Gathitu v Nyaboke (Civil Appeal E203 of 2022)
[2024] KEHC 10532 (KLR) (Civ) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E203 OF 2022

WM MUSYOKA, J

SEPTEMBER 3, 2024

BETWEEN

GABRIEL GATHITU ..... APPELLANT

AND

ROSE NYABOKE ..... RESPONDENT

(Appeal from judgment and decree of Hon. Muholi, Senior Principal Magistrate, SPM, in Milimani CMCCC No. 3273 of 2017, of 4th March 2022)

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation, for material loss arising out of a road traffic accident on 22nd September 2014, along Elgeyo Marakwet Road. The case by the respondent was that her motor vehicle, registration mark and number KBK 605N, was involved in an accident, with another, said to have belonged to the appellant, being registration mark and number KAS 469P, causing extensive damage to motor vehicle KBK 605N, and liability was attributed on the appellant on account of negligence. The appellant filed a defence, admitting the accident, but denying everything else pleaded in the plaint, and, in the alternative pleading contribution on the part of the respondent or her driver.

2. A trial was conducted. 3 witnesses testified for the respondent, while none testified for the appellant. Judgment was delivered on 15th September 2022. On liability, the court held the appellant 100% liable. On quantum, the court awarded Kshs 233,500.00 special damages.

3. The appellant was aggrieved, hence the instant appeal. The appeal has raised 3 grounds, revolving around liability and quantum.

4. On 20th December 2023, directions were given, for canvassing of the appeal by way of written submissions. It would appear that only the appellant filed written submissions, for those are the only submissions that I see in the record before me. The appellant has argued on only 2 grounds: liability and quantum.

5. On liability, he submits that the respondent did not prove that he was 100% liable for the accident. He submits that a sketch plan, indicating a point of impact, was not produced, and that the respondent was only relying on a police abstract report which blamed him for the accident, yet that of itself was not enough. He cites *Mwema Musyoka v Paulstone Shamwamam Shell* [2020] eKLR (JN Mulwa, J), *Fal Azad & another v Peter Mubua Karanja & 2 others* [2016] eKLR (JN Mulwa, J) and *Benter Atieno Obonyo v Anne Nganga & another* [2021] eKLR (Chemitei, J). He submits that the trial court ought to have found both drivers liable on a 50:50 basis.

6. On quantum, he submits that the claim for hire of a taxi for Kshs 90,000.00 was not proved, as no receipts were produced to support the claim. He further argues that that alleged loss of user was not pleaded, and, therefore, the court decided on a special damage that was neither pleaded nor proved. He avers the amount of Kshs 90,000.00 ought to have been excluded.

7. On liability, the respondent testified that she was a passenger in her car, when the accident happened. She stated that her car was at the junction of Ngong Road and Marakwet Road, when a woman, driving the appellant's car, rammed into her car, on its left side. PW2 was a police officer, who produced a police abstract report and an abstract from the relevant police occurrence book. He did not investigate the accident, but, based on the records, stated that the driver of the appellant's car joined the road without giving way, hence the collision. The appellant did not tender evidence, by either presenting the driver of the accident vehicle, or another, to testify on the aspect of liability. The defence case was closed without offering any evidence, and the witness statement, that had been placed on record, by the appellant, was not adopted as defence evidence. So, the only available evidence, on what transpired, was that adduced by the respondent. That evidence was not controverted, and the trial court had no other material upon which it could rely on, on the matter of liability.

8. The accident had been admitted in the defence. There was a collision. The only issue outstanding was establishing who, between the 2 drivers, was responsible for the collision. The respondent adduced evidence. The appellant did not. The respondent adduced evidence that the appellant was to blame for the accident, based on the facts presented by PW1 and PW2. The appellant did not present counter-evidence. Based on the that, the trial court was justified to conclude that the appellant had not provided any evidence, which it could use to apportion liability as between the 2 parties.

