



REPUBLIC OF KENYA



**Lorna Muthoni Nduati w/o Geoffrey Kabura Nduati t/a Yellow Green Hotel v Ngaruiya
(Civil Appeal 72 of 2018) [2023] KEHC 2171 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 72 OF 2018
JM CHIGITI, J
MARCH 3, 2023**

BETWEEN

**LORNA MUTHONI NDUATI W/O GEOFFREY KABURA NDUATI T/A
YELLOW GREEN HOTEL APPELLANT**

AND

GEOFFREY WAWERU NGARUIYA RESPONDENT

*(Being an appeal from the judgment and decree of the Senior Principal
Magistrate Court at Limuru delivered on 23rd November, 2017 by
Honourable E. S. Olwande SPM in Limuru SPMCC No. 75 of 2014)*

JUDGMENT

Brief Background

1. At the trial court, the Appellant sued the Respondent for damages and cost for damage to her motor-vehicle Reg. No. KBJ 858R; which was involved in an accident with motor-vehicle Reg. No. KAN 824J belonging to the Respondent – along Mai Mahiu – Nairobi Road.
2. The Appellant blamed the accident on the negligence of the Respondent, and that she had suffered loss and damage. The Appellant further avers that by virtue of the accident, her insurer Heritage Insurance Company Ltd compensated her for the cost of repair and is entitled to recover the same from the defendant under the doctrine of subrogation.
3. The Respondent filed a defense, where he conceded that an accident happened - involving his vehicle and that of the Appellant - but denied that the same was caused as a result of negligence on his(Respondent's) part, and he put the Appellant to strict proof.
4. The Respondent further denied the particulars of negligence attributed to him, and averred that the accident was caused as a result of the negligence of the driver of the Appellants vehicle. He further



stated that the driver of the Appellant's vehicle contributed to the accident. The defendant further denied that the Appellant suffered loss and damage and put the Appellant to strict proof. He urged the court to dismiss the suit with costs.

5. At the end of the trial, learned Magistrate in the Judgment dated 23rd November 2017, on liability rendered judgment in favour of the Appellant against the Respondent in the ratio of 85:15. On quantum judgment for special damages judgment was Ksh. 26,561. The other claims were dismissed. In sum, judgment was entered for the Appellant in the sum of Ksh. 22,576.85.
6. The Appellant being dissatisfied with the judgment, preferred this Appeal.

Analysis and Determination

7. The burden of proof was on the Plaintiff/Appellant to prove his case. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that: Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
8. That is called the legal burden of proof. There is, however, evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows: 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. [...] 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
9. The court can only disturb the quantum of damages if the amount awarded is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This principle was affirmed in the case of Butt v. Khan [1981] KLR 349, and in Mbogo V Shah (1968) EA 93.
10. In Butt v. Khan [1981] KLR 349 at page 93 in which DE LESTANG v (as he then was) observed at page 94.

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's decision has been different.”
11. This Appeal was disposed of by way of written submissions. The Appellant, in support, filed their written submissions dated 15th November 2022; while the Respondents, in opposition, filed their written submissions dated 5th December 2022.
12. After taking into consideration the materials before this court, the following issues for determination arises: Whether the accident occurred; Who was liable; and, Whether the award was reasonable.
13. The grounds of Appeal were presented as follows:
 - i. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent was 100% liable.



