



REPUBLIC OF KENYA



Wakenda v Kilesi (Civil Appeal 1 of 2022) [2023] KEHC 20738 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK**

CIVIL APPEAL 1 OF 2022

F GIKONYO, J

JULY 20, 2023

BETWEEN

PAUL MWENDA NJUGUNA WAKENDA APPELLANT

AND

DAVID KILESI RESPONDENT

*(Being an appeal from the judgment of Hon T.A.Sitati (S.R.M)
Delivered on 4th March 2024 in Narok SRMCC No. 170 of 2008)*

JUDGMENT

Impugned Judgment

1. In its judgment, the trial court on 4/3/2014 made the following awards: -
 - a. special damages Kshs. 10,000/=
 - b. Damage to motor vehicle Kshs. 1,681,420/=
 - c. Interest on 1 and 2 above from the date of filing till payment in full rate is 12% court rates.
2. In accordance with the memorandum of appeal dated 17/10/2019, this appeal challenges the liability and quantum of damages awarded above.

The plaint

3. The respondent in a plaint dated 27/11/2008 sought for;
 - a. Special damages for Kshs. 1,100/=
 - b. Damages in terms of mechanical charge
 - c. Costs of the suit



- d. Interest at court

Appellant's Case

4. The appellant did not call any witnesses.

Appellant's Submissions.

5. The Appellant submitted that the trial court wrongly awarded special damages notwithstanding the fact that the same was not pleaded and strictly proven. The appellant relied on the case of Swalleh C Kariuki & another v Violet Owiso Okuyu [2021] eKLR, Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR, Rukia Abdi Manya & another v officer Commanding Police Station Habaswein & Another [2020] eKLR.
6. The appellant submitted that 100% liability failed to consider the respondents' contribution when the circumstances of the case held that the accident was a head-on collision around a sharp bend. The appellant relied on the case of Simon Waweru Mugo v Alice Mwangoli Munyao [2020] eKLR, Eunice Wayua Munyao v Mutilu Beatrice & 3 others [2017] eKLR.
7. The appellant submitted that the trial court misdirected itself on the issue of vicarious liability notwithstanding the nexus between the appellant and the driver. The appellant relied on the cases of Ndungu Vs Coast Bus Company Ltd V Ziaudin [1987]eKLR.
8. The appellant prayed that the appeal be allowed with costs.

The Respondent's Case.

9. The respondent testified and called one witness.

Respondent's Submissions

10. The respondent submitted that the trial court considered and applied the correct principles in determining the quantum and arrived at a fair and reasonable award.
11. The respondent submitted that the appellant stated the particulars of damage to the motor vehicle and produced exhibits on the same.
12. The respondent submitted that the appellant did not call any witnesses to rebut the testimony of the plaintiff.
13. The respondent prayed that this appeal be dismissed in its entirety with costs to the respondents.

Analysis and Determination

Duty of court

14. As the first appellate court, the court should evaluate the evidence on the record and make its own determination except having in mind that it did not have the advantage of hearing witnesses. See: Selle & Another v Associated Motor Board Company Ltd [1968] EA 123.

Issues

15. Arising from the pleadings, evidence and submissions of parties are the following issues for determination:



- a. Liability; who is to blame for the accident? Is this a case of contributory negligence?
- b. Damages: Whether the trial court adopted wrong principles in awarding damages.

