



REPUBLIC OF KENYA



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**Kathuri v Kibocha (Civil Appeal E081 of 2023)
[2024] KEHC 12397 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E081 OF 2023
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

TERESIA WANJIRU KATHURI APPELLANT

AND

JACQUELINE WAMBUI KIBOCHA RESPONDENT

*(Appeal arising from the decision of Hon. Njoki Kabara SRM in
Siakago SPMCC No. E029 of 2021 delivered on 22nd November 2023)*

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 15th December 2023 seeking the following orders:
 - a. That the appeal be allowed with costs;
 - b. That the judgment of the trial court be discharged and set aside with costs to the appellant;
 - c. That the honourable court be pleased to apportion liability based on the facts of the case; and
 - d. That the honourable court be pleased to award the plaintiff quantum of general damages commensurate to the facts of the case.
2. The appeal is premised on the grounds that:
 - a. The trial magistrate erred in law and in fact by failing to appreciate and accord due regard to the appellant's submissions and authorities on quantum;
 - b. The trial magistrate erred in law and in fact by failing to consider the pleadings filed by the appellant;



- c. The trial magistrate erred in law and in fact by failing to consider the interest of justice when conducting hearing of the matter;
 - d. The learned trial magistrate erred in law and in fact by arriving at a wrong and unfair conclusion in the judgment;
 - e. The learned trial magistrate exercised her discretion capriciously but not judiciously by awarding an inordinately high sum as general damages; and
 - f. The trial magistrate erred in law and in fact and misdirected herself in awarding manifestly excessive general damages to the respondent in the sum of Kshs.200,000/=.
3. Through a plaint dated 24th March 2021, the respondent sought judgment against the appellant for compensation for material damage to the motor vehicle registration number KAX 616E Toyota Corolla AE110 worth Kshs.91,640/=, and special damages of Kshs.180,700/=. She stated that on 12th March 2019, she was lawfully driving the said motor vehicle along Embu-Kiritiri Road at Rwika when the appellant so negligently drove, managed and/or controlled motor vehicle registration number KBP 747H Toyota Hilux Pickup that it collided with the respondent's motor vehicle. The plaint also details the material damage to the appellant's motor vehicle. The appellant filed a statement of defense denying the averments made in the plaint and she alluded negligence to the respondent.
 4. At the hearing, PW1 was the respondent who produced documentary evidence in support of her case. She stated that she was at a junction and she had indicated with the intention of turning but the appellant's motor vehicle hit hers from behind. She blamed the appellant for the accident and produced an inventory of repairs undertaken on the motor vehicle. PW2 was Eric Mutuma Muriuki of AA Kenya who stated that he assessed the damage on the respondent's motor vehicle and he produced the assessment report.
 5. PW3 was Morris Mwakachola of Kiritiri Police Station, who produced the police abstract issued to the respondent. He stated that he arrived at the scene shortly after the accident and he blamed the appellant for the accident. The appellant did not testify at the trial. In its judgment, the trial court found that the appellant was wholly to blame for the accident and awarded special damages of Kshs.230,340/=, general damages of Kshs.200,000/= and Kshs.39,000/= as loss of user.
 6. The appeal was canvassed by way of written submissions. Both parties filed their submissions.
 7. It was the appellant's submission that the trial court was correct in its findings on liability and that the same should be upheld. That the award of loss of user is usually awarded by the court through its discretion and that in the present case, the motor vehicle was repaired immediately and returned to the respondent. That the amount of loss of user should be subtracted from the special damages or not be awarded at all. She relied on the case of *Jackson Mwabili v. Peterson Mateli* (2020) eKLR.
 8. The respondent submitted that during the trial, the appellant did not testify nor did she call any witnesses to substantiate her allegations. That the untendered defense cannot hold as was held by the Court of Appeal in the cases of *Netah Njoki Kamau & Another v. Eliud Mburu Mwaniki* (2021) eKLR and *Robert Ngande Kathathi v. Francis Kivuwa Kitonde* (2020) eKLR. It was her argument that award of general damages for loss of user as awarded by the trial court are fair since the appellant has not demonstrated that the trial court proceeded on wrong principles of law. She relied on the cases of *Yunes Nyambeki Nyakwara v. Thomason Machoka & 2 Others* (2016) eKLR and *Jackson Mwabili v. Peterson Mateli* (2020) eKLR. She urged that the correct amount for loss of user is Kshs.42,000/= and not Kshs.39,000/= as awarded by the trial court, considering the receipts produced.