- ii. That the learned trial Magistrate erred in law and in fact in finding that the Appellant's driver was guilty of contributory negligence.
 - iii. That the learned trial Magistrate erred in law and in fact in finding that the Appellant had failed to prove the repair charges.
 - iv. That the learned trial Magistrate erred in law and in fact in failing to apply the test of balance of probabilities in determining whether the claim for repair charges had been proved.
 - v. That the learned trial Magistrate erred in law in relying on case law that was clearly distinguishable.
14. PW1 Joseph Muricho Nderitu testified that he assessed KBJ 858R as instructed by Heritage Insurance Company. He prepared a report. He assessed the cost at 687,903.80. He produced the report as Exh. 2. He charged ksh 7,000 to attend court and Ksh. 2,088 for the report. He produced a receipt as exhibit 2.
 15. PW2 Ephraim Wachira Muthui, the manager of the Appellant. He confirms that an accident took place on 21.3.11 between the car he was driving being motor vehicle KBJ 858R and the defendants motor vehicle registration no. KAN 824J at a place known as Mutarakwa. He reported the accident and obtained a police abstract which he produced as exhibit no. 4. He claimed that KBJ 858R was extensively damaged by the other car. He testified that the accident occurred when the defendant drove into his side of the road. He told the court that he applied the brakes.
 16. PW3 Regina Ileri the legal officer of Heritage Insurance confirmed that the vehicle KBJ 855A was insured by the company. She confirmed that the company authorized the repairs which came to Ksh. 694,854. She produced an invoice as P.exh 5a for Ksh. 599,012 which was less VAT of 95,842 that she said was paid directly to KRA. She produced a letter that forwarded the cheque to the repairer as exhibit no. 5. She produced a receipt for Ksh. 19,000 for the amount refunded for towing charges as Exhb. 7. She said that the assessor was paid Ksh. 7,569. The witness testified further that the company paid a further Ksh. 18,900 for the investigator. She claims the refund of Ksh. 740,323 plus costs and interest.
 17. During cross-examination the witness testified that she had no receipts from Toyota E.A Limited, because they were in their panel of service providers.
 18. The Respondent, DW1 Geoffrey Waweru Ngaruiya testified. He told the court during chief examination that he was driving motor vehicle KAN 824J at the time of the accident. He was driving from Limuru to Mutarakwa shopping Centre. He drove from the shopping Centre and on Mai-Mahiu road when he reached the turning to his home he stopped, checked and confirmed that the road was clear from behind. He was to turn right into a quarry road. He testified that in front of him about 100 meters away there was an oncoming car. He testified that the said car banged into his car. He said that it was upon the collision that he realized that the other car driving at a high speed. He said that when he was about to turn, the road was clear.
 19. During cross-examination, he confirms that he saw the oncoming vehicle suddenly. He said it was kind of flying. That he though the car was far, suddenly he had the bang. He said he saw the car was far and did not think that there was need to wait for it because of the distance. He confirmed that the car was on high speed.
 20. I find that both the drivers are to blame for the accident. The Appellant appears to have been driving at a high speed to the extent that he was unable to swerve his car so as to avoid the accident.



21. On his part, the Respondent appears to have maintained a very casual attitude while driving to the extent that he failed to wait for Appellant to pass before he turned to join the marram road. He told the court that it is like the Appellant was flying. Had he waited then the accident wouldn't have occurred.
22. The Appellant has proved that the Respondent contributed to the accident. The defendant has also partly proven then that the Appellant was partly to blame for the accident. I do not find any fault in the manner in which the trial magistrate apportioned liability.
23. The next question is whether or not the Magistrate erred in law and in fact in finding that the Appellant had failed to prove the repair charges. The Appellant sough Ksh. 740,323 being special damages. It is trite law that special damages must be strictly pleaded and proved. This position was affirmed in the cases of Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990, and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681.
24. In the instant matter, the Appellant satisfied the first requirement, in that he pleaded. What is left is to answer the next question, of whether he proved.
25. During the cross-examination, the Appellant said that she did not have receipts to prove the repair charges. She had pro-forma invoice Exh. 5a, a cheque forwarding letter. She did not produce any receipt to prove that the repair charges were paid. She testified that the Toyota EA was in their panel and they didn't issue a receipt. This claim must fail. She did not bother nor make an attempt to produce a copy of the cheque or the receipt from KRA to show she paid VAT for the transaction.
26. The Appellant pleaded that the sum of Ksh. 756/- was paid as assessor's fees. The Appellant proved this. She also testified that the company paid Ksh. 19,000 as towing fees. This was proved. The witness testified that the company spent Ksh. 18,900 for investigations. The invoice remains as such and the same is not proof of payment. It does not help in proving special damages.

Disposition

27. Flowing from the above findings, this court does not find any reason nor justification to set aside the finding of the trial court. The Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 3RD DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

