Chege v Olembo & another (Civil Appeal 497 of 2018)
[2023] KEHC 18115 (KLR) (Civ) (19 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 497 OF 2018

JN NJAGI, J

MAY 19, 2023

BETWEEN

JOHN CHEGE ..... APPELLANT

AND

ALEX ROY OLEMBO ..... 1ST RESPONDENT

STEPHEN OWINO ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon.E.K.Usui, Senior Principal magistrate, in Nairobi CM`s Court Civil Suit No. 6573 of 2013 delivered on 18/9/2018)

JUDGMENT

1. The Appellant was involved in a road traffic accident wherein he hit into motor vehicle registration No. KBN 005P BMW which was at the time being driven by Ruth Owino PW2. The vehicle was registered in the name of the 1st Respondent but had been left in the hands of the 2nd Respondent who is husband to PW2. The vehicle was damaged during the accident. The 2nd Respondent repaired the motor vehicle at a cost of Ksh.324,048/=. He claimed the repair costs from the Appellant who refused to pay. The Respondents sued. After a full trial, the trial court found for the Respondents and entered judgment for the sum claimed. The Appellant was aggrieved by the judgment of the trial court and filed the instant appeal.

2. The grounds of appeal are that:

    1. The learned magistrate misdirected herself allowing the Respondents' suit as prayed in the Plaint despite glaring inconsistencies and material non-disclosures in the evidence in support of the claim.

2. The learned magistrate misdirected herself accepting the 2nd respondent's testimony despite there being no evidence tendered, produced or corroborated of the authority granted to the 2nd respondent b the 1st respondent to act and to testify in his behalf.

3. The learned magistrate misdirected herself accepting the 2nd respondent testimony despite there being no evidence of the authority granted to the 2nd respondent by the 1st respondent to make the claim in his (1st respondent's) behalf and or to incur the costs or expenses which form the basis of the claim for Special damages.

4. The learned magistrate erred in law and in fact by failing to have regard to or to consider the fact that the respondent (original plaintiffs) did not file any Police report of the accident that gave rise to the claim.

5. The learned magistrate erred in law and in fact by failing to have regard to, or to consider that the respondents did not file and/or produce in evidence any Accident Assessment Report by A qualified Accident Loss Assessor to support the claim for Special Damages for cost of repairs.

6. The learned magistrate erred in law and in fact by failing to have regard to, or to consider the fact by the respondents' witness that the photographs taken of the vehicle allegedly damaged were taken not at the scene of the accident at or so close to the time of the accident (about 1.00pm) but were taken by the 2nd respondent in the evening/night (about 8.00pm) of the date of the alleged accident.

7. The learned magistrate erred in law and in fact by failing to have regard to or to consider the appellant's written submissions and the authorities relied on which clearly show that for a material damage claim to succeed it must be supported by Assessment Report made by an Accident Loss Assessor.

8. The learned magistrate erred in law and in fact shifting the burden of proof to the Appellant and placing such burden at a higher bar despite the fact that the respondents had failed to discharge their burden to the required standard.

9. The learned magistrate misdirected herself when she found in favour of the respondents claim despite the weight of the evidence.

3. It was the case for the Respondents that the 1st Respondent lives in London and left the subject motor vehicle in the hands of the 2nd Respondent. That after the accident, the Appellant wrote a note admitting liability and undertook to meet the costs of repair. The costs of repair were estimated at Ksh. 448,605/= by Bavaria Auto Limited, who were the dealers of the motor vehicle. The Appellant was informed of the estimate and complained that it was too high. The 2nd Respondent repaired the vehicle at Pitstop Autoservice Centre at a cost of Ks.324,048/= wherein the rear bumper and the tail gate were replaced. He claimed the costs of repair from the Appellant who refused to pay.

4. The Appellant in his written statement of defence denied the occurrence of the accident and the particulars of negligence set out by the respondents. He denied the particulars of damage set out in the plaint. He pleaded in the alternative that it is the driver of Motor vehicle Reg. No. KBN 005P who caused or substantially contributed to the accident. However, during the hearing he admitted being involved in the accident. He admitted writing the liability note. He admitted that PW2 called him later after the accident and informed him of the estimated cost of repair. He said that the damage on the vehicle was only on the bumper and reflector whose repair cannot cost the amount of money claimed. That it was not necessary to replace the tail gate. He said that the claim was an extortion.

