



**Yellow House Limited v Machira & another (Civil Appeal E311 of 2022)
[2023] KEHC 17521 (KLR) (Commercial and Tax) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E311 OF 2022**

DAS MAJANJA, J

MAY 19, 2023

BETWEEN

YELLOW HOUSE LIMITED APPELLANT

AND

JOHN PATRICK MACHIRA 1ST RESPONDENT

MAUREEN WANJIRU MACHIRA 2ND RESPONDENT

(eing an appeal from the Judgment and Decree of Hon. B. J. Ofisi, RM/Adjudicator delivered on 14th April 2022 at the Small Claims Court, Milimani in SCCC No. E560 of 2021)

JUDGMENT

1. This is an appeal from a judgment of the Small Claims Court dismissing the Appellant's suit claiming repair costs amounting to Kshs 184,472.00 following a road traffic accident that took place on February 21, 2019. The Appellant, as owner of motor vehicle registration number KCP 898Q, alleged that the 1st Respondent was driving negligently as he was driving too fast, changed lanes, failed to apply brakes and failed to slow down and or control motor vehicle registration number KCP 922U owned by him and the 2nd Respondent. The Respondents, in their Statement in Response to the Claim while admitting the accident, blamed the Appellant's driver for being negligent in driving too fast, carelessly and dangerously and changing lanes without noticing their motor vehicle.
2. At the hearing, the Appellant called three witnesses. PC Peter Ndungu (CW 1), a police officer. He admitted that he was not the investigating officer, was not at the scene and did not witness the accident. He produced the police abstract which showed that the Respondents' vehicle was to blame. Peter Mbugua (CW 2), a motor vehicle assessor, assessment the Appellant's motor vehicle and produced the report showing the extent of damage on the motor vehicle and Lawrence Kagicha Momanyi (CW 3),



an officer of Mayfair Insurance, who produced evidence of payment of repair costs. The 1st Respondent (RW 1) testified and he denied the accident. He stated that he and the 2nd Respondent had nothing to do with the accident.

3. In the judgment rendered on March 31, 2022, the Adjudicator came to the following conclusion:

This is a material damage claim. The claimant did not testify to prove negligence on the Respondent's part. The officer only confirmed that the motor vehicle which was blamed for the occurrence of the accident. The court is unable to decipher how the accident occurred. Consequently, I find the Claimant has failed to prove his claim to the required standard. It is dismissed with costs to the Respondents.

4. The thrust of the appeal as set out in the Memorandum of Appeal dated May 13, 2022 is that the Adjudicator failed to find that the Appellant had proved its case on a balance of probabilities. That the trial court ignored the pleadings and evidence and came to an erroneous conclusion. Both parties have filed written submission coupled with authorities on the issue of evidence and burden of proof which I have considered.

5. The jurisdiction of this court on an appeal from the Small Claims Court is circumscribed by section 38(1) of the *Small Claims Court Act*, 2016. The appeal is limited to matters of law only. Accordingly, the court is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).

6. The trial magistrate came to a reasonable conclusion supported by the evidence on record as the Appellant did not call any direct witness to prove the particulars of negligence pleaded in the Statement of Claim. There was nothing in the totality of the evidence that would assist the court infer that the Respondents were negligent as alleged or at all bearing in mind that it is the Appellant who bore the burden of proof to prove its case. The facts of this case are similar to what the court decided in *Patrick Muhia Giathi v Joseph Kingiri Mwangi and Another* KBU HCCA NO 147 OF 2017 [2020] eKLR as follows:

(7) PW 2 and PW 3 did not witness the accident hence they could not give direct evidence on how it happened. In other words, there was no direct evidence to support the particulars of negligence pleaded by the appellant. For example, there is no evidence that the vehicle was being driven too fast or that it failed to keep a proper look out for the other road users or that it failed to apply brakes in time or that it failed to slow down, swerve or in any way avoid the accident. PW 3 was not the investigating officer and he produced the police abstract which confirmed the particulars of the accident. He could not tell how the accident happened and even if he did, his testimony was inadmissible hearsay.

(8) The appellant advanced the argument that the police abstract supported its case as it stated that the driver of motor vehicle registration number KBH 542S was to blame. The question then is whether the contents of a police abstract constitute proof of negligence. As the name suggests, a police abstract is an abstract or summary of information contained in the police record. It contains factual matter like the parties involved in an accident, the date and time of accident, whether a party has been charged, person injured and such information. A statement contained therein that a party is to blame is a statement of opinion as it is based on the writer's perception of a certain set of facts. It is therefore inadmissible unless it is admitted under section 48 of the *Evidence Act*. Moreover, the set of facts which it is based on must be proved. In other words,



the appellant through PW 2 did not show or establish any facts upon which the court could conclude that indeed the respondents were to blame.

- (9) Finally, the appellant did not lay before the court any fact which would prima facie lead to an inference of negligence. For example, PW2 did not produce any sketch plans, he did not tell the court the relative position of the vehicles where the accident took place, the nature and extent of damage on both vehicles and any other facts upon which the court could infer negligence.
7. In short, the Appellant did not place before the court any fact upon which the Adjudicator could conclude that the Respondents were negligent. Any reasonable tribunal confronted with the same facts and circumstances would probably come to the same conclusion hence there is no ground for this court to intervene.
8. The appeal is dismissed. The Appellant shall pay costs of the appeal assessed at Kshs 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Manyara instructed by Eboso and Company Advocates for the Appellant.

Mr Keiro instructed by Kamotho Njomo and Company Advocates for the Respondents.

