



**Kirui v Nyambura & 2 others (Civil Appeal E008 of 2024)
[2024] KEHC 15518 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E008 OF 2024
SM GITHINJI, J
DECEMBER 5, 2024**

BETWEEN

KENNEDY KIPRONO KIRUI APPELLANT

AND

PERIS MUTHONI NYAMBURA 1ST RESPONDENT

MWONGELI MWAU KITHOME 2ND RESPONDENT

JOSPHAT MUCHIRI 3RD RESPONDENT

*(Being an Appeal against the Judgment and decree of the Honourable D.
Wasike-PM, delivered on 19.12.2023 in Kilifi SPMCC No. 195 of 2023)*

JUDGMENT

Representations:

Nyambura Kamau Advocates for the Appellant

N/A for the Respondents

1. The appeal herein arises from the judgment of the trial court at Kilifi in Civil Suit No 195 of 2023. In the said suit the Appellant moved the court vide a plaint filed on May, 5th 2023, in which he sought damages against the appellant following a road traffic accident that occurred in July 23, 2020.
2. The Appellant aggrieved by the Judgment of the learned Principal Magistrate in the said suit, delivered on 19th December, 2023 set forth the following grounds in the Memorandum of appeal dated 22nd January, 2024;



1. That the Learned Magistrate erred both in fact and in law by failing to award special damages for motor vehicle repair cost whereas the Appellant pleaded and proved them specifically by producing the motor vehicle assessment report.
 2. That the Learned Magistrate erred both in fact and in law by making a finding that the Appellant is not entitled to the motor vehicle repair costs because the Appellant did not produce any receipts for the repairs nor any certificate of satisfaction to show that the repairs have been done to the motor vehicle totally ignoring the motor vehicle assessment report on record.
 3. That the Learned Magistrate erred both in fact and in law by failing to consider the appellant's submissions.
 4. That the Learned Magistrate erred both in fact and in law by failing to consider the authorities cited by the Appellant with regards to the Plaintiff's burden of proving special damages in a material damage claim.
3. The Appellant sought to have the appeal allowed and the Judgment of 19th December, 2023 be set aside partially and be substituted with an order awarding special damages for the motor vehicle registration number KCA 894K Nissan Caravan repair cost of Kshs. 423,396.00. Further, that the costs of the appeal be awarded to the Appellant.
 4. Despite service both in the trial court and this court, the Respondent did not enter appearance and the matter proceeded undefended.

Litigation

5. PW1 Kennedy Kiprono Kirui told the court that he recorded a statement dated 9th May, 2023 which was adopted as his evidence in chief. He further stated that he is the registered owner of motor vehicle registration number KCA 894K Nissan Caravan which he had invested in the matatu business. His testimony is that he had employed one Cleophas Kipkoskei Rotich as the driver.
6. He stated that on 23rd July, 2020, he received a call informing him that his motor vehicle had been involved in a road accident. That he never received any communication from his driver whom he later came to learn was severely injured and was admitted at Kilifi District Hospital. On following up on the accident at the Kilifi Police Station, he was informed that his motor vehicle was involved in an accident with motor vehicle registration number KAM 176T whose driver was blamed for the accident and charged for careless driving.
7. It is his testimony that his motor vehicle was towed to Kilifi Police Station; he paid for the towing charges and the motor vehicle was inspected after which he was allowed to remove it from the police station to a garage. That as a result of the accident the motor vehicle was extensively damaged and to date, he has not been able to repair it since the estimated cost of repairs is too high. Further, that the motor vehicle has not resumed operations and due to the accident he has since lost his source of income from the matatu business where he earned an average of Kshs. 4,000/- every day.
8. The Plaintiff produced the following documents;
 - Police Abstract Plaintiff Exhibit No. 1
 - Certificate of Examination Plaintiff Exhibit No.2
 - Motor vehicle Certificate Plaintiff Exhibit No. 3



Assessment Report Plaintiff Exhibit No. 4
Motor Vehicle invoice Plaintiff Exhibit No.5
Receipt for Kshs. 5,000.00 Plaintiff Exhibit No. 6
Receipt for kshs. 15,000.00 Plaintiff Exhibit No. 7
Receipt for Kshs. 20,000.00 Plaintiff Exhibit No. 8
Receipt for kshs. 50,000.00 Plaintiff Exhibit No. 9
Discharge summary Plaintiff Exhibit No. 10
Receipts from Kilifi Hospital Plaintiff Exhibit No. 11
Demand letter and statutory notice Plaintiff Exhibit No. 11A-11B