9. I agree, the respondent adduced evidence to establish negligence on the part of the appellant. The standard of proof required was on a balance of probability, not proof beyond reasonable doubt. The respondent discharged the burden upon her, to the required standard. There was a collision, the respondent was a passenger in her vehicle, and an eyewitness, therefore. PW2 produced police records, where blame was apportioned on the appellant. PW2 was not the investigator of the accident, but he had the relevant police records on the same. Based on the preponderance of the evidence adduced, the appellant was liable. He chose not to adduce evidence to challenge the case by the respondent, and, thereby failed provide a basis upon which the court could apportion liability as between the 2 drivers in the manner proposed in his written submissions.

10. The appellant argues that liability ought to have been assessed on a 50:50 basis. He has not laid basis for that submission. I reiterate, that the trial court would have gotten into the exercise of apportioning liability, as between the parties, if both sides had adduced evidence on what transpired. Only 1 party adduced evidence, and, without the input from the other side, there was no way the trial court would

have begun apportioning liability as between them, when it only had 1 version of what transpired. The appellant, perhaps, has in mind the principle that where there is evidence of a collision between 2 or more motor vehicles, but inadequate evidence on how the collision happened, then the court should find and hold both sides liable. See *Lakhamshi v Attorney General* [1971] EA 118 (Spry VP, Lutta & Mustafa, JJA), *Domitila Wangui Karugu & another v Dagu Hidris Haide* [2020] eKLR (Majanja, J), *Amani Kazungu Karema v Jackmash Auto Ltd & another* [2021] eKLR (Nyakundi, J) and *Ndatho v Chebet* [2022] KEHC 346 (KLR)(Gitari, J). However, that principle works best where both sides present conflicting versions of what transpired, or the versions presented fail to bring any light into the issue of who was to blame for the collision. In this case, there was only 1 version, according to which the appellant was said to have had rammed into a vehicle that had right of way. The appellant had no answer to that testimony, and, therefore, that was the only explanation available, and the trial court believed it. I have been unable to find basis for differing with the trial court on the matter of liability.

11. On quantum, the appellant has issue with only 1 item, the claim of Kshs 90,000.00, for loss of user, on the basis that the same was neither pleaded, nor proved. Loss of user is in the nature of a special damage. It is trite that a special damage must be not only specifically pleaded, it has to be specifically proved. See *Hahn v Singh* [1985] KLR (Kneller, Nyarangi JJA, & Chesoni, Ag JA) and *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR (Mwera, Warsame & Gatembu, JJA). Was there a specific pleading of the loss of user, of Kshs 90,000.00, in the plaint? I see on record a plaint, which is undated, but was filed in court on 12th May 2017. At paragraph 6 of the plaint, in the particulars of special damage, is a claim for hire of a taxi for a period, against a value of Kshs 90.000.00. So, there was a specific pleading of the said special damage.

12. Was that alleged special damage specifically proved? The respondent testified on 9th March 2021. She said that she had hired a taxi, for approximately 1 month, at an approximate cost of Kshs 90,000.00. She paid Kshs 200.00. A copy of a receipt of Kshs 500.00 was referred to, but not produced. She also referred to payments made by cheques, totalling Kshs 13,000.00. However, copies of the alleged cheques, or their encashment or payment, were not put in evidence as exhibits. Based on that, the claim for Kshs 90,000.00, in respect of hire of a taxi, was not specifically proved, and should not have been awarded. I agree with the appellant, that the same should be deducted from the amount awarded by the trial court.

13. In the end, I find merit in the appeal, only to the limited extent of the claim for Kshs 90,000.00, and I hereby allow it, to that limited extent. The effect shall be that the appeal herein is hereby dismissed, on the aspect of liability, but allowed, on the aspect of special damages, so that the amount awarded, of Kshs 233,500.00, is reduced by subtracting from it Kshs 90,000.00, and substituting the judgment sum with Kshs 143,500.00. This appeal is disposed of in those terms. Each party shall bear their own costs, of this appeal.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS

3RD DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Mbaluka, instructed by Munene Wambugu & Company, Advocates for the appellant.

Mr. Okore, instructed by Kerongo Bosire & Company, Advocates for the respondent.