Of Liability

16. Liability for tortious acts or breach of statutory duty is determined on the basis of the evidence and facts of the case, and the applicable law. The burden of proof on balance of probabilities falls on the person alleging; in this case, the Respondent who alleged negligence or breach of statutory duty on the part of the Appellant. See Sections 107 and 108 of the *Evidence Act*.
17. What evidence was adduced? And does it prove to the required standard that the appellant is liable for the damages to the respondent's vehicle?
18. The respondent testified as PW2 that the appellant's driver was driving a motor vehicle registration KAD 887L Isuzu lorry and rammed into a Toyota land cruiser KAC 226R head-on while driving at a high speed around a sharp bend while driving on the wrong lane. The respondent produced a police abstract of 7/4/2008, a certificate of vehicle examination dated 4/4/2008, a vehicle inspection report dated 18/4/2008, and copies of proceedings in traffic case no. 88/2008 as P Exh 6,7,8, and 9.
19. In the traffic case, the appellant's driver, Eliud Gachoka Njenga was charged, tried, found guilty, and fined Kshs. 5,000/= in default 3 months imprisonment for the offence of careless driving under section 49(1) of the *traffic act*.
20. According to the respondent, the appellant's lorry was driven at a high speed around a sharp bend in the wrong lane- the respondent's driver's lane. Further, in traffic case no. 88 of 2008, the appellant's driver was found guilty of careless driving.
21. An evaluation of the evidence adduced show that; i) the appellant's driver drove the vehicle at high speed; ii) at a sharp corner; iii) on the wrong lane; and iv) collided with the respondent's vehicle who was on his correct lane. When put in a proper perspective and appreciation of analysis, the evidence adduced yields two conclusions; i) that, appellant's driver was wholly to blame for the accident; and ii) there is no evidence of or any basis or justification to infer contributory negligence as the evidence shows otherwise.
22. As a consequence, the court finds that the respondent proved on a balance of probabilities that the appellant's driver was wholly to blame for the accident. Therefore, the trial magistrate did not err in his finding thereto.

Of vicarious liability

23. From the record, there was no objection to the non-joinder of the appellant's driver to the proceedings before the trial court. Although the respondent did not also seek to join the said driver to the suit, judicial authorities have proclaimed that failure to join the driver of a vehicle is not fatal to the proceedings (Ndungu v Coast Bus Company Limited[2000] E.A. 462,).
24. In the upshot, I find that the trial magistrate did not err in holding that the appellant was vicariously liable at 100% for the accident. The appeal on liability fails.



Quantum of damages

25. The appellate court ought not to interfere with the assessment of damages by the trial court except where the trial magistrate acted on wrong principles of law or made an erroneous estimate of the damages (Butt v Khan [1981] KLR 349)
26. The law on pleading and proof of special damages is: ‘Special damages must not only be specifically claimed (pleaded) but also strictly proved...and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.’ (Court of Appeal in Hahn v Singh, Civil Appeal No. 42 of 1983 [185] KLR 716).
27. Emphasis on strict proof of special damages is that; ‘... the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.’ (Court of Appeal, Jackson K Kiptoo v The Hon Attorney General [2009] KLR 657).
28. The respondent pleaded in his plaint, ‘special damages of Kshs. 1,100 and damages on mechanical charges’.
29. PW1- LT COL.(RTD) George Kimeria Ndungu testified that he was a motor vehicle assessor at Kinteck Auto Service Nairobi. He assessed the motor vehicle registration No. KAC226R Toyota Land cruiser. He prepared a report dated 23/4/2008. He concluded in his professional assessment that the vehicle’s total cost of repair was Kshs. 1,681,420.20. He produced a receipt of assessment fees, an invoice of Kshs. 10,000 dated 23/4/12, photographs taken of the damaged motor vehicle, report of damage assessment dated 23/4/2008, and summary report as P Exh 1,2,3,4, and 5 respectively.
30. The respondent produced a police abstract of 7/4/2008, a certificate of vehicle examination dated 4/4/2008, a vehicle inspection report dated 18/4/2008, and copies of proceedings in traffic case no. 88/2008 as P Exh 6,7,8, and 9.
31. Accordingly, mechanical repairs as special damages were specifically pleaded and strictly proved in this case. (Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992).
32. Therefore, the court finds that special damages were specifically pleaded and strictly proved.
33. The appeal on quantum therefore fails.
34. In the upshot, this appeal is dismissed with costs to the respondent.
35. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
20TH DAY OF JULY, 2023**

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F.GIKONYO

JUDGE

In the presence of:

1. Mr Baraka for the appellant
2. Mr Onduso for the respondent



3. Kasaso - CA

