



**Rupesh v Day Break Limited (Civil Appeal E432 of 2023)
[2024] KEHC 12026 (KLR) (Civ) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12026 (KLR)

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

CIVIL

CIVIL APPEAL E432 OF 2023

JM NANG'EA, J

OCTOBER 8, 2024

BETWEEN

CHAUHAN RUPESH APPELLANT

AND

THE DAY BREAK LIMITED RESPONDENT

*(Being an appeal from the Judgement of the Chief Magistrate's
Court – Milimani Commercial Courts at Nairobi (Hon. S.A.
Opande- PM) delivered on 5th May 2023 CMCC NO. 5256 of 2015.)*

JUDGMENT

Grounds of Appeal and reliefs sought

1. The appellant herein is challenging the said learned trial magistrate's judgement in which he granted the respondent Kshs. 830,547 in material claim damages together with the costs of the suit and interest from the date of filing suit.
2. The appellant's Grounds of Appeal as per Memorandum of Appeal dated 26/5/2023 may be condensed as hereunder:
 - a. That the learned trial magistrate erred in law and fact by failing to appreciate the evidence adduced by both parties and thereby wrongly found that it was the appellant' motor vehicle registration number KBV 008 B (Land Rover Station Wagon) , blue in colour, that knocked the respondent' motor vehicle.

And



- b. That the learned trial magistrate erred in law and fact by finding and holding the appellant wholly liable for the subject accident against the weight of evidence.
3. The appellant therefore prays that the appeal be allowed and the trial court's judgement and decree set aside and substituted with an order dismissing the suit with costs to him as incurred in the appeal as well as in the lower court.

The parties' pleadings and evidence in the lower court.

4. The summary of the case before the trial court is that the respondent sued the appellant seeking judgement in the above stated sum of Kshs. 830,547 as compensation for alleged damage to the former's said motor vehicle registration number KBM 096 H. The respondent also sought the costs of the suit. The appellant's motor vehicle registration number KBV 008 B Land Rover Station Wagon (hereinafter referred to as ' the Land Rover'") is said to have rammmed into the side of the respondent's motor vehicle owing to negligent driving resulting in extensive damage thereto. The respondent's insurer (First Assurance Company Limited) fully compensated it for the loss and the suit was brought under the insurance principle of subrogation to indemnify the insurer.
5. The appellant traversed all the material averments in the suit in his defence to the claim. He contended that his vehicle registration number KBV 008 B (Land Rover Station Wagon), blue in colour, is designed as a Rally Car for use exclusively for Motor Sports off road and was never at the scene of the alleged accident on Thika Road, Nairobi, on the material date. It was pointed out that the respondent described the vehicle involved in the accident as a "Nissan Hard Body" and therefore it could not have been his vehicle which is a Station Wagon.
6. The respondent called a Motor Vehicles Assessor (PW1), its Insurer's Claims Controller (PW2), a police officer (PW3) and an Insurance Fraud Investigator (PW4). PW1 of Integrated Loss Assessors told the court that First Assurance Company Limited instructed him to assess its insured client's motor vehicle registration number KBM 096 H reported to have collided with another vehicle. The witness described the vehicle's colour as brown. No traces of paint showing the colour of the second vehicle was left on the vehicle he was asked to assess. PW1 opined that the vehicle's repair costs were Ksh. 820,620.42. He charged Ksh. 1,840 and Ksh. 6,400 in inspection and assessment fees respectively.
7. PW2 confirmed that they instructed the Loss Assessors and paid them for their services. The loss assessor's reports before and after the vehicle repair were produced in evidence. While the vehicle was undergoing repairs by Dekker Auto Clinic Limited, the insurer hired another vehicle from Panaroma Car Hire & Tours Limited for use by its client. The insurer claimed to have paid the car hire charges of Ksh. 39,000 for a period of 10 days the respondent used the car.
8. PW2 further testified that a Nissan Hard Body vehicle hit the side of motor vehicle registration number KBM 096 H. When the respondent's advocate showed him records of ownership of the Land Rover alleged to have knocked the vehicle, he confirmed the Land Rover's body type as a Station Wagon. The witness acknowledged that there is a difference between a Land Rover Station Wagon and a Hard Body shape.
9. PW3 stated that the accident was reported at Kasarani Police Station Traffic Base on 23/7/2014 as a "hit and run" accident by one Charles Muthuri. According to PW3, the Land Rover's driver was to blame for over speeding and failing to stop after the collision.
10. On his part PW4 of Defend & Detect (K) Limited told the court that said Insurance Company asked them to investigate the ownership of the Land Rover. He conducted search with the Registrar of motor vehicles and established the vehicle's registration particulars as KBV 008 B Station Wagon, blue in



colour. The owner of the vehicle was identified as the appellant herein while Vibro Kenya Limited was the “Third Party registered owner”. The Investigator tendered his report dated 20/8/2014 in evidence.

11. The parties filed written submissions vide the court’s e-filing platform which I have perused against the record of this appeal.

Guiding Legal Principles.

12. It is trite law that the appellate court can only interfere with the findings and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co. (1968) EA 123*. The Court of Appeal for East Africa in *Peters V. Sunday Post Limited [1958] EA 424* underscored the same principles delivering itself thus:

- i. i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court 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.”

Analysis and Determination.

13. Learned Counsel for the appellant submit that the trial court erred by faulting their client for not producing records of ownership of motor vehicle registration number KBV 008 B yet the same records were tendered by the respondent and show that the accident vehicle was a Land Rover. Counsel therefore maintain that the respondent failed to discharge its burden of proof of the appellant’s liability for the accident in question contrary to the provisions of sections 107 and 108 of the *Evidence Act*.
14. On their part the respondent’s advocates submit that the trial court rightly found the appellant liable. While acknowledging that its driver or any of its officials didn’t testify, the respondent is of the opinion that it didn’t have to itself give evidence and the legal submissions of its legal Counsel were sufficient. In support of this position reliance is placed on the judicial determination in *Mombasa CA C A No. 57 of 1996 (Julianne Ulrike Stamm V. Tiwi Beach Hotel Ltd)*.

Determination.

15. The issue for determination is whether the respondent proved the appellant’s liability on a balance of probability. In entering judgement for the respondent the learned trial magistrate faulted the appellant inter alia for not exhibiting records of registration of his vehicle in a bid to prove his claim that the vehicle is a Land Rover. The trial court is also to be faulted for adjudging the appellant liable in negligence in the absence of evidence of eye witnesses including that of the respondent’s own witness.
16. The case law supra the respondent cites in this regard is distinguishable in the circumstances of this case in which the motor vehicle registration records produced by the respondent seem to absolve the appellant. It is further observed that the only evidence the respondent relied upon to prove negligence



is that of a police officer who didn't witness the accident and does not appear to have investigated the same. The respondent did not therefore discharge the burden of proof it shoulders by dint of sections 107, 108 and 109 of the *Evidence Act*. In *Eastern Produce (K) Limited - Chemomi Tea Estate V. Bonface Shoya* (2018) eKLR it was observed that "when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability is more probable than the other." The respondent's case was not established on a balance of probability in the circumstances of this case.

17. In the result, the appeal succeeds. The lower court's judgement granting the respondent the sum of Kshs. 830, 547 with costs and interest is set aside and substituted with an order dismissing the suit. The appellant will have the costs of this appeal as well as those incurred in the lower court.
18. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 8TH DAY OF OCTOBER 2024 IN THE PRESENCE OF:

The Appellant's Advocate,

The Respondent's Advocate,

The Court Assistant,

J. M NANG'EA, JUDGE.

