



**Mugambi v Waithera (Civil Appeal E065 of 2023)
[2024] KEHC 8958 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E065 OF 2023
LM NJUGUNA, J
JULY 24, 2024**

BETWEEN

MILTON MURIITHI MUGAMBI APPELLANT

AND

ANTONY KARANJA WAITHERA RESPONDENT

(Appeal arising from the decision of Hon. D. Endoo in Chief Magistrate's Court at Embu Civil Suit No. E075 of 2023 delivered on 27th October 2023)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 3rd November 2023 challenging the decision of the trial court and seeking the following orders:
 - a. That the appeal be allowed;
 - b. That the judgment of the trial court be set aside and be replaced by an order of this court that the appellant was entitled to be paid Kshs.219,579/= for material damage of the appellant's motor vehicle registration number KCE 920C after it was involved in a road traffic accident with the respondent's motor vehicle registration number KCF 752A; and
 - c. That the costs of this appeal be awarded to the appellant.
2. The appeal is premised on the grounds that the learned magistrate erred in law and fact:
 - a. By failing to appreciate the law regarding proof;
 - b. By failing to be guided by Metropolitan Motor Assessment report and make a finding that the appellant had proved material damage to the appellant's motor vehicle registration number KCE 920C after it was involved in a road traffic accident with the respondent's motor vehicle registration number KCF 752A;



- c. Failing to find and hold that the appellant had proved material damage of his motor vehicle registration number KCE 920C in the tune of Kshs.219,579/= thus failing to award him the same;
 - d. Failing to be guided by stare decisis and particularly the authorities cited by the appellant and which were binding to the learned trial magistrate; and
 - e. Failing to consider forceful submissions by the appellant.
3. The trial court suit was instituted vide a plaint dated 02nd May 2023 through which the appellant sought judgment against the respondent for general damages for non-user of his motor vehicle registration number KCE 920C, costs for accessories of the damaged motor vehicle in the sum of Kshs.204,820/=, special damages of Kshs.233,520/= and costs of the suit. It was the appellant's case that on 24th December 2022, he was lawfully driving his motor vehicle registration number KCE 920C along Embu- Meru road when at Embu Level 5 Hospital, the respondent drove, managed and/or controlled his motor vehicle registration number KCF 752A so carelessly, recklessly, negligently so much so that a collision occurred between the two motor vehicles while the appellant's motor vehicle was on its correct lane, thus causing him loss and damage.
 4. Even though he was served, the respondent did not enter appearance and interlocutory judgment was entered against him. At the formal proof hearing, the appellant testified as PW1, stating that following the accident he could no longer use the motor vehicle to work and to take his son to school and was forced to use public means which was inconveniencing. He urged the court to award him Kshs.233,520/= as repair costs. The trial court found the respondent 100% liable for the accident and awarded general damages for non-user of motor vehicle of Kshs.20,000/=, special damages of Kshs.12,941/= and interests.
 5. In the appeal herein, the court directed the parties to file their written submission but only the appellant complied.
 6. In his submission, he stated that the appeal only challenges the findings of the trial court to the extent that the said court failed to award him Kshs.219,280/= for the material damage to his vehicle. That there is no doubt that the material damage was proved to the required standard. That the motor vehicle assessment report was produced but the trial court failed to rely on it yet it indicated the costs of repair of the motor vehicle. It was his submission that proof of general damages is not subject to the strict proof as required in the case of special damages, hence the motor vehicle assessment report was sufficient proof.
 7. He relied on the cases of *Silas Mutua Mberia v Muthoni Njue Veronica* (2021) eKLR and *Nkuene Dairy Farmers Cooperative Society Ltd & Another v Ngacha Ndeiya* (2010) eKLR where the courts insisted that proof in civil cases should be on a balance of probabilities. He submitted that he presented enough evidence before the court to enable it to award the amount sought and urged this court to award him Kshs.219,820/= for material damage to his car.
 8. The issue for determination is whether the court should award the appellant Kshs.219,579/= as general damages for the material damage caused to his motor vehicle.
 9. The first appellate court is required to revisit the evidence adduced at the trial court and make its own finding. Such was held in the case of *Okeno v. Republic* (1972) EA 32 where the court held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting



evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

10. The trial court awarded Kshs.20,000/= as general damages for non-user of the appellant's motor vehicle. It stated that the special damages that were proved with receipts amounted to Kshs.12,941/= out of the pleaded amount of Kshs.233,520/=. That the amounts stated in the motor vehicle assessment report were not proved by way of receipts, thus the same could not be awarded as special damages.
11. The trial court addressed itself to prayers (a), (c) and (d) of the plaint. In its reasoning (b) which was the costs of the damaged motor vehicle accessories and prayer (c) were both treated as special damages. This does not appear to be the case. These are 2 separate prayers and are subject to different standards of proof. In her determination, the trial magistrate correctly held that the special damages were not strictly proved and she awarded the amount proved through receipts.
12. Damages sought for the purpose of repair of the motor vehicle are not to be treated as special damages but their proof must be subjected to the required standard of proof in civil cases; on a balance of probabilities. That is to say, damage of the motor vehicle should be proved and the court may award the sum prayed even though the appellant has not incurred any costs of the repairs yet. In the case of *Silas Mutua Mberia v Muthoni Njue Veronica* (2021) eKLR the court held thus:

"It is thus clear that the appellant only needed to prove the extent of the damage to his motor vehicle and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. It must always be remembered that the balance of proof on the appellant was at all times on a balance of probabilities and not higher. The claim by the appellant was not for an expense already incurred but a claim to restore his damaged motor vehicle to its pre-accident state. The value of the damage was assessed and a report produced in evidence. It was therefore not necessary to demonstrate that indeed the costs of repairs were incurred, because the report was sufficient proof on a balance of probabilities. The appellant was not legally required or obligated to specifically prove the claim by production of receipts like in the case of special damages."

13. In a similar case, the Court of Appeal in the case of *David Bagine v Martin Bundi* (1996) eKLR, stated thus in asserting the probative value of an assessor's report:

"The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim"

14. Additionally, in the case of *Nkuene Dairy Farmers Co-operative Society & Anor v Ngacha Ndeiya* (2010) eKLR, the Court of Appeal held:-

"In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's



vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”

15. The motor assessor’s report should have been considered on a balance of probabilities in order to guide the court in determining this prayer. Judgment was entered in favour of the appellant and he is the only one who testified at the formal proof hearing. The report dated 17th March 2023 from Metropolitan Motor Assessors Ltd stated that the appellant’s motor vehicle would need to be repaired at a cumulative cost of Kshs.219,820/=. There was no evidence countering this position. Therefore, on a balance of probabilities, the appellant’s case was proved and prayer (b) of the plaint ought to have been granted.
16. In the end, I find that the appeal succeeds and the same is hereby allowed with orders as follows:
 - a. The respondent to pay the appellant Kshs.219,820/= for material damage of the appellant’s motor vehicle registration number KCE 920C after it was involved in a road traffic accident with the respondent’s motor vehicle registration number KCF 742A; and
 - b. The costs of this appeal are awarded to the appellant.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

