Amollo v Onyango & another (Civil Appeal E023 of 2022)
[2023] KEHC 4143 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4143 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E023 OF 2022

WA OKWANY, J

MAY 11, 2023

BETWEEN

RAYMOND OUMA AMOLLO ..... APPELLANT

AND

THADDEUS ONYANGO ..... 1ST RESPONDENT

IMEVO LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of the Hon. B. M. Kimutai, Principal Magistrate delivered on 10th May 2022 in the Principal Magistrate's Court at Keroka, Civil Case No. E080 of 2021)

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where he sued the Respondents for material damage to his motor vehicle Reg. No. KCR 039K. The Appellant's case was that on the 19th November 2020, his said motor vehicle was parked off the road along Keroka-Masimba Road when the Respondents' motor vehicle Registration No. KBP 539B, which was travelling at a high speed, lost control, veered off the road and rammed into his said stationary vehicle thereby damaging it extensively.
2. The Appellant averred that the cost of repairing the said vehicle was assessed at Kshs. 416,410/=.
3. The trial court heard the case and rendered a decision dismissing the Appellant's case thereby precipitating the filing of this appeal in which the Appellant listed the following grounds of appeal: -
    1. The learned trial magistrate erred in fact and in law by finding that the Appellant had failed to prove that the Respondents were liable for the accident when it was clear from his pleadings and testimony that the Appellant's motor vehicle was stationary and could not have caused an accident in that state of no motion and in addition, the Respondents having failed to call any witnesses to rebut the Appellant's testimony, the Appellant's evidence was uncontroverted.

2. The learned trial magistrate erred in fact and in law by finding that the Appellant's case was rendered fatal by lack of production of the receipts for the repair of the suit motor vehicle and yet the Appellant had produced a motor vehicle assessment report clearly showing the particulars of damage and the expenses that the Appellant was to incur in the restitution of the suit motor vehicle to its pre-accident condition.

3. The learned trial magistrate erred in fact and in law by holding that special damages in a material damage claim, where the suit motor vehicle had not been repaired could only be proved by means of receipts and not even the motor vehicle assessment report which was uncontroverted was sufficient.

4. The learned trial magistrate erred in fact and in law by placing on the Appellant's shoulder, a heavier burden of proving his case compared to the required standard of a balance of probabilities.

5. The learned trial magistrate erred in law and fact by failing to accord the requisite consideration to the Appellant's submissions filed on record.

4. The Appellant now seeks the setting aside of the lower court's judgment and that in its place, judgment be entered in his favour as sought in the Plaint dated 16th May 2021.

5. When the Appeal came up for directions on 16th November 2022, the parties agreed to canvass it by way of written submissions.

6. It is trite that a first appellate court is required to re-evaluate and re-analyze evidence afresh and arrive at its own findings and conclusions while bearing in mind the fact that it neither heard nor saw the parties testify. In *Selle vs. Associated Motorboat Company* (1968) EA 123, Sir Clement stated thus: -

> " This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression bases as the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamond Sarif vs. Ali Mohamed Solan [1955] 22 EACA 270)"

7. I have considered the Record of Appeal and the parties' respective submissions. I find that the following issues arise for my determination:

   i. Whether the Appellant proved ownership of the suit motor vehicle.

   ii. Who is liable for the said accident?

   iii. What reliefs ought to issue?

Ownership of the suit motor vehicle.

8. Section 8 of the *Traffic Act* Cap 403 provides that;

   8. Owner of vehicle

   The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

9. In *Osapil vs. Kaddy* (2000) 1 EALA 187 it was held:-

> " Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise."

10. From the above cited provision and authority, it is clear that even though a log book forms prima facie proof of ownership of a motor vehicle, other evidence may be presented to prove otherwise. In the instant case, I note that even though the Appellant stated, during cross examination, that he had not produced the motor vehicle logbook in his bundle of documents, on re-exam, he clarified that the same was attached to the motor vehicle Assessment Report. The Assessment Report and the Log Book were produced and marked as P. Exh5 and P.Exh 6 respectively.

11. I also noted that at page 24 of the Record of Appeal, a copy of the logbook for the suit vehicle KCR 039K was attached to the Assessment Report. The said Log Book is however not legible on the vehicle's ownership section. I will therefore consider other factors in determining this issue of ownership.

12. I note that at paragraphs 3 and 4 of the Respondents' Statement of Defence dated 16th August 2021, the Respondents concede that the suit motor vehicle belongs to the Appellant. The Respondents only denied the claim that they owned the other vehicle Mitsubishi Canter Registration KBP 539B which allegedly caused the accident. The issue of ownership of the suit motor vehicle was therefore not one of the issues that were contested before the trial court.

