



**Kimeru Enterprises Limited v Mukaria (Civil Appeal E147 of 2022)  
[2024] KEHC 11177 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11177 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E147 OF 2022  
LW GITARI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**KIMERU ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**AGNESS KANJA MUKARIA ..... RESPONDENT**

**JUDGMENT**

1. The respondent filed suit vide a plaint dated 28<sup>th</sup> May, 2021 against the appellant seeking general damages for loss of user, kshs500,000, special damages as pleaded and costs of the suit and interest thereon.
2. The respondent pleaded that at all material times relevant to the suit, the Appellant has always been the registered and/or beneficial owner of m/vehicle registration no. KCD 004Z Mitsubishi FH while she has been the registered owner of m/v reg no. KBK 809Z Toyota Probox.
3. The respondent avers that on or about 7<sup>th</sup> May 2021 she was lawfully driving her m/vehicle registration no. KBK 809Z Toyota Probox along the Meru-Mikinduri road when the Appellant's driver and or agent while in the cause of his duty so negligently drove, managed and/or controlled the said m/vehicle KCD 004Z Mitsubishi FH causing it to lose control and collide with the m/vehicle registration no KBK 809 Z Toyota Probox occasioning it serious damages. The respondent further enumerated the particulars of negligence on the part of the Appellant as driving Motor vehicle registration no. KCD 004Z Mitsubishi FH at an excessive and dangerous speed in the circumstances causing the m/vehicle to collide with the her vehicle, negligently failing to brake, slow down or otherwise control the said motor vehicle to avoid the accident, negligently violating the traffic rules and the Highway Code of conduct and causing the accident and driving without due care, prudence, skill and competence of a driver.



4. The respondent pleaded that in the alternative the said motor vehicle must have been defective thus incapable of proper control and management by the driver. The respondent further relied on the doctrine of *res ipsa loquitur*.
5. The respondent further pleaded that as a result of the aforementioned, her vehicle was extensively damaged rendering the same uneconomical to repair. That the pre-accident value was kshs.350,000. That the respondent suffered total loss of his motor vehicle with a salvage value of kshs.100,000.
6. The Appellant filed a defence dated 21<sup>st</sup> October, 2021 wherein he denied the respondent's claim and put the respondent to strict proof thereof. The Appellant pleaded that without prejudice and in the alternative, he averred that if there was any accident as alleged which is vehemently denied the same was wholly caused by and or substantially contributed to by the negligence of the driver of motor vehicle registration number KBK 809 Z.
7. The Appellant enumerated the particulars of sole and or contributory negligence of the driver of motor vehicle registration number KBK 809Z as failing to keep a proper look out, driving at an excessive speed, carrying excessive passengers contrary to the authorized number of passengers, engaging in Public Service vehicle business without a valid licence and or authority from NTSA, failing to take precautions for other road users and causing the accident, being negligent and careless, failing to notice the presence of motor vehicle Registration Number KCD 004Z, failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor vehicle as to avoid the accident, failing to observe the Highway code, causing or permitting the said motor vehicle to skid on the said road and or failing to take any or any adequate measures to avoid the accident, failing to stop and give way on joining the highway, changing the lane without ascertain that the road was safe, driving a defective motor vehicle and driving a vehicle without brake lights and or warning lights.
8. The Appellant avers that the respondent's vehicle was damaged beyond repair as a result of the said accident's the respondent is not entitled to any compensation or at all and further particulars of damages are also denied.
9. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondent against the Appellant as follows:
  - i. Liability -100%
  - ii. Special damages- Kshs 455,550/=
  - iii. The claim for loss of user is declined.
  - iv. The special damages to attract interest at court rates from the date of filling suit until payment in full
  - v. Costs awarded to the respondent.
10. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;
  1. The learned Trial Magistrate erred in Law and fact by not considering the submissions of the appellant hence arriving at the wrong decision.
  2. The Learned Trial Magistrate erred in Law and fact by treating the salvage value of kshs. 100,000 as a special claim instead of deducting the same from the pre- accident value.
  3. The Learned trial Magistrate erred in Law and fact in awarding a sum of kshs 100,000/- as the salvage value yet the same was not pleaded in the claim.



11. The appellant prays that the appeal be allowed, the judgement entered by the lower court be varied and/or altered and or be set aside and the respondent be ordered to pay costs of the appeal.
12. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 20<sup>th</sup> July, 2023 through the firm of Kaimba Peter & Co. Advocates while the respondent filed his dated 5<sup>th</sup> July 2023 through the firm of Jackson Omwenga & Co. advocates.