Appellant's Submissions

9. The appellant through the firm of Nyambura Kamau Advocates filed submissions dated 25th October, 2024. Counsel submitted that the trial court erred both in fact and in law by failing to award special damages for motor vehicle repair costs whereas the Appellant pleaded and proved them specifically by producing the motor vehicle assessment report. On this heading she averred that special damages ought to be specifically pleaded and strictly proved. According to her, the appellant specifically pleaded the claim for the vehicle repair costs in paragraph 5 of the Plaint and that he met the burden of strictly proving his claim by producing a motor vehicle assessment report as Exhibit 4 of the Appellant's documents.
10. It is her further submission that the burden of proving a material damage claim is simply by the party claiming proving loss of the asset claimed to have been damaged. The principle was affirmed in the case of Mohammed Ali & Another v Sagoo Radiators Limited (2013) eKLR. She submitted that the motor vehicle assessment report produced as evidence contained a thorough examination of the vehicle's condition after the accident. That the said report also provided a detailed estimate of the costs necessary to restore the appellant's vehicle to its pre-accident condition which was assessed by a certified loss assessor at Kshs. 423,396.00.
11. On the 2nd Ground where the learned Magistrate allegedly erred in finding that the Appellant is not entitled to the motor vehicle repair costs, counsel submitted that the appellant testified that he had not carried out repairs on the matatu which had sustained extensive damage. That the Appellant did not produce receipts for repair but produced an assessment report prepared by a certified loss assessor giving detailed and credible evidence, outlining the necessary repairs and associated costs. In her view, the trial magistrate's requirement for repair receipts or a certificate of satisfaction was an error. Further, that the requirement for receipts or a certificate of satisfaction primarily applies when actual expenses have been incurred. It is her submission that special damages, particularly for assessment-based repair costs, do not necessitate that actual repairs be completed for a claim to be valid. She relied on the case of Silas Mutua Mberia v Muthoni Njue Veronica (2021) eKLR.

Analysis and Determination

12. his being a first appeal the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.



13. In the case of *Selle & another vs Associated Motor Boat Co. Ltd* [1968] EA the court held as follows:

...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

14. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions by counsel. In my view the only issue for determination is whether the trial court erred in failing to award the motor vehicle repair costs despite production of the motor vehicle assessment report in evidence.

15. In my view, the crux of a material damage claim is to reinstate the asset lost or damaged, in this instance motor vehicle KCA 894K, Nissan Matatu which was damaged due to the alleged negligent actions on the part of the Respondents, to close to the state it was before the accident. Had it not been for the accident, the Appellant would have continued with his matatu business to the best of his ability. The Appellant thus moved the Court for an award of Kshs 423,396/- being the value of the damage to the motor vehicle as per the assessment report. The principle of compensation calls on a negligent party, to pay a sum of money which will put the party who has suffered loss in the same position he was before loss.

16. My analysis reveals that; PW1 testified that after the accident, the Motor vehicle was assessed and an assessment Report prepared which was produced in evidence as Plaintiff Exhibit No. 4. The Report provides a detailed estimate of the costs necessary to restore the appellant's vehicle to its pre-accident condition, which was assessed by a certified loss assessor at Kshs. 423,396.00/=.

17. The Appellant herein was only required to show the extent of the damage on his motor vehicle and what it would cost to restore the motor vehicle to as near as possible the condition it was in before the damage complained of. The Appellant did so by way of an assessment report and the said report was produced in evidence. No report to the contrary was filed by the Respondents thus the report was unchallenged and uncontroverted. Why then did the trial Court reject the findings of the report?

18. In HCA No. 154 of 2005 *Nkuene Dairy Farmer Co-operative Society Ltd -vs- Ngacha Ndeiya*(2010) eKLR the court held;

special damages in a material damage claim need not be shown to have actually been incurred, that the claimant is only required to show the extent of damage and what would cost to restore the damaged item as near as possible to the condition it was before the accident."

19. The fact is that the motor vehicle as a result of the said accident suffered damage estimated at Kshs. 423,396.00/=. The vehicle had not been repaired and payment receipts were not therefore available. It needed not be repaired for the Plaintiff to be entitled to compensation for the loss. The damage or loss had been ascertained and that is all that matters. It was therefore specifically pleaded and proved. I therefore find the appeal merited and is allowed as prayed.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI



JUDGE

In the Presence of; -

1. Ms Kamau for the Appellant
2. Respondents absent