5. The trial magistrate in her judgment found that the Appellant was the one entirely to blame for the accident. She found that the Appellant was informed of the estimate for repairs by the plaintiff but did not bother to get an independent assessment. The magistrate found the case proved and entered judgment for the Respondents as claimed.

6. The appeal was canvassed by way of written submissions. The appellant through the firm of Nduati Charagu & Co.Advocates submitted that the Appellant`s liability for causing the accident was not properly established. That the trial magistrate erred in finding the Appellant 100% liable for causing the accident.

7. The Appellant submitted that the owner of the vehicle, the 1st Respondent, did not testify in the case. That the letter of authority by the 1st respondent to the 2nd respondent to plead, act and adduce evidence on his behalf did not extend to the 2nd respondent incurring expenses, yet the documents produced to the court showed that it is the 2nd respondent who incurred the costs.

8. The Appellant submitted that the damage that occurred on the vehicle was recorded in the liability note. That there was no inspection report from a gazetted motor vehicle inspector to show the extent of the damage. Therefore, that the damage being claimed by the respondents may have been occasioned later after the material accident. That the damage was not proved.

9. It was submitted that the Respondents only produced a quotation for parts needed to repair the vehicle but did not produce an assessment report. That failure to produce an assessment report is fatal to a claim for special damages. The Appellant relied on the case of *Linus Fredrick Msaky v Lazaro Thuram Richoro & another [2016]* eKLR where Justice Aburili stated that:

   In the case of damages to a motor vehicle, it was critical that the specific damages or the nature of the damage 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.

10. The Appellant submitted that it is the requirement of the law that special damages must be specially pleaded and proved. They cited the Court of Appeal decision in *Douglas Odhiambo Apel & another v Telkom Kenya Limited [2014]* eKLR where the court stated as follows:

    > "…….a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or submissions. Cases are decided on actual evidence that is tendered before the court……..Unless a consent is entered into for a special sum, then it behoves the claiming party to produce evidence to prove the special damages claimed. Submissions, as he correctly observed, are not evidence……."

11. Also cited was the case of *Nkuene Dairy Farmers Co-operative Society Ltd & another v Ngacha Ndeiya (2010)* eKLR where 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 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.

12. It was submitted that the Respondents produced a repair estimate by Bavaria Motors but not an assessment report. That the repair estimate did not have photographs of the vehicle to show the nature and extent of the damage and the length of time required to repair the damage. That the trial court ignored the fact that there was no expert report in the form of an assessment report and therefore that the case was not proved.

13. It was submitted that the trial court shifted the burden of proof on the Appellant when it held that " the defendant did not bother to have an independent assessment for repairs even after the plaintiff had contacted him." The Appellant cited the Nkuene Dairy case (supra) where the court cited with approval Ratcliffe v Evans [1892] 2 QB524 where Bowen L.J. said:

> " 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 in pleading and proof of damage, as is reasonable, having regard to the circumstances 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 pendantry."

14. The Appellant urged the court to allow the appeal.

15. The Respondents through the firm of S.O. Owino & Associates Advocates, submitted that there is no requirement in law that for a material damage claim to succeed, the accident assessment report must be produced into evidence. That the only issue that needs to be determined is whether or not the special damages in a material damage claim have been pleaded and proved on a balance of probabilities. They cited the case of Gulthamed Mohamed Jivanji t/a Jivanji Agencies v Sanyo Electrical Company Ltd [2013] where the Court of Appeal stated that:

    Finally, the third ground challenges not only the total lack of pleading of special damages but also lack of strict proof thereof. Those are the twin requirements of law where a party seeks special damages. Further submission was made by Mr. Hira that there was no mitigation of damages by the respondent.

16. It was submitted that the respondents pleaded special damages to which the Appellant denied. That the appellant did not take issue with the pleading of special damages in the lower court and neither does he challenge the same in this court except that he contends that the Respondents failed to prove the same to the required standard. The Respondents distinguished the facts of this case with those in the Linus *Fredrick Msaky v Lazaro Thuram Richoro & another* case (supra) in that in that case the actual damages were never ascertained and the appellant never stated with precision the damages that were occasioned to his vehicle necessitating repairs and the cost incurred in repairing it.

17. It was submitted that the Appellant admitted liability and undertook to make repairs. That it was not necessary for the Respondents to adduce evidence to prove liability. More so, that their documents were tendered into evidence unchallenged. That the special damages were proved to the required standard.

