



**Topcats Safaris Ltd v Juma & another (Civil Appeal E118 of 2021)
[2023] KEHC 2143 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E118 OF 2021
JM CHIGITI, J
MARCH 6, 2023**

BETWEEN

TOPCATS SAFARIS LTD APPELLANT

AND

MICHALE LUKHOBA JUMA 1ST RESPONDENT

THE QUIL LIMITED 2ND RESPONDENT

JUDGMENT

Brief Background

1. The cause of action arose from an accident that occurred on January 1, 2015 along Thika - Sagana Road near Kenol when the 1st respondent was driving motor vehicle registration No KBR 099W. The appellant blamed the 1st respondent for the accident and pleaded that the 2nd respondent was vicariously liable.
2. The matter proceeded for hearing after which a judgment was delivered on May 31, 2021 dismissing the suit with costs precipitating this appeal.
3. In the grounds of appeal dated June 24, 2021 the appellant challenges the entire judgement on the basis of the 4 grounds set out as follows:-
 - a. That the learned magistrate erred in law and fact in finding the appellant 50% liable without any rota of evidence.
 - b. That the learned magistrate erred in law and fact in requiring the production of motor vehicle assessment to prove damage thus placing a standard of proof higher than what is required in civil cases.



- c. That the learned magistrate erred in law and fact in disregarding the receipts produced and admitted in evidence as enough evidence to prove damage and repairs of motor vehicle KAX 540 U.
 - d. That the learned magistrate erred in law and fact in making judgment against the weight of evidence.
4. The appellant prays for orders that;
- a. The appeal herein be allowed with costs; and
 - b. The judgment of the lower court be set aside and be substituted with an order allowing the appellants' case with costs.

Analysis and Determination:

5. I have been guided by the principles set out in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA in arriving at the determination in this appeal.
6. The court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. This principle was enunciated thus: "...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..."
8. I have identified the following as the issues for determination:
 - a. Who is liable
 - b. Quantity of special damages
9. The plaint sets out grounds of negligence which the appellant had to prove in paragraph 5 a-f.
10. The respondents denied all the particulars of negligence putting the appellant to strict proof.
11. I have looked at the police abstract, motor vehicle repairs receipts and contract, and I have no doubt whatsoever that an accident indeed took place as pleaded.
12. During the hearing PW1, the managing director of the appellant, testifies in cross examination stating that he was driving at the speed of 20 KPH when he saw the cars behind him waiting for him to turn when he was hit. In re-examination he testified that motor vehicle KBR 099W was being driven at a very high speed.
13. From the reassessment, reanalysis of the evidence, I am persuaded that the 1st respondent caused the accident.
14. From the fact that the appellant was driving at 20 KPH and there were two cars behind him waiting for him to turn, the act that his car was hit with such an impact that caused his car to turn are to me pointers that have made me arrive at a conclusion that the respondent was the author of the accident.



15. Section 107 and 109 of the *Evidence Act* provide that:
- “ 107 . 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.
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.”
16. I am persuaded that the appellant has proven that the 1st respondent drove motor vehicle No KBR 099W in the manner set out in the paragraph 5a-f of the plaint.
17. The 1st respondent did not call any witness. The upshot of the foregoing is that his statement of defence remains a statement with no evidential value.
18. The appellant’s case remains uncontroverted.
- The 2nd issue is whether the appellant is entitled to special damages;
19. Special damages must be pleaded and proved. In *Fredrick Msaky v Lazaro Thuram Richoro & another* [2016]eKLR Aburili, J held as follows on the importance of a motor vehicle assessment report:
- “In the case of damages to a vehicle, it was critical that the specific damages or the nature of the damages itself be pleaded and strictly proven. The court would not assess damages which are not specifically pleaded. Only a specialist and qualified motor vehicle assessor would have examined the vehicle and set out the exact damages before stating what parts required replacement or repair as the case may be. It was not enough for a garage to quote for repairs without an accident assessment report on the specific damages caused by the accident and the value estimated for each damaged part.”
20. During the chief examination, the appellant produced the documents set out in his lists of documents dated December 6, 2016 as exhibits 1-4. The respondents did not object to the production of the said exhibits.
21. The court has looked at the receipts and the contract that the appellant produced. The court curiously notes that the appellant did not tender the accident report.
22. This report would have helped the court from an opinion whether or not the receipts had a correlation to the accident or not.
23. In *Omari Gulca Jana v B.M Muange* [2010]eKLR Okwengu, J (as then she was) held thus;
- “ Although it was alleged that motor vehicle KAC 996F was damaged, the assessment report was not produced in evidence. This was crucial evidence as without the assessment report it was impossible for the court to establish the damage to the motor vehicle or the estimated costs of repairs.”
24. The court is left with receipts for motor vehicle repairs for diverse dates. A claim for special damages must be strictly proven. The court finds that the appellant has failed to discharge the burden of proof that would enable the court to grant the prayers for special discharges.
25. I am further guided on the issue of the importance of assessors report by the court of appeal decision on C/A No 310 of 2005 *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013]eKLR where the Court



of Appeal referred to the case of *Kenya Industrial Industries LTD v Lee Enterprises LTD* [2009]KLR 135 where the court stated:

“Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction.”

26. I am guided by the above authority in asserting that the assessment report would have guided the trial court ascertaining the normal measure of damages and the actual cost if replacement of the goods at and the damaged parts at marked value without the reports.

Disposition:

27. Although the appeal succeeds on the issue of liability, the claim for special damages is dismissed.
28. The court is not in a position to ascertain whether there was any damage to the car or which parts got damaged, whether there were preexisting damages, the costs of the damaged parts or at all.

Orders:

29. The appeal succeeds on liability but fails on quantum of damages.
30. The costs shall be to the appellant.

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

