages is an exercise of discretion and an appellate court is slow to reverse a subordinate court on the question of the amount of damages unless it is satisfied that the said court acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See *Mariga v Musila* [1984] KLR 251 and *Kemfo Africa limited t/a Meru Express Services (1976) & Another v Lubia & Another* [1987] KLR 30). Such an award must also take into account the prevailing economic environment (See *Bwire v Wayo & Sailoki* [2022] KEHC 7 (KLR) and the court is required to examine the extent and gravity of the injuries suffered by the plaintiff, relevant and comparative case law to ensure fairness. In sum, as was stated by the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR, "comparable injuries should attract comparable awards."
  14. The parties agree that the Respondent suffered fractures of the left maxilla and fractures of the left zygomatic complex. The Appellants had urged the Subordinate Court to award Kshs. 400,000.00 for these injuries whereas the Respondent sought Kshs. 3,500,000.00. In awarding Kshs. 1,200,000.00, the



subordinate court stated that it had considered the injuries sustained by the Respondent, the parties' submissions and authorities cited, passage of time and inflationary trends. I find that the subordinate court took into account relevant principles in arriving at the award and there is therefore no reason for the court to disturb the same.

15. On special damages, the Respondent submits that the Subordinate Court erred in awarding him Kshs. 27,595.00 and not the Kshs. 945,291.00 as pleaded. The Respondent submits that this was proved to the required standard as evidenced by the supporting documents on record. In *Hahn v Singh* [1985] KLR 716 the Court of Appeal held as follows regarding special damages:

Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. [Emphasis mine]

16. The Respondent submits that from the medical bill summary from Karen Hospital, there is evidence endorsed by the hospital therein that it made payments amounting to Kshs. 433,996.11 by cash and Mpesa. Whereas the Appellants admit this, they aver that there are no receipts to support them same and that in the absence of receipts, the Kshs. 433,996.11 has not been proved as having been paid. I disagree. In *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR the Court of Appeal held that special damages can be proved by either producing actual receipts or invoices endorsed with the word "Paid". The Bill produced by the Respondent clearly indicates that the issuing hospital endorsed that this sum had been paid by way of cash and Mpesa. This was sufficient proof of payment and the Subordinate Court had no valid reason to reject this evidence of payment. The trial court therefore erred in not awarding the entire sum of Kshs. 433,996.11 already paid and proved to have been paid. This ground of appeal by the Respondent succeeds.
17. The Respondent also sought special damages of Kshs. 450,000.00 being the value of his motor vehicle. In support of this claim, the Respondent produced in evidence the Hire Purchase Agreement which indicates that the total purchase price was Kshs. 450,000.00 and that the Respondent had already paid Kshs. 300,000.00 leaving a balance of Kshs. 150,000.00. As stated, a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation can be considered or otherwise demonstrate with the permitted degree of certainty what loss or amount, he will suffer in the future.
18. The onus was on the Respondent to prove the value of his motor vehicle. In *Permuge Auto Spares & Barclays Bank of Kenya Ltd v Margaret Korir Gati* [2015] eKLR the court held that once a vehicle has been written off, the only compensation is the pre-accident value, less salvage value as assessed. Whereas I would state that the Hire Purchase Agreement gives guidance as to the pre-accident value of the motor vehicle, the absence of the salvage value makes it difficult for the court to reasonably determine what is fairly due to the Respondent and bring him as near as possible to the state he would have been if not for the accident. In my view, since the Respondent was specifically seeking compensation for the value of the motor vehicle rather than the purchase price, he ought to have subjected the same to an assessment to determine its fair value. In any event, I find that since he had already paid Kshs. 300,000.00, I find that this would be fair compensation for the value motor vehicle.
19. Therefore, based on the evidence on record, it follows that the Respondent's claim for special damages succeeds as follows; medical expenses Kshs. 454,091.11, motor vehicle search Kshs. 550.00, value of the motor vehicle Kshs. 300,000.00 making a total of Kshs. 754,641.11.



**Disposition**

20. The Appellants' appeal is therefore dismissed. The Respondent's appeal succeeds to the extent that the Subordinate Court's award of Kshs. 27,595.00 as special damages is set aside and substituted with an award of Kshs. 754,641.11. The Respondent is awarded half the costs of both appeals assessed at Kshs. 60,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2024.**

**D. S. MAJANJA**

**JUDGE**