9. From the foregoing, the issue for determination is whether trial court's judgment should be set aside.
10. The role of the appellate court is stated in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123, as follows:

“..this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

11. The appellant challenged the findings of the trial court on quantum. One of the prayers in the plaint was for general damages for loss of user, special damages and compensation for material damage. It is upon the alleging party to prove their allegations on a balance of probabilities as provided under sections 107 and 109 of the *Evidence Act*. In the case of *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, it was held that:

“Denning J. in *Miller vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

12. It is imperative that the appellant proves her case and not just place paperwork before the court for the court to decipher and make a finding. In the case of *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), the court observed that:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

13. In this case, the appellant, who was the defendant did not testify. The respondent, on the other hand, testified that she was driving and indicated with the intention of turning when the appellant knocked her motor vehicle from behind. PW2 assessed the damage to the respondent's motor vehicle and produced the assessment report as evidence. PW3 investigated the accident and produced the police abstract. He stated that he arrived at the scene promptly after the accident and from his investigations, he blamed the appellant for the accident. With the available evidence, the Trial court made its findings on both liability and quantum.

14. On the damages for Loss of use (loss of user), the same are in the nature of special damages and they must be specifically pleaded and strictly proved. In the case of *David Bagaine v Martin Bundi* (1997) eKLR, the Court of Appeal while addressing the issue of loss of user stated as follows:

“We must and ought to make it clear that damages claimed under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It cannot in the



circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can.” The damages as pointed out earlier by us must be strictly proved. Having so erred, the learned Judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent’s lorry could have been repaired plus some period that may have been required to assess the repair costs.

15. The trial court considered the circumstances of the case and awarded loss of user for the duration that the respondent’s motor vehicle was not in use, during which time she used a taxi. The respondent stated that she was using her motor vehicle for personal use and following the accident, the motor vehicle was immobilized, forcing her to use a taxi for a while. She produced 14 receipts of taxi fares as proof of the expenses she incurred during that period. Each receipt was for the amount of Kshs.3,000/=. The trial court awarded Kshs.39,000/= as loss of use, but the total sum should be Kshs.42,000/=.
16. For the award of compensation for/special damages for material damage to the motor vehicle, the respondent produced the assessment report and payment receipts for the repairs and towing charges. According to the assessment report, the total cost for repairs was Kshs.91,640/= under this head. The trial court awarded Kshs.189,340/= stating that the respondent stated that the repairs cost that much. It also added Kshs.35,000/= being towing charges and Kshs.6,000/= being assessment fees, bringing the total sum of special damages for material damage to Kshs.230,340/=. In the case of *Nkuene Dairy Farmers Co-op Society Ltd & Another v. Ngacha Ndeiya* [2010] eKLR, the Court of Appeal held that;

“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 damages complained of.”
17. The trial court stated that it would award general damages for Kshs.100,000/= but in its final disposition, it awarded Kshs.200,000/= under this head. This seems like a human error that requires to be clarified. The award of general damages is made at the court’s discretion in the circumstances of the case. Here, the trial court considered the inconvenience caused and decided to make an award of Kshs.100,000/= which is high considering that the respondent was awarded damages for loss of user. I find Kshs.50,000/- reasonable. According to p.226 para 394 of *Halsbury’s Laws of England* Vol. 11 3rd Edition, it states thus:

“The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages”.
18. On the issue of liability, the trial court worked with the evidence before it and found the appellant fully liable for the accident. I have not found a reason to overturn this finding, given that the appellant did not defend her cause at trial.
19. In the end, the appeal partially succeeds. I find that the trial court’s finding on liability sound and is hereby upheld. As regards, quantum, the finding of the trial court is hereby upheld save for the following:
 - a. The trial court’s award of loss of user is retained at Kshs.39,000 as there was no cross appeal.



- b. The trial court's disposition on the award of general damages is hereby set aside and substituted with an award of Kshs.50,000/=
20. The appellant shall have 50% of the costs of this appeal.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

