Kibos Sugar & Allied Industries Ltd v Ayub (Civil Appeal E018 of 2021) [2023] KEHC 17387 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17387 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E018 OF 2021

RE ABURILI, J

MAY 2, 2023

BETWEEN

KIBOS SUGAR & ALLIED INDUSTRIES LTD ..... APPELLANT

AND

DENNIS MORARA AYUB ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. Linah Akoth, Resident Magistrate delivered on 29th October 2020 in Kisumu CMCC No. 528 of 2019)

JUDGMENT

Introduction

1. This appeal arises from the judgment and decree of Hon. Linah Akoth Resident Magistrate at Kisumu Chief Magistrate's Court, dated 29th October 2020. In that judgment, the learned trial magistrate allowed the respondent's suit for damages for material loss of Kshs. 510,000 being the pre accident value of his damaged motor vehicle registration KBN 687G that was crushed while it was stationary by motor vehicle registration KBL 592D and trailer number ZF 0964 belonging to the appellant. Liability was also entered against the appellant at 100%.

2. Aggrieved by that judgement and decree, the appellant Kibos Sugar &Allied Industries Limited, who was the defendant before the trial court lodged this appeal vide memorandum of appeal dated 26th November 2020, raising the following grounds:

    a. That the learned trial magistrate erred in law and fact by holding the appellant wholly liable for the occurrence of the suit accident despite making a clear finding of fact that the respondent had at the time of the suit accident parked his motor vehicle registration number KBL 592D at the edge of the road and not a designated parking area.

b. That the learned trial magistrate erred in law and fact by failing to find and hold that the fact of parking motor vehicle registration number KBL 592D at a non-designated parking contributed to a considerable extent to the occurrence of the suit accident.

c. That the learned trial magistrate erred in fact and law by failing to find and hold that the respondent contributed to the occurrence of the suit road traffic accident by leaving unmanned his motor vehicle registration number KBL 592D by the road side at a non-designated parking area.

d. That the learned trial magistrate erred in law by failing to take into account the acts and omissions on the part of the respondent relative to their blameworthiness in relation to causation of the suit road traffic accident when apportioning liability for the accident.

e. That the learned trial magistrate erred in fact and law by failing to properly analyse the evidence and pleadings filed by both parties in the lower court as a result of which she fell into error by improperly setting out the issues of law and fact falling for determination before as a result of which, she arrived at an erroneous decision on both quantum and liability.

f. That the learned trial magistrate erred in law by failing to appreciate that the appellant having filed a defence the onus in law fell upon the respondent to prove to the requisite standards all the ingredients of the cause of action and his case generally.

g. That the learned trial magistrate erred in law and in fact by holding that the appellant failed to rebut the respondent's evidence despite clear cross-examination and in error proceeded to find the appellant wholly liable for the suit accident.

h. That the learned trial magistrate erred in law by arbitrarily finding in favour of the appellant the pre-accident value of the motor vehicle registration number KBN 681G of Kshs. 510,000 in the absence of any cogent and clear evidence.

i. That the learned trial magistrate erred in law by placing undue reliance on the motor vehicle post-accident assessment report as the basis for the findings as regards the respondent's motor vehicle pre-accident value in the absence of any justifiable basis.

j. That the learned trial magistrate erred in law by relying on post-accident assessment report that had clear unauthenticated alterations despite the same being of doubtful probative value in arriving at the pre-accident value of the suit motor vehicle.

k. That the learned trial magistrate erred in law and fact by relying on the post-accident assessment report to arrive at the pre-accident value of the suit motor vehicle despite the assessment report being silent on how the value was arrived at and in the absence of any evidence of prior assessment pre-accident being done by the assessor.

l. That the learned trial magistrate erred in law when awarding the respondent, the full pre-accident value of the motor vehicle without taking into account

its salvage value with the result that the respondent now stands doubly compensated.

3. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

4. It was submitted on behalf of the appellant that it was evident from the testimony of the respondent before the trial court that the respondent misled the court on where he had parked his car having claimed to have parked 6 meters off the road.

5. The appellant's counsel further submitted that the trial magistrate erred by apportioning blame wholly on the appellant whereas the cumulative effect of the respondent's omissions and acts in parking the vehicle a metre from the road ought to have translated into an apportionment of liability.