### **Appellant's Submissions**

13. The Appellant submitted that he had listed three grounds of appeal in the appeal.
14. It is the Appellant's submission that the appeal is basically on the issue of the award of salvage value of the damaged vehicle by the trial magistrate. The Appellant further stated that at paragraph 6 of the plaint it was pleaded that the respondent's motor vehicle was extensively damaged rendering the same uneconomical to repair. That the pre-accident value was 350,000/= and the respondent suffered a total loss of his motor vehicle with a salvage value of Kshs.100,000.
15. The Appellant submitted that in the vehicle assessment report at page 17 of the record of appeal the assessor recommended repairing the subject vehicle is uneconomical and they recommended the claim to be settled on total loss basis and place a pre- accident value of kshs. 350,000 and the salvage to attract offers as from kshs 100,000/=
16. The Appellant submitted that in the respondent's witness statement she pleaded that she eventually had her car assessed by a professional valuer and he declared her motor vehicle registration no. KBK809 Z Toyota probox a total write off and uneconomical to repair.
17. It is the Appellant's submission that the respondent did not pleaded to be awarded a sum of kshs.100,000 being salvage value since she retained the salvage. That the trial court failed to explain where and how the figure of kshs 100,000 was arrived at as the same was neither plucked from the plaint nor the defence. The Appellant relied in the case of Wilberforce Osodo vs Sarova Hotels Ltd & Ano. HCCC No.18 of 1994.
18. The Appellant submitted that it is trite law that the value of the salvage cannot be awarded to the claimant but must be deducted from the pre accident value of the vehicle. The Appellant relied in the cases of Bungoma Line Sacco Society Ltd vs Super Bargains Hardware (K) LTD(2021)eKLR and Geoffrey Kamau Ndishu & Ano.vs Peter Muchiri Muriungi(Civil Appeal No.3 of 2020(2022)KEHC 2 (KLR).
19. The Appellant submitted that the appeal be allowed and the award of kshs 100,000 be dismissed with costs to the Appellant.

### **Respondent's Submission**

20. The respondent submitted on brief facts of the case and outlined the duty of the court on first appeal. The Appellant relied in the case of Catholic Diocese of Kisumu v Tete (2004) eKLR.Civil Appeal No. 284 of 2001 and Kitavi v Coast Bottlers ltd(1985) KLR 470.
21. The respondent submitted further on the issue of quantum of special damages awarded to her that it should be upheld.
22. It is the respondent's submission that the Appellant argues that trial court was in error for awarding her the salvage value of her damaged motor vehicle reg no KBK 809 Z when awarding her special damages



- of kshs.455 550/=That the trial court awarded the salvage value of kshs 100,000 as a special claim instead of deducting it from the pre accident value and yet the same was not pleaded in the claim.
23. The respondent submitted that a perusal of paragraph 6 of the plaint she pleaded that the pre accident value was kshs. 350,000. That she suffered total loss of his m/vehicle with a salvage value of kshs.100,000.
  24. The respondent further submitted that she specifically claimed a sum of kshs.500,000/= comprising kshs. 5,000 for motor vehicle assessment fee of kshs. 450,000 for the entire value of m/v KBK 809Z.
  25. It is the respondent's submission that it is factually erroneous for the Appellant to allege the full value of the subject vehicle was never claimed or that the trial court plucked the figure from unknown location. That the respondent claimed kshs.550/= for the value of motor vehicle search and referenced the copy of receipts produced at the trial court hearing.
  26. The respondent submitted that the excerpt of exhibit 9 in the impugned judgement the trial court appreciated the totality of the respondent's claim for special damages and found them strictly proved.
  27. It is the respondent's submission that the trial court should have deducted the salvage value from the loss of motor vehicle awarded. The Appellant relied in the testimony of Vincent Murithi Mutiga/PW3.
  28. The respondent submitted that pw3 produced the motor vehicle assessment report as plaintiff EX-3 and testified that the total cost of repairs exceeded the pre-accident value of the subject vehicle hence they recommended the vehicle was uneconomical to repair.
  29. The respondent submitted that from the above testimony it is clear that there was one follow up question that should have been asked whether she kept the salvage or abandoned it in return for the full value of the subject value.
  30. It is the respondent's submission that the question was never put to her to give an answer and none of other witness testimony in writing or orally gave an answer thereto. That the Appellant herein is promoting speculation when they argue the salvage should be deducted from the special damages because there is no basis to conclude that she retained the salvage.
  31. The respondent submitted that recalling the fact she claimed the full value of the subject vehicle inclusive the pre- accident value and the salvage value. The respondent further submitted that she abandoned the salvage and opted to claim the full value in a lawsuit. That if the Appellant believed otherwise they should have sought a specific answer to the question from her cross examination.
  32. It is the respondent submission that the Appellant harbors distrust towards her on whether they retained the salvage and only realized post judgement that they squandered their chance at the trial court hearing to obtain a conclusive answer to that suspicion and now are now using the appeal to get another bite at the cherry.
  33. The respondent submitted that the same must be firmly opposed in the interest of fairness and natural justice. That this being an appeal she is not allowed to present additional testimony to resolve the question and likewise the Appellant should be prevented from relying on mere suspicion to overthrow a lawful judgement especially when they had the opportunity at the trial hearing to interrogate their suspicions but were indolent.
  34. It is the respondent's submission that the argument on salvage value is devoid of evidence and must be rejected. That there is no sustainable challenge against kshs. 455,550 in special damages awarded to her.