Analysis and Determination –

18. This being a first appeal it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, 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..."

19. I have considered the grounds of appeal, the record of the trial court and the submissions by the respective advocates for the parties. The issues for determination are:

    (1) Whether the Appellant was entirely to blame for causing the accident.

    (2) Whether the award of Ksh.324,048/= was proved.

Whether the Appellant was entirely to blame –

20. It was the evidence of PW2 that she was on the material day negotiating the Ngong Road/Mbagathi Way round about when her car was hit from behind by the Appellant`s motor vehicle. The Appellant admitted in writing that he was to blame for the accident and undertook to repair her vehicle. A policeman went to the scene and they told him that they had agreed to resolve the matter. The Appellant gave her his phone number. She told him that her husband would take the vehicle for quotation of repairs at Bavaria Motors, the dealers who normally repaired the vehicle. They agreed that she would call him on the following Monday. On that day she called him and told him that her husband was taking the vehicle for quotation. He said he will send his mechanic to do the quotation and she directed him on where they lived. Later her husband got the quotation. She called the Appellant but he did not pick the phone. He later called her on the same day and she gave him the estimated cost from Bavaria Motors. He got shocked and said that he would have to inform his insurers. Thereafter she called him a few times but he did not pick her calls.

21. The Appellant adopted his witness statement as his evidence-in-chief in which he stated that on that day he was driving along Ngong road when at Mbagathi round about a vehicle that was ahead of him suddenly braked thereby causing him to knock into it. The vehicle was being driven by PW2. Her vehicle was slightly damaged. They agreed that he pays her Ksh.6,500/= but she changed her mind when a crowd formed. A police officer went there and he insisted that he meets the cost of repair. That under duress he undertook to repair the vehicle. The lady promised to contact him but she never did. He was never served with any documents before he was sued. He said that the cost being claimed is inflated and exaggerated.

22. The Appellant however in his evidence in court stated that he had stopped at the round about to give way. That there was a dark/blue vehicle ahead of him. That there was a policeman at the round about controlling traffic. That when the policeman signaled to vehicles on his road to move, the vehicle that was ahead of him did not move. He rammed into it. He and the driver of the vehicle checked it. He saw a light reflector damaged. A traffic policeman went there. He said it was a minor damage and they should pull aside and agree. They did so. He offered her Ksh.6,000/=. He wrote a note on liability.

That the lady called him on the following Monday and she mentioned a crazy figure. He told her that it was too much. He asked her that he takes the vehicle to a garage but she declined.

23. It is thus clear from the evidence that the Appellant gave two versions on how the accident occurred. In his written statement he stated that the accident occurred when the vehicle that was ahead of him suddenly stopped for no reason thereby causing him to ram into it. In his evidence in court he stated a different story that he and PW2 were stationary at the round-about and that when a policeman signaled to them to move, PW2`s vehicle did not move and he thereupon rammed into her vehicle. Which of these two versions is the correct one? It can only mean that the Appellant was not telling the truth on how the accident occurred.

24. Further to this the Appellant stated in his written statement that PW2 never contacted him from the day of the accident but in court he admitted that PW2 called her on the following Monday when she informed him of the quotation. He stated that he wrote the liability note under duress but never made such a claim in court. All this shows that the Appellant is not a person worthy of belief. His story on how the accident occurred was fabricated. PW2 must be the one who was telling the truth on how the accident occurred. The Appellant hit her from behind when she was negotiating the round-about. It is thus my finding that the trial court was right in holding the Appellant 100% liable for causing the accident.

Whether damages were proved –

25. It was the evidence of the 2nd Respondent PW1 that the repair charges were estimated by Bavaria Auto Ltd at Ksh.448,605/= as per document No.7 in their list of documents. That it was repaired at a cost of Ksh.324,048/= as per an invoice from Pitstop Auto centre, document No.5 in their list of documents. That he paid the repair charges as per receipt annexed. He wrote a letter to the Appellant informing him of the repair charges of Ksh.324,6048/=. The Appellant refused to pay and they sued. During the hearing he produced the above stated documents as exhibits. He also produced photographs showing the damage, as per document No.5 in their list of documents. It was his evidence that the rear bumper and the tail gate were replaced.