6. Further submission on behalf of the appellant was that in arriving at an award of Kshs. 510,000, the trial magistrate committed an error in principle as she failed to take into account relevant factors such as the fact that the pre-accident value of the motor vehicle was not signed and also bore alterations, that the said report was not produced, that the said value was based on the previous value not taking into consideration usage of the vehicle and its present condition.

7. The appellant's counsel further submitted that apart from being unable to avail any evidence of the ascertained value of the respondent's motor vehicle prior to the occurrence of the suit accident, PW2 admitted that he was unable to ascertain the mileage of the said motor vehicle.

8. It was thus submitted that the stated value of Kshs. 510,000 by PW2 was unsupported, speculative and appeared plucked from the air.

9. The appellant's counsel submitted that apart from the ascertainment of the pre-accident value of the respondent's motor vehicle, the trial court was also duty bound to determine how much of the pre-accident value of the suit motor vehicle was to be compensated noting that the salvage of the said motor vehicle was still in possession of the respondent and thus the salvage value of the motor vehicle being Kshs. 120,000 ought to have been deducted from the ascertained pre accident value of the said motor vehicle.

10. The appellant relied on the case of *Permuga Auto Spares & Another v Margaret Korir Tagi [2015]* eKLR where the court held inter alia that once a vehicle is written off, the only compensation is the pre-accident value less the salvage value as assessed and other reasonable consequential expenses that are subject to prove. Reliance was also placed on the Court of Appeal case of *Jimnah Munene Macharia v John Kamau Erera Civil Appeal No. 218 of 1998* where it was held that where there was no proof of actual repair, the plaintiff was only entitled to the pre-accident value less the salvage value. Further reliance was placed on the case of Super Bargains Hardware (K) Limited (2021) eKLR where the court held *inter alia* that the vehicle having been declared a write off, the only way to compensate the victim was to allow the pre-accident value less the salvage as the vehicle could not be economically viable to repair.

11. The appellant submitted that the failure on the part of the trial court to take into account the value of the salvage when arriving at the quantum of compensation payable constituted an error in principle with the result that the respondent stood to benefit from double compensation and be unjustly enriched.

The Respondent's Submissions

12. The respondent's counsel submitted that on liability, the trial court did not err in finding the appellant 100% liable as the appellant failed to bring a witness or give evidence as to what efforts he had made to avoid the accident from occurring and that the pleadings by the appellant remained as mere statements of fact as was held in the cases of Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 and *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*.

13. The respondent relied on the case of *Rose Makombo Masanju v Flora alias Nightie Flora & Another (2016)* eKLR where the Court held *inter alia* that:

> " The fact that she veered off the road to the side of the road was indicative of the excessive speed she was driving at the material time that made it difficult for her to control and/or manage her motor vehicle that collided with the 2nd respondent's motor vehicle that was stationary. There was no doubt in the mind of this court that the appellant herein sustained injuries due to the 1st respondent's reckless driving and the judge set aside apportionment of liability and replaced liability at 100% as against the 2nd respondent."

14. On the issue of non-production of a sale agreement by the respondent during the hearing to ascertain the pre-accident value, it was submitted that the issue ought to have been raised before the trial court in support of the appellant's assertions to the contrary as he who asserts must prove in line with the provisions of sections 107 & 108 of the *Evidence Act*.

15. The respondent's counsel further submitted that there was no evidence that he took the mangled wreckage of the accident motor vehicle but that the said wreckage was towed to Kondele Police Station and the respondent was not laying claim on the salvage.

16. The respondent thus submitted that the appeal herein was misconceived, bad in law and an abuse of the court process and the same ought to be dismissed with costs.

Analysis and Determination

17. This is a first appeal. The duty of this Court is to subject the whole evidence before the trial court to re-appraisal, being conscious of the fact that this Court did not have the opportunity of seeing and hearing the witnesses first hand. This position was well stated in the old age case of Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123. The Court in the above case stated as follows concerning interference with the factual findings of the trial court by a first appellate court:

> " ..... if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally". See the case of Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270.

18. In addition, it is not open to the court on first appeal to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. These are the principles I share bear in mind as I determine this appeal.

19. The issues for determination in this appeal therefore are whether the trial magistrate erred in law and fact in making a finding that the appellant was 100% liable for the pleaded accident and secondly,

whether the trial magistrate committed any errors in awarding the respondent damages of Kshs 510,00. Further, what orders should this court make and who should bear costs of the appeal.

