



Star Renovators and Decorators & another v Jihan Freighters Limited (Civil Appeal 170 of 2016) [2023] KEHC 18578 (KLR) (Civ) (13 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 170 OF 2016

AN ONGERI, J

JUNE 13, 2023

BETWEEN

STAR RENOVATORS AND DECORATORS 1ST APPELLANT

SUMAC CREDIT LIMITED 2ND APPELLANT

AND

JIHAN FREIGHTERS LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Rachel Ngetich
(CM) in Milimani CMCC no. 5047 of 2007 delivered on 10/3/2016)*

JUDGMENT

1. The respondent filed Milimani CMCC No 5647 against the appellant seeking special damages of Kshs 2,627,097.25 in respect of repair damages to respondents vehicle registration No KAQ 585G when it was involved in an accident with 1st appellant's motor vehicle registration No KAK 124C.
2. The evidence adduced before the trial court in summary the respondent's motor vehicle was being driven by Peter Ngeta (DW 1) when KAQ 585G veered to his side of the road and the collusion occurred.
3. The trial court found that the accident occurred on the left side where motor vehicle registration KAK 124C was being driven and apportioned liability at 20:80 with the appellant bearing 80%.
4. The appellant has now appealed to this court against liability and quantum of damages on the following grounds;
 - a. The learned trial magistrate erred in fact and in law by failing to give concise statements of points of determination and reasons for her judgment pronounced on March 10, 2016.



- b. The learned trial magistrate erred in fact and in law in its holding disregarding that the burden of proof negligence and in particular negligence pleaded in the plaint which the respondent failed to prove.
 - c. The learned trial magistrate erred in law and in fact by disregarding and ignoring the testimony and evidence adduced by the appellant's witnesses.
 - d. The learned trial magistrate erred in law and in fact in disregarding the evidence adduced to prove the special damages and instead of assessing the actual costs and repairs, wrongly relied upon the assessor's report to award damages.
 - e. The learned trial magistrate failed to appreciate the totality of the evidence before her and erred in dismissing the evidence of the appellants and submissions on behalf of the appellant and in particular submissions on the actual costs of spares and repairs.
 - f. The learned trial magistrate erred in law and in fact in apportioning liability and awarding the Respondent only 20% contribution.
 - g. The damages awarded by the learned trial magistrate are excessive, unrealistic and unreasonable.
5. The parties filed written submissions in the appeal as follows; the 1st appellant submitted that, it is a requirement of the *Civil Procedure Rules*, and in particular Order 21 Rule 4 that Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. That a reading of the trial Magistrate's judgment dated March 10, 2016 clearly fails on the above and whereas brevity may still achieve the purpose, such brevity should not absolve the Trial magistrate from the express requirements.
 6. The appellant argued that, it is a well-established principle of law that he who alleges must prove and it is clear that the burden of proof laid with the respondent to prove the allegations of negligence. That it was not enough for the respondents to merely state that the appellants were negligent and proceed to give particulars of the said negligence. The Respondent in its final submissions alleged that the 1st Appellant's motor vehicle was being driven at high speed. However, the Court records show that the Respondent did not tender any evidence in support of this allegation. On the other hand, the Appellants' First witness (DW1) was particular as to the exact speed that the motor vehicle was being driven at which will demonstrate that the same was within the prescribed maximum limit. That if indeed the 1st Appellants' driver had been driving recklessly and at high speed, he ought to have been charged in a Court of law and this was however not done. That therefore causation of the accident by the 1st Appellant was never established by the Respondent neither was negligence demonstrated and/or established.
 7. The 1st appellant submitted that Respondent claimed a total of Kshs 2,627,097.25 in special damages. However, the total amount furnished by the Respondent in terms of receipts and invoices only summed up to Kshs 1,402,647.25. It was therefore its submission that this honorable court reconsider the evidence on record and consider the only proved special damages.
 8. On apportionment of liability, it was the 1st appellant's submission that the respondent did not prove its case on a balance of probabilities and therefore the trial court ought not to have apportioned liability.
 9. The respondent submitted that the learned trial magistrate stated clearly the points of determination as provided for under Order 21 rule 4 of the Civil procedure rules. That the trial magistrate correctly lined up two issues for determination made an analysis and came to the correct determination.



10. It was submitted that the trial magistrate was able establish which party was negligent based on the evidence that was tendered before the trial court. The learned trial magistrate had already apportioned liability to the parties in the accident. This is self-explanatory that based on the evidence and its assessment, the Appellants had a duty of care which was apportioned at 80%, whereas the respondent was apportioned 20% for contributory negligence.
11. The respondent on special damages submitted that the court was carefully guided by the assessor's report which provided the cost incurred in repairing the Respondent's motor vehicle. Further, the receipts that were tendered by the Respondent were sufficient enough for the Court to assess and award damages. It is on record that the sum of Kshs 2,101,667.80 was pleaded and the receipts were filed in the Court and proven at the hearing of the case.
12. On apportionment of liability the respondent submitted that the trial magistrate relied on the testimony of PW1 (police officer) who apportioned liability to the respondent during the hearing. That the court analyzed the testimony of PW1 and was satisfied that that the allegations/submissions before the court was not supported by any documentary evidence.
 1. This being the first appellate court, the duty of this court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the trial court's findings. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held;

“ An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.”
13. The same principles apply in the High court in its appellate capacity while doing appeals from the lower courts.
14. The issues for determination are as follows;
 - i. Whether the appellant's driver was liable for the accident.
 - ii. Whether the respondent proved special damages.
15. On the issue of liability, the trial court apportioned liability at 80:20 against the Respondent in favor of Appellant.
16. The appellant said his driver (DW 2) said it was the respondent's motor vehicle which veered to his lane.
17. The trial court however found that the accident occurred on the respondent's side of the road.
18. I find that the trial court was right in liability at 80:20 in favor of the respondent against the appellant.
19. On the issue of quantum of damages, the law requires that the same be specifically pleaded and proved and this was done in the current case.
20. I find that the special damages herein were specifically pleaded and proved.



21. I find that the appeal herein lacks in merit and the same is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
13TH DAY OF JUNE, 2023.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the 1st Appellant

.....for the 2nd Appellant

..... for the Respondent