35. The respondent submitted that the Appeal centers on inclusion of the salvage value in the quantum, of special damages and it follows that failure to prove any error in law or fact in the judgement warrants a finding that the appeal is unmerited and should be dismissed.
36. The respondent submitted also on the issue of cost and relied on section 27 of the Civil Procedure Act which stipulates that costs shall follow the event unless the court grants a good reason or orders otherwise.

### **Analysis & Determination**

37. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. This position was taken in *Selle & Another Vs Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the Court of Appeal held as follows:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

38. This same position had been taken by the Court of Appeal for East Africa in *Peters Vs Sunday Post Limited* (1958) EA 424 where Sir Kenneth O’connor stated as follows-;

“It is a strong thing for an appellate court to differ from the findings on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally upon that evidence should stand. But it is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion.”

39. The above was also the position in the case of *Sumaria & another Vs Allied Industries Limited* [2007] 2 KLR 1 wherein the Court of Appeal held inter alia, that “being a first appeal, the court was obliged to reconsider the evidence, re-evaluate it and make its own conclusion,” with the only caveat being that interference with a finding of fact on appeal can only arise where the same was based on “no evidence, or on a misapprehension of the evidence or that the judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did.”

40. Further, in the case of *Mugera vs Mwechesi & another* (2007) 2 KLR 159, the Court of Appeal held:

“An appellate court has to be very slow to interfere with the trial judge’s findings unless it is satisfied that either there was absolutely no evidence to support the findings or that the trial judge had misunderstood the weight and bearing of the evidence before him and arrived at an insupportably conclusion.”



41. The issue for determination as I can deduce from the grounds of appeal is whether the trial magistrate erred in law and in fact by treating the salvage value of kshs 100,000 as a special claim instead of deducting the same from the pre-accident value

Whether the trial magistrate erred in law and in fact by treating the salvage value of kshs 100,000 as a special claim instead of deducting the same from the pre-accident value

42. It is trite law that an appellate court can only interfere with an award of damages where the award was either based on wrong principles or is so inordinately high or low as to be a wholly an erroneous estimate (See *Kemfro Limited t/a Meru Express Services v Lubia and Another* [1987] KLR30).
43. The principle espoused in the law of tort is to restitute a victim of a tortious act to as much as possible to where he would have been if he had not suffered the tort (restitution in integrum). The rationale for the rule that special damages must be strictly proved is to police the practice so that Plaintiffs do not present exaggerated claims not tied to actual losses. The rule is, therefore, that 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.
44. The Appeal herein is in regards to the issue of the award of the salvage value of the damaged vehicle that was issued by the trial court. The Appellant had pleaded that the motor vehicle was extensively damaged rendering the same uneconomical to repair. That the pre- accident value was kshs 350,000. That further she had suffered a total loss of his m/vehicle with a salvage value of Kshs 100,000.
45. In the perusal of the record the assessment report it indicated that repairing the subject vehicle is uneconomical and they recommended the claim to be settled on a total loss basis and place a pre-accident value of kshs 350,000 and the salvage to attract offers as from kshs.100,000.
46. The respondent had pleaded special damages of kshs 500.000 comprising of kshs 350,000 being the pre- accident value of the subject motor vehicles 100,000 being the salvage value and 5000/- being the assessment fees.
47. The trial court awarded special damages of kshs 455,550/=which I find erroneous for reasons that the court ought not to grant the salvage value because the vehicle was beyond repair since the assessors had clearly stated that repairing the vehicle was uneconomical. Therefore, it was only fair to award the pre-accident value plus the assessment cost which was kshs.5000 less the salvage value.
48. The Court of Appeal in *Jimnah Munene Macharia vs. John Kamau Erera* Civil Appeal No. 218 of 1998 was of the view that:

“Where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value.”

49. Similarly, in *Permuga Auto Spares & another v Margaret Korir Tagi* [2015] eKLR where Mulwa J. held that;

“It is the courts view that once a vehicle has been written off the only compensation is the pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other



consequential losses would be awarded double compensation. The claim for loss of user is disallowed. "

I am guided by the binding decision of the Court of Appeal. Damages are not for unjust enrichment, they are meant to compensate a party for the loss suffered. So where one's motor vehicle is written off it is restored to him/her at the pre-accident value and less the determined value for the salvage. The respondent was not entitled to recover the salvage value. The trial magistrate erred by awarding Ksh.100,000/- as salvage value.

50. Consequently, the appeal succeeds, the judgment of the lower court on damages is set aside and I substituted with judgment in favour of the appellant in the following terms;

Pre-Accident Value (Kshs. 350,000)

Less Salvage Value (Kshs. 100,000)

Assessor's Fees Kshs. 5,000

Loss of User NIL

Total Kshs. 255,000

51. The appellant shall have the costs of this appeal and those in the lower court together with interest.

**DELIVERED DATED AND SIGNED AT MERU THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L.W. GITARI**

**JUDGE**

**19/9/2024**

Mr. Kaumba for Respondent

Mr. Omwenga for Applicant

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

