

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. E015 OF 2025

DANSON MWANDOTO.....

APPELLANT

=VERSUS=

KENNEDY

WAMBUA

WAMARIA....

.....RESPONDENT

(Being an appeal from the Judgment of Hon. D. Wangeci (PM)

in Voi CMCC No. 119 of 2007 delivered on 28th April 2022)

JUDGMENT

1. The Appellant **DANSON MWANDOTO** was the Plaintiff in Voi CMCC No. 119 of 2007 where he sued the Respondent **KENNEDY WAMBUA WAMARIA** seeking special damages in respect of material damages to the Appellant's motor vehicle registration No. KAT 512L.
2. The cause of action arose out of a road traffic accident that occurred on 18th December 2006 when the Appellant's motor vehicle registration KAT 512L Toyota Hilux was knocked by the Respondent's motor vehicle registration No. KAH 517A Mitsubishi Pajero.

3. The Appellant in a plaint dated 17th May 2007 filed in court on 5th October 2007 averred that the Respondent's motor vehicle registration No. KAH 517A Mitsubishi Pajero was so negligently driven that it collided with the Appellant's motor vehicle registration No. KAT 512L Toyota Hilux.

4. The Appellant's motor vehicle was declared a write off and that he suffered loss and damages as follows:-

(i) The pre-accident value of the motor vehicle
Kshs.400,000/=

(ii) Assessor's fees **Kshs.**
5,800/=

(iii) Towing charges to Macknon Police Station **Kshs.**
3,000/=

(iv) Towing charges to Voi Police Station **Kshs.**
15,000/=

(v) Hiring alternative transport from Mombasa
to Werugha **Kshs.**
225,000/=

Total **Kshs.**
678,800/=

5. The evidence of the Appellant was that the Respondent's motor vehicle was overtaking 2 trailers when the accident occurred.
6. The Respondent's testimony was that his driver had stopped on the side of the road when the Appellant's motor vehicle which was pushed off the road hit the Respondent's motor vehicle on the passenger door.
7. The trial court found that the Appellant did not prove his case to the required standard and dismissed the Appellant's suit.
8. The trial court further said that had the Appellant proved his case he would have been awarded special damages of Kshs. 145,800/=.
9. The Appellant has appealed against the Judgment on the following grounds:-
 - (i) **The learned Magistrate erred both in fact and law by holding that the Defendant was not liable for the accident in the face of the facts and evidence on record.**
 - (ii) **The learned Magistrate erred in fact and in law by failing to award the Appellant herein for a material**

damage claim even after he had proved his case to the required standards.

- (iii) The learned Magistrate erred in fact and in law in dismissing the Appellant's claim when the same being a material damage claim and especially for special damages even after the same was sufficiently proven.**
- (iv) The learned Magistrate erred in fact and in law in disregarding the Appellants strong case even after he had produced sufficient evidence as to the costs of repair/damage.**
- (v) The learned Magistrate erred in fact and in law in disregarding the Appellant's case even after he produced evidence of the loss of user.**
- (vi) The learned Magistrate erred in fact and in law in concluding that the Defendant/Respondent was not liable for the damages caused upon the Appellant.**
- (vii) The learned Magistrate's finding was not supported by evidence on record and no sufficient reasons for her finding were given.**

10. The parties filed written submissions as follows:-

11. The appellant submitted that this appeal challenges the trial court's dismissal of a negligence claim arising from a motor vehicle accident. The Appellant argues that the trial magistrate erred in both the findings on liability and the award for damages.
12. The Appellant contends that the Plaintiff's case on negligence was established on a balance of probabilities. A pivotal point is the admission by the Respondent's witness that their driver was convicted and fined for the traffic offence of careless driving in a criminal court.
13. This conviction, under Section 17A of the Evidence Act, is asserted to be conclusive proof of negligence in the civil suit, as the standard of proof in a criminal case is higher. The trial court's failure to accord this evidence due weight is presented as a fundamental error.
14. Further, the Appellant argues that the trial court misdirected itself by failing to properly analyze the pleaded particulars of negligence and the causal link between the Respondent's actions and the accident.
15. The Respondent's own testimony revealed that his driver embarked on an unsafe overtaking maneuver, misjudging the number of lorries and finding himself trapped on the wrong side of the road—the Appellant's lane.

16. The Appellant invokes the "but for" test, asserting that but for this careless overtaking, the collision would not have occurred.
17. The Appellant's version of events, where he swerved off and back onto the road in a futile attempt to avoid the Respondent's vehicle, is presented as more plausible and consistent with the evidence than the Respondent's claim of being stationary off the road at the time of impact.
18. Regarding quantum, the Appellant submits that the trial court erred in dismissing the claim for loss of user.
19. It is argued that while specific receipts for Kshs. 225,000 were not produced, this does not extinguish the claim.
20. Citing precedent, the Appellant emphasizes that a profit-making vehicle like a pickup truck, used for commercial purposes on a ranch, inherently suffers a loss of use when written off.
21. The court is urged to apply the principle of restitutio in integrum and make a reasonable assessment of these general damages, even in the absence of precise evidence.
22. In conclusion, the Appellant prays for the appeal to be allowed, with a finding that negligence was proved against the Respondent and an award for both the special damages deemed proved by the trial court (Kshs. 145,800) and general damages for loss of user.