On Liability

20. On liability, the appellant submitted that the respondent misled the court on where he had parked his car having claimed to have parked 6 meters off the road which translated in an error by the trial magistrate in apportioning liability. The appellant further lamented that the respondent should have been held to have contributed to the occurrence of the material accident as he left his motor vehicle unattended and secondly, that he parked the said motor vehicle at an undesignated parking area.

21. The testimony by PW1 was that on 6/9/2019, he was on his way home and driving his motor vehicle KBN 687G. That it was raining so he stayed therein until the rains reduced then he drove across to the right side of the road and parked carefully on the side of the road, 6 meters off the road before heading to the nearby shops and that after a few minutes, he heard a loud bang. He went to where his motor vehicle was parked and found trailer KBL 592D and ZF0964 had landed on top of his car. He assisted the occupants of the trailer to get out of their vehicle then they escaped from the scene. PW1 called the police to the scene. They went and towed his car to Kondele Police Station. He stated that as an Insurances Agent, he was using his car for work to meet his clients, to take his children to school and to attend church service hence he was forced to hire another motor vehicle for use. He produced documents as exhibits.

22. In cross examination, the respondent stated that his vehicle was properly parked right next to the shop, off the road although it was not in a designated parking area.

23. In his testimony, PW3 testified that the driver of the appellant's vehicle failed to keep on his lane and encroached on the right side of the lane, lost control of the motor vehicle that fell on the other side and the trailer fell on the respondent's vehicle. It was his testimony that the driver of the appellant's vehicle was to blame for the accident. In cross-examination, PW3 stated that the shops were 4 metres from the road and that the respondent's motor vehicle was parked in an area not designated for parking.

24. The respondent produced documents including notice of intention to prosecute him and to sue (PEX1), Certificate of inspection for motor vehicle ZF 0946L (PEX2), Motor vehicle's Copy of records (PEX3) and the Motor Vehicle Accident Assessment Report (PEX4) prepared by AA Motors. To all these documents, there was no objection by the appellant.

25. The appellant on its part did not call any witnesses in support of its defence. That notwithstanding, the burden of proof lies on he who alleges.

26. In such instances case law provides as follows: In *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012]* eKLR, Odunga, J. stated as follows on the consequences of failure by a party to call evidence:

> "What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:
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> "Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the

Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

27. There is no reason to belabour the point here. The appellant did not adduce any contrary evidence as to how the material accident occurred and how the respondent materially contributed to its occurrence.

28. Where a party fails to adduce evidence, and has had opportunity to test and verify the same through cross examination, the court may properly rely on the evidence adduced subject to the usual rules as to relevance and probative value. Further, it is clear from the cross examination of the plaintiff/ respondent that he had parked his car on the side of the road and that the appellant's car was the one which was driven negligently as to lose control and fall on the respondent's car. The evidence from the photographs produced in evidence as exhibits, of the damaged motor vehicle is clear and there was no evidence that the appellant's motor vehicle fell on the respondent's car simply because of the same having been parked at a non-designated place. I hasten to add that although the appellant's counsel claimed that the assessors report was not signed, there was no objection to its production in the lower court and more so, it is the maker thereof who produced the said report as an exhibit.

29. In *Mursal & Another v Manesa (suing as legal representative of the state of Dalphine Kaninini Manesa[2022]*e KLR Mativo J stated as follows and I concur that:

"...The Respondent opted not to adduce evidence despite filing a defense denying liability. It is established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved.

20. In Interchemie EA Limited v Nakuru Veterinary Centre Limited it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. A similar position was held in Trust Bank Limited v Paramount Universal Bank Limited & 2 Others where it was held: - "it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

21. The appellant's counsel did not adduce evidence in the lower court, but cross-examined the Respondent. The purpose of cross-examination is three-fold. First, to elicit evidence in support of the party cross-examining. Second, to cast doubts on, or undermine the witness's evidence to weaken the opponent's case. Three, to undermine the witness's credibility. Fourth, to put the party's case and challenge disputed evidence. However, once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Accordingly, the assault on the argument casting doubts on the findings on liability fails.

22. In every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, in the instant case, to meet this standard, the appellants were required to do much more in the lower court. By opting not to adduce evidence to rebut the Respondent's evidence, they took the risk of leaving the Respondent's evidence unchallenged..."