13. Having conceded, in their defence, that the suit motor vehicle belongs to the Appellant, I find that the Respondents cannot turn around and raise the issue of ownership in this appeal as it is trite that parties are bound by their pleadings. This is the position that was taken by the Supreme Court of Nigeria in *Adetonn Oladeji (NIG) Ltd. vs Nigeria Breweries PLC* S.C.91/2002 where it was held that: -

Per Judge Pius J.S.C:

> "....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

Par Judge Christopher Mitchell J.S.C:

> "In fact, that parties are not allowed to depart from their pleadings is no the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation,"

14. It is also noteworthy that the Respondents did not tender any evidence to show that the suit motor vehicle belonged to someone else other than the Appellant. I therefore find that the Appellant proved, on a balance of probabilities, that he owned the said vehicle.

Liability for the Accident.

15. The Police Abstract Report (P. Exh1) dated 16th December 2020 indicated that the accident occurred along Keroka-Masimba Road and that it involved a Mitsubishi Canter registration no. KBP 539B and Mitsubishi Lancer registration no. KCR 039K. It was therefore not in dispute that the accident occurred.

16. It was the Appellant's case that his car was parked off the road when the Respondents' vehicle lost control and rammed into it thereby causing extensive damage on the rear side. The Respondents, on their part, contended that the Appellant should have presented evidence of photos of the scene of the accident as well as witness testimonies to prove that the Respondents' vehicle caused the accident.

17. Sections 107-109 of the *Evidence of Act* provide as follows: -

> 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> 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 that fact shall lie on any particular person.

18. In *Kirugi and Another vs. Kabiya & 3 Others [1987]* KLR 347, it was held:

> " The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

19. Similarly, the Court of Appeal in the case of *Ignatius Makau Mutisya vs. Reuben Musyoki Muli (2015)* eKLR while quoting Denning J, in *Miller vs Minister of Pensions* [1947] 2 All ER 372 explained the degree of burden of proof and stated thus:-

> " 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'. Thus, proof on a balance 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, whether both parties are equally unconvincing, the part bearing the burden of proof will lose because the requisite standard will not have been attained."

20. I have considered the Appellant's testimony before the trial court and his statement dated 16th May 2021. The Appellant stated that he had parked his car off the road and was taking supper in a nearby establishment when he heard a vehicle engine roaring as if at high speed. He turned to look and saw a white canter that had lost control and veered off the road before ramming into his car.

21. The Respondents did not rebut the Appellant's evidence at the hearing. I therefore find that the Appellant's version of events that led to the accident was uncontroverted and amounted to proof on

a balance of probabilities. I am guided by the Court of Appeal decision in *Lei Masaku vs. Kalpama Builders Ltd Civil Appeal No.40 of 2007 (2014)* eKLR where the learned Judges held thus: -

> " ...The appellant testified on oath that he was a casual employee of the respondent. That as such employee, he was not issued with any identification document by the respondent but merely signed against his name in the register. That register was or must have been in the possession of the respondent. That evidence given on oath was unchallenged and remained uncontroverted. To my mind the evidentiary burden thereby shifted to the respondent to deny those facts. It was incumbent upon the respondent to show that either there was no such a register of casual workers or if there was, the name of the appellant was not appearing thereon. In my view, evidence in rebuttal was necessary. In the absence of such a rebuttal, the facts as presented by the appellant remained unchallenged and uncontroverted." (Emphasis added)

22. I also associate myself with the decision in *Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015]* eKLR, where it was held:-

> " ...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

23. The Respondents alluded to the fact that the Appellant may have wrongly parked his vehicle on the roadside thus causing the said accident. Having found that the Appellant's motor vehicle was stationary at the time of the accident, I am not persuaded by the Respondents' argument on the issue of wrong parking. I refer to the decision of the Court of Appeal in *Michael Hubert Kloss & Another vs. David Seroney & 5 Others [2009]* eKLR where it was held: -

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...'"

24. This Court takes the position that the Appellant's vehicle having been stationary at the time of the accident, the burden of reasonable care fell on the Respondents' driver. I find guidance in the Court of Appeal decision in *Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others* Civil Appeal No. 214 of 2004 (UR) where the learned Judges took the following view: -

> " If a 'matatu' is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or

it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle...Vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of on-coming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other." (Emphasis added).

25. In *Njuguna Njoroge vs. Peter Kihiu Mucheru; Choi Seo Dong & another [2019]* eKLR Gikonyo J. also stated: -

> " However, the driver of the motor vehicle registration number KAA 153V was also under a duty to drive at reasonably safe speed especially on a road not well lit and under construction. Given the condition of the road, the said driver ought to have driven at a speed that would enable him observe or see a stationery vehicle in good time and perhaps swerve or undertake such other action as to avoid hitting the appellant's stationery vehicle. In addition, with proper and functional headlights and at reasonable speed he would have seen the stationery vehicle in good time and avoid hitting it. Therefore, I find him to be guilty of contributory negligence." (Emphasis added).

