**Kenya Urban Roads Authority v Kimgen Supplies Company Limited (Civil Appeal 2 of 2022) [2024] KEHC 9820 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9820 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT THIKA**

**CIVIL APPEAL 2 OF 2022**

**BM MUSYOKI, J**

**JULY 24, 2024**

**(FORMERLY KIAMBU HCCA NUMBER 2 OF 2022)**

**BETWEEN**

**KENYA URBAN ROADS AUTHORITY ..... APPELLANT**

**AND**

**KIMGEN SUPPLIES COMPANY LIMITED ..... RESPONDENT**

***(An appeal from judgement and decree of Honourable C.K. Kisiangani, SRM dated 30-06-2022 in Ruiru Senior Principal Magistrate's Court civil case number E179 of 2021)***

## JUDGMENT

1. The respondent brought a suit in the lower court vide plaint dated 25-03-2021 whose prayers were;
    a. A declaration that the defendant be held liable for negligence, damage and loss as pleaded above.
    b. Special damages for Kshs 427,949.72.
    c. General damages as pleaded in paragraph 7 of the plaint.
    d. Interest on a and b at court rates.
    e. Costs and interest of the suit.
2. The defendant filed its defence denying the claim and the matter went through the trial process after which the honourable magistrate entered judgement against the appellant as follows;
    1. Kshs 427,949.72.
    2. General damages at Kshs 500,000.00.

3. Costs of the suit.

4. Interest on 1 and 2 above.

3. The appellant has preferred this appeal against the aforesaid judgment. This being a first appeal, I have the duty of analysing and evaluating the evidence produced before the lower court and come to my own independent conclusion. It is an established position of the law that a first appeal is in a form of a re-trial but the appellate court should always bear in mind that it did not have the benefit of seeing the demeanor of the witnesses.

**The respondent's case in the lower court**

4. The respondent pleaded that it was the owner of motor vehicle registration number KCX 378N. On 29-12-2020 the respondent's director who testified in the lower court was driving the said motor vehicle along Ruiru- Kiambu road when he hit a pothole which was in the middle of the road as a consequence of which it was extensively damaged. The respondent blamed the appellant for the accident because it had failed to maintain the road in good condition which duty was shouldered on it by section 10(2) of the Roods Act. The respondent claimed that as a result of the damage to the vehicle, it spent Kshs 427,949.72 as repair costs. According to the plaint, the respondent also claimed loss of user for seven days and general damages. the respondent called one witness and produced the following four documents;

   i. Copy of log book for motor vehicle registration number KCX 378N dated 27-12-2019.

   ii. Copy of the respondent's certificate of incorporation dated 15-03-2007.

   iii. Copy of police abstract dated 30-12-2020.

   iv. Copy of certificate of inspection dated 26-01-2021.

   v. Receipt dated 24-03-2021 for Kshs 90,000.00 and invoice dated 22-02-2021 for Kshs 427,949.72.

5. The respondent's attempt to produce some phgotographs of the vehicle and the road where the alleged pothole was alleged to be was opposed. The same were not produced as evidence. In cross examination, the respondent's sole witness told the court that he was alone in the motor vehicle. He added that after hitting the pothole, its tyre burst. He admitted that he had not produced receipts for repairs and the CR 12 to confirm that he was a director of the respondent and that he had authority to give evidence on behalf of the respondent. He also admitted that he did not produce evidence to show that he used an alternative car during the period the motor vehicle was in the garage for repairs. He claimed that he had an invoice dated 4-01-2021 which was five days after the incident.

**The appellant's defence in the lower court**

6. In its defence, the respondent denied occurrence of the accident and that it was negligent as claimed by the appellant. It also pleaded negligence against the respondent, the damage to the respondent's motor vehicle. The respondent also denied that it was responsible for maintenance of the road and put the respondent into strict proof thereof. The respondent did not call any witness.

**Analysis and determination**

7. I have read through the pleadings, exhibits, proceedings and judgment in the lower court, the memorandum of appeal and the submissions by the parties herein. I pick out the following as the issues for determination in this appeal;

    a. Whether the accident in question occurred.

    b. Whether the respondent's motor vehicle was damaged as a result of the accident and if so, whether the respondent incurred costs of repairs as claimed.

    c. Whether the honourable magistrate was right in awarding general damages.

    d. Whether the appellant was responsible for maintenance of the named Ruiru-Kamiti road and if so whether it was negligent in failing to maintain it.