26. In her evidence, PW2 stated that she took the photographs on the same day of the accident but not at the scene. She stated in her evidence-in-chief that the defects are not visible from the photographs but in cross-examination stated some damages were visible from the photographs.

27. The Appellant on his part admitted that he wrote a note that indicated that the vehicle was damaged on the back left bumper, left rear light, broken reflector and a dent at the back. He insisted that the damage was minor.

28. It is trite law that special damages must be specifically pleaded and strictly proved. In a material damage, a claimant is only required to prove the extent of the damage and what it would cost to restore the damage as was held in the case of *Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya* (Supra)where the court said 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. "

29. In *Jackson Mwabili v Peterson Mateli [2020]* eKLR, Mwita J held as follows:

There is no doubt that the respondent's claim for repair costs was special damage claim. In that regard, the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing.

In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016]* eKLR, the Court of Appeal reiterated the fact that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.

30. The reason why the law requires strict proof of special damages is to avoid a claimant exaggerating the damage suffered. In *Julius Kariuki Kimani v Evanson Kariuki [2021]* eKLR Joel Ngugi J. (as he then was) stated that:

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.

31. The Appellant says that the claim for the Appellants is exaggerated. Dispute between the two parties seem to be the act of the Respondents in replacing the rear bumper and the tail gate. The estimate from Bavaria Auto estimated the cost of replacing the bumper at Ksh.156,359/= and that of the tail gate at Ksh.127,859/=. According to the 1st Respondent the vehicle was repaired by Pitstop Auto service Centre where he paid Ksh.156,0859/= for the replacement of the bumper and Ksh.127,049/= for the replacement of the rear lower tail gate. This is as indicated by the invoice from Pitstop dated 26th September 2013. The question is whether the Respondents proved that it was necessary to replace the two parts.

32. The Appellant argued that the Respondents did not produce an assessment report from a motor vehicle assessor but only relied on a quotation for repairs from a motor vehicle garage. The Respondents on the other hand argued that there is no requirement in law that for a material damage claim to succeed, the accident assessment report must be produced into evidence. That they were only required to proof that the material damage had been proved on a balance of probabilities. They submitted that the extent of the damage in the case was proved by the memorandum admitting the damage and the photographs. That the repair costs were proved by the repair estimate from Bavaria Auto Motors.

33. Whereas, in my view, there is no requirement in law that a motor vehicle assessor`s report has to be produced in court for a material damage claim to succeed, the Respondents in this case were required to call evidence from a motor vehicle expert to show why it was necessary to replace the bumper and the tail gate. They did not call the person who prepared the repair estimate from Bavaria Auto Limited to explain why it was necessary to replace the two parts. The qualifications of the person who prepared the report are not known. Neither is the document signed by the person who prepared it. The court in the circumstances cannot know whether the same is a genuine document or not.

34. In addition, the photographs that the Respondents produced in court were not clear on the damage occasioned on the vehicle. Out of the three photographs, only one of them showed a small dent on the

back. How then can the court determine whether serious damage had been occasioned to the vehicle that may possibly have called for replacement of the bumper and the tailgate?

35. More so, the receipt that the Respondents produced in court of Ksh.324,048/= did not have an ETR receipt. It is therefore difficult to know whether it was a genuine receipt and whether the sum claimed was actually paid or not. The invoice from Pitstop Autoservice Centre was not signed by anybody to certify that it was a genuine document. Neither did the Respondents call anybody from the said garage to prove that they actually repaired the vehicle at the stated cost.

36. In view of the foregoing, it is my finding that the Respondents did not strictly prove the extent of the damage that was occasioned on their vehicle and that it was necessary to replace the bumper and the tail gate. It was not proved that the cost of the sum claimed was actually paid. The fact that the Appellant admitted liability did not give the Respondents a free hand to replace parts even where the damage could be restored by other ways such as panel beating. The fact that the Appellant was informed of the estimated cost and did not obtain his own estimate did not remove the duty of the Respondents of strictly proving the claim. I find the cost of replacement of the bumper and the tail gate totaling to Ksh.283,908/= not proved. The balance of Ksh.40,141/= was proved.

37. The upshot is that the judgment of the trial magistrate is set aside and replaced with one of Ksh.40,141/=. Each party to bear its own costs to the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH MAY 2023

J.N. NJAGI

JUDGE

In the presence of:

Mr. Gichuki for Appellant

Mr. Osodo for Respondent

Court Assistant -Amina

30 days right of appeal.