30. Accordingly, there is nothing to persuade this Court, despite the very strongly worded submissions, that the trial magistrate was not entitled to fully rely on the evidence adduced by the respondent, or that it was improperly relied upon. In law, submissions, however well-choreographed they may be, can never amount to evidence. They remain submissions. see the Court of Appeal case of *Japhet Nkubitu & Another v Regina Thirindi [1998]* eKLR. Where it was stated as follows, in part:

> "We are concerned that the learned Judge embarked on the exercise of assessing damages in vacuo and in the absence of any evidence as none was led. Submissions are not evidence and cannot take the place of evidence. We are told this practice is rampant at Meru but that is no excuse for a practice which is clearly illegal and contrary to law.
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> .... Although the legal position is too plain to raise any difficulty in view of this novel practice at Meru we are constrained to restate and reinforce the mandatory provisions of section 107 of the *Evidence Act* (Cap 80) which provides -
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> "107(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."
>
> In this case evidence was not produced and witnesses were never called. There was therefore no basis at all upon which an award of damages could have been made."

31. Further, the *Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014]* e KLR stated as follows:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

32. Similarly, in *Ngang'a & Another v Owiti & Another [2008]* 1 KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis

of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

33. In *Erastus Wade Opande v Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007*, Mwera J stated that:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

34. The learned Judge in the above case also stated as follows in the case of *Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993*:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

35. Thus, as was stated by Odunga J citing the above cases, in the case of *Riziki Fresh Limited & another v JKM (suing next of kin and on behalf of the dependants and the estate of JNK-Deceased) [2020]* eKLR, "a court is not bound to decide a matter in accordance with the submissions cited before it by the parties. A court of law, in my view, is obliged to carry out its research and study in the area under litigation and ought not to swallow the material placed before it, line, hook and sinker as it were."

36. Submissions simply put means an evaluation of the evidence of each party and analysis of the law. It cannot be substituted for evidence. In addition, a party cannot establish its case through cross examination. This Court had occasion to so hold in the case of *Farmers Choice Company Limited v Dorleen Anyango Wasonga & another [2015]* eKLR, citing the Court of Appeal cases and stating:

> " It is worth noting that parties do not adduce evidence in cross-examination. Neither can cross examination be deemed to be a defence to a claim." "In the Court of Appeal decision of John Wainaina Kagwe Vs Hussein Dairy Limited Mombasa Court of Appeal 215/2010 per Githinji, Makhandia and Murgor JJA, the Court of Appeal was categorical that "answers in cross-examination cannot form a basis of a party's case or built a defence. They must tender evidence in support of the allegation." In Nandwa Vs Kenya Kazi Limited (1988) KLR 488 the Court of Appeal observed that: "In an action for negligence, the burden is always on the Plaintiff to prove the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the Plaintiff's favour unless the defendants' evidence provides some answer adequate to displace that inference."

37. The appellant blamed the trial court for finding that the appellant adduced no evidence despite the cross examination. A stated above, cross examination and answers derived therefrom could not form the basis of the appellant's case. Neither could the submissions. See *Daniel Toroitich Arap Moi*

& Another v Mwangi Stephen Murithi & Another (*supra*). Further in *Mary Njeri Murigi v Peter Macharia & Another [2016]* e KLR I stated, and I still reiterate that:

> " In addition, pleadings, answers, in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well-choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence."

38. I therefore find that albeit the appellant claimed that the trial court erred in failing to find the respondent liable for the accident or contributing to the accident because he left his motor vehicle unattended and that he parked at an undesignated area, I find that leaving a motor vehicle unattended is in itself not an offence. Section 66 of the *Traffic Act* only makes it an offence for unattended motor vehicles which are left with the engine running and quitting any vehicle without having taken due precautions against its moving along the road from its stationary position. This was not the case here. Neither was there evidence that the respondent's motor vehicle being unattended in any way contributed to the occurrence of the material accident whether by way of obstruction or otherwise. If anything, the evidence of PW3 which was uncontroverted was clear that the appellant's driver left his lane and drove onto a wrong lane and lost control thereby his motor vehicle falling off and landing on the respondent's car and had the respondent been inside that car, he would be history.