8. Before I address the issues I have framed above, I note from reading of the lower court's judgement that the magistrate's findings were majorly influenced by the fact that the appellant did not call evidence to controvert the evidence of the respondent and as such she took what the respondent had adduced as enough to establish its case against the appellant. I should address this observation first. The position of the law under Section 109 of the *Evidence Act* is that the burden of proof lies on the party who wants the court to believe in a certain circumstance. The burden of proof is placed on the party who would fail if no evidence at all were to be produced. In view of these legal provisions, it was not right for the Honourable Magistrate to take the route she took. Whereas there was nothing wrong with her observing that the respondent's evidence was uncontroverted, she should have noted that despite that position, the respondent had a duty to prove its case. She misapplied the authorities she cited in taking that position. She did not consider the context of the holdings in those authorities. The Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR held that;

> 'It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standards of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in absence of a rebuttal by the other side.'

9. I now move to the first issue as framed above. The respondent produced a police abstract dated 30-12-2020 in proof of occurrence of the accident. The accident was reported to the police by the appellant's witness under occurrence book entry number 45/30/12/2020. The abstract attest to the occurrence as reported by the said witness. In his evidence, the witness stated in cross examination that the police did not visit the scene. Photographs of the scene were objected to and were not produced. However, I have no reason to doubt that the accident occurred since the police abstract confirms it.

10. I now go to the issue of whether the respondent's motor vehicle was damaged as claimed. The plaint pleaded that the respondent suffered loss and damage and pleaded part of the damage as repair costs of Kshs 427,949.72. In proof of this damage, the plaintiff produced three documents. That is invoice dated 4-01-2021 for Kshs 801,202.12, invoice dated 22-02-2022 for Kshs 427,949.72 and a delivery note dated 24-03-2022 for Kshs 90,000.00. The first two invoices were from Inchcape Kenya Limited while third one is issued by Hekima Auto Tyres.

11. Admittedly, the vehicle was not assessed by an expert in order to ascertain the damage thereon. The respondent did not produce a receipt for repairs. I am aware of the position that there need not be receipts for a party to prove special damages as long as the same can be proved by invoices and other corroborative evidence. However, I hold the position that a mere invoice without an assessment report is not enough to prove special damages. Otherwise, how would the court be able to ascertain that the items of repairs shown in the invoice were attributable to the accident or incident in issue? It could as well have been caused before the accident or after the vehicle was repaired.

12. The invoice dated 22-02-2021 shows that the same was for fitting, balancing and alignment of 4 tires and rims, 2 wheels and 1 sensor. This is the invoice which has a value of Kshs 427,949.72 which is what the respondent was claiming. The respondent's witness testified that only one tyre burst and he picked the vehicle on 4-01-2021. One would expect the invoice for 4-01-2021 to be the one with the value pleaded in the plaint but this one has a value of Kshs 801,202.12. It shows that it was for balancing and carrying out alignment of six tyres and purchase of 4 wheels. There is no job card to show what the vehicle was booked for. The respondent expected the court to believe that he drove into a garage where the vehicle was serviced and repaired and drove out without any documentation except the invoice dated 4-01-2021 then came back on 22-02-2021 when he paid the invoice of Kshs 427,949.72.

13. The invoice/delivery from Hekima Auto Tyres is dated 24-03-2021. The same is for Kshs 90,000.00 although the recorded evidence of the appellant's witness talks of Kshs 190,000.00. The invoice shows that it was for delivery or purchase of two tyres. One would be interested to know whether the tyres in this invoice were part of the six contained in the invoice dated 4-01-2024 which were said to have been fixed immediately after the accident. How could they have been delivered in March 2021 yet they were fitted in the period between 29th December 2020 and 4th January 2021?

14. The above glaring inconsistencies lead me to conclude that even if the vehicle was damaged on 29-12-2020 as claimed, the documents produced by the appellant were not in relation to that particular accident. I consequently hold that the respondent did not produce enough evidence to prove the nature and extent of damage to its motor vehicle on 29-12-2020. In matters of this nature proof of damages must be through a report prepared by a motor vehicle assessor. The respondent chose not to have its motor vehicle assessed before the repairs.

15. The honourable magistrate held the position that the inspection report dated 26-01-2021 was enough proof that the respondent's vehicle had been repaired. This report was prepared by a valuer and inspector for purpose of insurance and came almost two months after the vehicle had been allegedly repaired. The appellant had used the vehicle during this intervening period. It is clear to me that the report could not be proof of repairs. The report even shows that the vehicle's tyres had good tread depth which means that they were new. These must be the tyres bought on 22-02-2021 yet the respondent testified that the tyres were fitted between 29-12-2020 and 4-01-2021. If indeed the tyres were fitted on 4-01-2021, why then was the respondent buying other new tyres on 22-02-2021. Interestingly, it is this latter invoice which has the value of the amount the respondent sought to recover.

