



**Tamno v Simon & 2 others (Civil Appeal 22B of 2021)
[2023] KEHC 1690 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 22B OF 2021
DKN MAGARE, J
MARCH 10, 2023**

BETWEEN

METHUSELAH TAMNO APPELLANT

AND

KURIA SIMON 1ST DEFENDANT

SAMMY NDUMA THUKU 2ND DEFENDANT

BLAIR KOSKEI 3RD DEFENDANT

JUDGMENT

1. This is a fairly straight forward appeal. The same is over a sum of Ksh 142,552 which were repair charges. The same arose from the assessment by Diplomatic assessors who stated that Ksh 142,552 is required for repairs. Instructions were given to the garage to repair. Diplomatic assessors re-assessed repairs and was paid Ksh 1,900/=. Plus VAT making a total of Ksh 2,320/=.
2. In its judgment the court entered judgment for Ksh 18,150 made up of
 - a. 5,250 exhibit 3
 - b. 1000 – 2 Receipts of 5000 each exhibit 8.
 - c. 1900 – Payment to diplomatic assessors, exhibit 9
10,000/= - payment in exhibit 10
3. The appellant complains if the court disregarding evidence on total repair costs.



Duty of the Appellate Court

4. The duty of the 1st Appellant Court was settled long ago by Client De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of *Seen and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

Appellant’s Submissions

5. The Appellant relied on the decision of *Herbert Hahn v Amrik Singh* [1985] ECLR

“... special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by Bowen LJ in *Ratcliffe v Evans* (1892), 2 QB 524, 532, 533, Lord Macnaghten in *Stroms Bruks Aktic Bolag v John & Peter Hutchinson*, [1905] AC 515, 525, 526, Lutta JA in *Kampala City Council v Nakaye*, [1972] EA 446, 447 and Chesoni J, in *Ouma v Nairobi City Council*, [1976] KLR 297,”

6. He argues that the assessor’s report was adequate and relies on the authority of *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] eKLR, where the court of appeal held as doth: -

“This Court differently constituted there said, as is material, as follows: -

“He said he had not at all repaired the vehicle as he could not afford it. This seems far-fetched. If he was earning as he said shs 5000/= to shs 9000/= a day he could easily have repaired the vehicle and put it back on the road. The best evidence in this respect could have been supplied by an automobile assessor.

In the result we agree with Mr Charles Kariuki that the Assessor’s report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent’s claim. We dismiss this appeal with costs to the respondent.”

7. They posited that it was not necessary to prove that the repairs were actually carried out. He posited that the appellant was not legally bound to prove the claim through receipts.

Respondents Submissions

8. The respondent started their submissions by relying on Justice Chitembwe’s decision in *Leli Chaka Ndoro v Maree Ahmed & SM Lardhib* [2017] eKLR, where the court stated: -

“The principle of subrogation applies where there is a contract of insurance. If the insured risk takes effect and the insurer settles the insured’s claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured



and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the compensation is not more than what has been paid to the insured.”

9. They argue that the insurance should have repaired before claiming against the tortfeasor. Therefore, given that the report was produced by consent, then there is no prove that repairs took place.

Analysis

10. Both parties are correct on the law but fail to appreciate a very small detail. the Court of Appeal has indicated that receipts are not necessary to proof damage. That is the correct law and is binding on this court. However, that law does not answer the question in the court.
11. What is the nature of the claim before court? In the circumstances, understanding the nature of the claim settles the question whether the case was proved.
12. It is equally true that the insurance must incur expenses begot seeking subrogation. Both parties ignore the very same detail that converges their answers and solves he imbroglio and leads to a perfect answer.
13. The answer is not a one million dollar question but a 2,320 one. Tacked inside the Plaintiff is an expense that clears the air whether repairs were carried out or not. A sum of Ksh 2, 320/= was paid to the assessors for re-assessment of the vehicle once repairs were carried out. This sum was allowed by the court, albeit without tax, there was no appeal about re-inspection fees.
14. Therefore, once repairs were estimated and the vehicle re-inspected, it is a forgone conclusion that the repairs were carried out. It is true the cheque for the said amount was not produced. It does not mean that it was not done this is not a criminal case but civil. It is whether it is probable or not that it could have happened. There is no explanation for re-assessment fees other than repairs.
15. The issue of burden of proof in civil cases was succinctly dealt with in *Eastern Produce (K) Ltd – Chemomi Tea Estate v Bonfas Shoya* [2018] eKLR as doth: -
 - “ 14. The burden of proof in civil cases on the balance of probability was defined in the case of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
16. Given that the same was paid by the insurance, then it follows all these were the result of fall up by the insurer. An Njenga of diplomatic assessors in his re- assessment report indicated repairs of 145,232/= were carried out and the said amount was due to seas motors and spares Nakuru.
17. These are the document produced by consent of parties. This means the Respondent did not have question s on them. It cannot be turned around because one was not cross examined, then there were no repairs. The duty remains with the defendant to cross examine. By admitting the assessment and re- assessment reports, ipso fact cannot challenge the same.
18. The Court dismissed the claim for 142, 552 on basis where no receipts. I do not know the basis where the Court found that receipts are necessary to proof special damages.
19. What is required of the parties in relation to special damages is to strictly plead and proof. Although I note that the Applicants pleadings may not be the best, the sum of Ksh 142,552/= is specifically pleaded by repair charges. So are the other expenses.



20. The Second witness testified that the garage was instructed. These repair were done in accordance with the assessment report. The same as re-assessed and found to be satisfactorily repaired. The Quantum of repairs was set out in the assessment report.
21. The parties there in agreement that the motor vehicle was involved in an accident. If the Respondent had issues with repair charges, they will have cross examined the re-assessment by diplomatic assessors. As they stand, the repairs reported in the assessment report there done. There is no requirement for receipts. The only thing required is shows that the repairs were carried out and the liability for repair discharged.
22. I am therefore satisfied that the Court fell into error in discounting not only the amount of Ksh 142,552 but all the other amount pleaded in the paint.
23. I note that the Court gave premium to receipts in such a way that in matters where an invoice of Ksh 6.300/= is raised only the net amount is captured. This amount related to tax withheld were lost. The requirement of the law as set out in the court of appeal decisions is not that expenses be receipted but they be strictly proven. It is that spirit that the Court of Appeal stated in *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] Eklr.

“In Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Court of Appeal 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 loose, because the requisite standard will not have been attained.”

24. In the circumstances, it is clear repairs were carried out and shouldered by the insurer. The assessment and re[assessment were done by professionals. On re-assessment, repairs were done according to assessment. Although there were other repairs to be carried out, they have not been claimed.
25. In the circumstances I set aside Judgment on special damages and in lieu therefore enter judgment for the Appellant for the Respondent for: -
 - a. Repair costs 145,232/=
 - b. Assessment fees 6,300/=
 - c. Re – inspection fees 2,320/=
 - d. Towing charges 10,000/=
 - e. Copy of recordes 500/=164, 352
26. I disallow the expense of Ksh 200 as the police abstract is indicated to be provided for free. I also award costs of the lower court to the Appellant to be assessed or agreed.



27. The appellant having been successful, I award cost of the appeal of Ksh 60,000/=

28. The Judgment sum shall attract interest from the date of filing.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

.....for the Appellant

..... for the Respondents

Nancy Bor – Court Assistant.