26. In *Dorine Mkanjala & Another vs. United Touring Company & 3 others, Civil Suit No. 624 and 625 of 1983*, the driver rammed into a stationary vehicle and Wambilianga J. (as he then was) held: -

> " A prudent driver should travel at such a speed and at such a distance that he is able to pull up without colliding with a vehicle ahead of him. His primary duty is to keep a reasonable look-out for destructions or conditions which may impair efficacious operation of the vehicle ..."

27. In Amisi Gunga Baya vs. Salt Manufacturers Ltd & 2 Others, HCCC NO. 651 of 1993 the Defendant's vehicle rammed into a stationary unlit vehicle at night and the court held thus: -

> " He must not have had a proper look-out for obstacles as required of a prudent driver; otherwise he should not have failed to notice the lorry given that it was on a very straight stretch of the road,"

28. Guided by the above cited cases, I find that it was upon the driver of the Mitsubishi Canter KBP 539B to take reasonable care so as to ensure that his vehicle was driven with proper care to avoid veering off the road and ramming into a stationary car. Failure to do so meant that the driver was negligent, and I find that the evidence before the Court proves, on a balance of probabilities, that the Respondents were solely liable for the said accident.

What reliefs ought to issue?

29. The Appellant relied on the repair costs estimates contained in the motor vehicle's assessment report and prayed for special damages of Kshs. 416,410/=. The Respondents however contended that the only sufficient proof of special damages was receipts and not the motor vehicle assessment report.

30. Special damages refer to any costs that can be quantified or ascertained at the time when an action arises. They are different from general damages because they are specific in nature. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992]* KLR 177 stated thus: -

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

31. It is a well-established legal principle that special damages must be specifically pleaded and proved. The Court of Appeal in *Hahn vs. Singh (1985)* KLR, 716 stated thus: -

> " .....Special damages which must not only be claimed specifically 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 act themselves."

32. The question that begs an answer is whether a motor vehicle assessment report, in circumstances where repairs are yet to be undertaken, is sufficient proof for a claim for special damages.

33. In *Julius Kariuki Kimani vs. Evanson Kariuki [2021]* eKLR the court allowed the Appellant's prayer for special damages for the repair of a motor vehicle holding thus: -

> The aim of Tort law is to, as much as possible, return the victim to where he would have been if he had not suffered the tort. 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 will be permitted or otherwise demonstrate with the permitted degree of certainty what loss or amount he will suffer in the future.

34. This degree of certainty was aptly explained in the English case of Patcliffe vs. Evans [1892] 2 QB 524 (CA) as follows:-

> " In all actions accordingly, on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both the pleading and proof of damage, as is reasonable, having regard to the circumstance and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

35. In the present case, I find that the assessor's report demonstrated to this Court, with a degree of certainty, what costs would be incurred should the vehicle be repaired. *Blacks' Law Dictionary 6th Edn*. at p.116 defines assess as:

> " The ascertaining or fixing the value of something or a valuation or a determination as to value of property."

36. In essence, the Court will allow evidence in any form other than receipts in a claim for special damages, if that evidence will clearly demonstrate and ascertain the likely costs to be incurred in future for purposes of restoring a damaged item to as nearly original a position as it was.

37. The said Assessor's Report indicated a total of Kshs. 415,860/= as the cost of repairs. I have, in considering this issue, relied on the Court of Appeal case of *Nkuene Dairy Farmers Co-operative Society & Anor vs. Ngacha Ndeiya (2010)* eKLR, where it was held-:

> " 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 damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

38. My finding is that the evidence before this Court in respect to the cost of repairs was sufficiently proved by the Assessor's Report (P.Exh 5). The said report is clear on what it would cost the Appellant to restore his vehicle to its original state and the same was demonstrated to the permitted degree of certainty. I further find that the Respondents had the chance to engage their own experts to assess the extent and cost of the damage to the appellant's vehicle if at all they had misgivings on the Appellant's assessment. The Respondents did not do the assessment and cannot therefore claim that the same was not proved.

39. In the end, I find that this appeal is merited and I therefore allow it in the following terms: -

    i. Special Damages in the sum of Kshs. 415,860/=

    ii. Interests on (i) above at court rates from the date of filing the suit till payment in full.

    iii. I award the Appellant the Costs of the Appeal.

40. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 11TH DAY OF MAY 2023.

W. A. OKWANY

JUDGE