16. It is hard to ascertain the damage on the vehicle especially considering the amount allegedly used to replace the damaged parts. In view of this and the inconsistencies noted above, I find and hold that the special damages of Kshs 427,949.72 were not proved and the honourable magistrate erred in finding so simply because the respondent did not testify before her.

16. I now turn to the issue whether the Magistrate was correct in awarding general damages of Kshs 500,000.00. The respondent had pleaded loss of business for seven days together with general damages. The general damages were said to be compensation for lost business for seven days. The court did not state what kind of business the vehicle was being used for and what was lost. The respondent did not

even make an attempt to established the kind of business the vehicle was being used for or the income it was generating for the respondent. Loss of business is a special damage claim and as the law provides, it must be specifically pleaded and strictly proved. This position was taken by the court in David Irungu Mwangi v Attorney General [2018] eKLR where it held that;

> 'It must be appreciated that claim for loss of business is akin to special damages for it is intended to show that the claimant did suffer actual and not perceived loss. Compensation is to return the party to as nearly the same level was before as possible. This requires proof of actual loss suffered.'

17. In Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya [2015] eKLR, the Court of Appeal held that loss of business must be specifically pleaded and proven. This court and those below it cannot deviate from this position.

18. There is nothing in law like general damages for lost business or loss of business. The person claiming loss of business must indicate in its pleadings what he was earning for what kind of business or at least show the nature of business the motor vehicle was being used for. I find the award by the honourable magistrate to be atrocious and lacking any basis in law. She erred in awarding such damages and this court cannot uphold such. The same is hereby set aside for lack of basis in law.

19. The appellant sought to rely on Section 10(2) of the Roads Act in proving the first issue I have framed above. In reliance to the Section referred to, the honourable magistrate enumerated the functions and duties of the appellant provided thereunder and found that the appellant had failed in its duties of maintaining the road as a result of which the appellant's car was damaged as pleaded.

20. The court stated that the defendant had failed to call any evidence to controvert the respondent's and went on to address the effect of failure by a party to controvert evidence produced by the opposing party. A look at the part of the judgment on this issue reveals that the honourable magistrate reasoning for finding that the appellant had a duty to maintain this road was that there was no evidence by the appellant to controvert what the respondent had adduced.

21. Paragraph 6 of the appellant's defence denied paragraph 6 of the plaint. Paragraph 6 of the plaint pleads that the appellant owed a duty of care to the respondent to maintain the said road. I hold the view that when a pleading is denied, the party pleading retains the duty to prove the facts as pleaded to the required standards. There was no interlocutory judgment against the appellant as it had filed a defence and in the circumstances, the respondent had a duty to prove that the appellant had a duty to maintain the said road on a balance of probabilities.

22. Did the respondent prove that the appellant had a duty to maintain the said road? Reliance was placed on Section 10(2) of the Roads Act. According to the said Section, the appellant has a statutory duty to maintain all public roads in the republic except national roads. That Section cannot be read in isolation. It must be read together with all the other Sections of the Act. Section 10(1) provides that the respondent shall have responsibility for the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities in Kenya except where those roads are national roads. What this means is that for one to place a road under the appellant, they must prove that the said public road is not a national road. Section 2 of the Roads Act gives definitions of the of national roads, urban roads and rural road. The appellant's responsibilities and duties are over roads classified as urban roads. These classifications are contained in the first schedule of the Act. The schedule defines urban roads as those categorized as UA, UC and UL.

23. In view of the above, the respondent had a duty to place the Ruiru-Kamiti road under either of these classes. Nowhere in its pleadings or its evidence did the respondent tell the court the class of the road

in question. Nothing in the judgement indicates that the court was aware or it took judicial notice that the said road was either a class UA, UC or UL. It is therefore clear to me that the court stretched too far in assuming that since the appellant did not testify in denial of the allegation that the respondent had a duty to maintain the specified road, it should be found liable. As stated above, the case before the court was not a formal proof. The appellant had denied responsibility and, in the circumstances, the respondent had a duty to establish on a balance of probabilities that the road was a responsibility of the appellant.

24. In conclusion, I find that the honourable magistrate erred in entering judgment against the appellant as she did. The said judgement is hereby set aside and costs of the appeal and in the lower court awarded to the appellant. I hereby make the following orders;

    a. The judgement in Ruiru Senior Principal Magistrate's Court civil case number E179 of 2021 dated 30-06-2022 is hereby set aside and substituted for an order dismissing the said suit with costs.

    b. The respondent shall pay the costs of this appeal.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**