39. On parking at an undesignated area or place, I find that this in itself could not have contributed to the accident as the respondent did not park in the way of the appellant or other road users. There was no evidence that he obstructed any other road user from using that part of the road where he parked. The appellant did not adduce any evidence on whether its drive had any right of way in that area or that that is the place where its motor vehicle had the right to land hence the obstruction by the respondent.

40. For the above reasons, I find no basis for interfering with the trial court's finding on liability. I uphold it.

On Quantum

41. The appellant also faulted the trial court's award on quantum of damages on the grounds that the averred motor vehicle pre-accident value of Kshs. 510,000 by PW2 was unsupportable, speculative and appeared plucked from the air. It was submitted that there was no sale agreement on the cost price of the respondent's motor vehicle hence the pre accident value was not supported. The appellant further submitted that the salvage value of the motor vehicle of Kshs. 120,000 ought to have been deducted from the ascertained pre accident value of the said motor vehicle. Further, the appellant asserted that the assessors report was unauthenticated and therefore it had no probative value.

42. In response, the respondent submitted that the issue of sale agreement ought to have been raised by the appellant in the trial court and further that there was no evidence that he took the mangled wreckage of the accident motor vehicle but that the said wreckage was towed to Kondele Police Station and that the respondent was not laying claim on the salvage. PW2 denied that the report showed that the salvage value was Kshs. 120,000.

43. It is an established principle of law that that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).

44. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004]* 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

45. The plaintiff/ respondent herein adduced evidence to the effect that following the material accident, his motor vehicle was a complete write off and beyond any economic repair as the appellant's trailer fell on the said vehicle. The respondent subjected his motor vehicle to an assessment by Automobile Association of Kenya which produced a report that was produced by PW2 the assessor. The witness admitted that the report was not signed but that he was the author thereof and he even conceded making some errors which he personally corrected by hand on the total pre accident value of the motor vehicle in issue. The appellant did not object to the production of the assessment report which was produced as an exhibit. It did not produce an alternative assessment report on what it believed to be the correct assessment of the pre accident value of the respondent's motor vehicle.

46. It is trite that in civil cases, a party is expected to discharge the burden of proving his case on a balance of probabilities and not beyond reasonable doubt. To trash the respondent's evidence as unsubstantiated and unauthenticated in the circumstances of this case would be tantamount to asking the respondent to prove his case against the appellant beyond reasonable doubt.

47. The appellant also put up a spirited fight in this appeal claiming that the salvage value of kshs 120,000 should have been discounted. I have perused the trial court record on the assessment report. I find that on the last page of the Assessor's report, the assessor clearly stated in handwritten form that the pre accident value was kshs 510,000 and in typed form that the salvage would realize kshs 120,000. The figure of kshs 120,000 appear to have escapade the attention of the trial magistrate. I am in agreement with the appellant's counsel's submission on this that the pre accident value had to be discounted with the salvage value leaving Kshs 390,000. To that extent only, this appeal on quantum succeeds. Accordingly, I set aside the award of kshs 510,000 and substitute the same with kshs 390,000.

48. On the alleged non production of a sale agreement for the accident motor vehicle, this was anew matter being raised on appeal and in addition, there is no scientific evidence that a pre accident value would only be derived from the sale or purchase price since an independent valuation was done by the motor vehicle assessor who valued each part of the motor vehicle. I find the assertion by the appellant not merited and dismiss it.

49. In the end, I find that the respondent proved his case against the appellant on a balance of probabilities on liability at 100%. I however find merit in the challenge on the quantum of damages awarded being the pre-accident value of the damaged motor vehicle is kshs 510,000 less salvage value of kshs 120,000 balance kshs 390,000.

50. As for the other special damages, the same were pleaded by the respondent but not proven and the trial court rightly declined to grant them. I will not interfere with the same as there was no cross appeal.

51. The upshot of the above is that I find that the appeal partially succeeds on quantum of damages as stated above. The appeal against liability is found to be devoid of merit. It is hereby dismissed. The appeal against quantum of damages succeeds only to the extent that the award of kshs 510,000 pre accident value is hereby set aside and substituted with a sum of kshs 510,000 less Kshs 120,000 salvage value leaving a balance of kshs 390,000 plus interest thereon from date of filing suit in the lower court until payment in full.

52. As the appeal is only partially successful, I award costs of this appeal to the respondent assessed at Kshs 30,000.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF MAY, 2023

R.E. ABURILI

JUDGE