23. The Respondent submitted that the Appellant's appeal should be dismissed as it lacks merit. The Respondent contends that the trial magistrate correctly dismissed the original claim because the Appellant failed to meet the necessary legal burdens of proof on two fundamental issues.
24. First, the Respondent argues that the Appellant provided a contradictory and improbable account of how the accident occurred, offering multiple versions of whether the vehicles swerved off the road and whether the collision was head-on.
25. This inconsistency, coupled with a lack of any corroborating evidence, meant the Appellant failed to prove that the Respondent was to blame for the accident.
26. The Respondent also refutes the Appellant's claim that the Respondent's driver was charged with careless driving, stating that no official proof, such as a charge sheet or conviction, was presented to the court.
27. Second, the Respondent submits that the Appellant failed to provide any proof that his motor vehicle was damaged in the accident. While the Appellant submitted photographs and receipts, the Respondent asserts that this evidence did not successfully demonstrate that the alleged damage was a direct result of the collision with the Respondent's vehicle.

28. This failure to prove damage, in the Respondent's view, made it impossible for the trial court to rule in the Appellant's favor, especially given the unreliable testimony about the accident's cause.
29. In conclusion, the Respondent maintains that the trial magistrate's judgment was sound and based on a proper application of the law to the facts, and therefore, the appeal should be dismissed with costs.
30. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
31. The issues for determination in this appeal are as follows:-
- (i) Whether the learned trial Magistrate erred in law and fact in finding that the Appellant did not prove the Respondent's negligence as the cause of the road traffic accident.**
 - (ii) Whether the learned trial Magistrate erred in law and fact in dismissing the Appellant's claim for special damages, particularly the claim for loss of user.**

32. On the first issue regarding liability, the task of the trial court was to determine, on a balance of probabilities, whether the Respondent's driver was negligent and whether that negligence caused the accident.
33. The Appellant's evidence was that the Respondent's vehicle, while attempting to overtake two trailers, encroached onto his lane, forcing him to swerve and ultimately leading to the collision.
34. The Respondent, on the other hand, claimed his vehicle was stationary off the road when the Appellant's vehicle, having itself swerved off the road, hit it.
35. The trial magistrate found that the Appellant did not prove his case. However, upon re-evaluation of the evidence, this Court finds that the trial magistrate fell into error.
36. A critical piece of evidence was the Appellant's assertion, which was not conclusively rebutted by the Respondent, that the driver of the Respondent's vehicle was convicted of the traffic offence of careless driving in a criminal court.
37. A conviction in a criminal case, while not automatically constituting conclusive proof of negligence in a subsequent civil suit, is nevertheless prima facie evidence that the defendant committed the offence.
38. The burden then shifts to the defendant to demonstrate that the conviction was wrong or that it should not affect the civil case.

39. In the present matter, the Respondent failed to discharge this burden. The trial magistrate's failure to accord this evidence appropriate weight was a misdirection.
40. Furthermore, the Respondent's own testimony that his driver was overtaking and found himself "trapped" on the wrong side of the road lends credence to the Appellant's version of events.
41. Applying the "but for" test, but for the Respondent's driver's unsafe overtaking manoeuvre, the collision would not have occurred.
42. Consequently, this Court finds that the Appellant proved on a balance of probabilities that the accident was caused by the negligence of the Respondent's driver.
43. On the second issue regarding quantum, the trial magistrate, having dismissed the suit, did not make a final award but indicated that, had liability been established, she would have awarded Kshs. 145,800/= in special damages.
44. This amount comprised the pre-accident value of the vehicle (Kshs. 400,000 which was pleaded but the court found the proved value to be Kshs. 120,000), assessor's fees (Kshs. 5,800), and towing charges (Kshs. 20,000).
45. The trial magistrate correctly applied the long-standing principle that special damages must not only be pleaded but also strictly proved.

46. The Appellant did not challenge this specific finding on the proved special damages, and this Court finds no reason to interfere with it.
47. The crux of the appeal on quantum is the dismissal of the claim of Kshs. 225,000/= for loss of user.
48. The trial court rejected this claim due to the lack of receipts. While it is true that the Appellant did not produce specific receipts for hiring an alternative vehicle, the law recognises that a claim for loss of user can be framed as general damages where the loss is a direct and foreseeable consequence of the tort.
49. The vehicle in question, a Toyota Hilux pickup, is inherently a commercial utility vehicle.
50. The Court takes judicial notice that such a vehicle is used for income-generating activities, and its deprivation causes a loss of use.
51. The principle of restitutio in integrum requires that an injured party should be restored, as far as money can do, to the position they would have been in had the wrong not occurred.
52. The Appellant was deprived of his vehicle, which was a write-off. In such circumstances, the court is entitled to make a reasonable estimate of the damages for loss of use.

53. Considering the nature of the vehicle and the period for which the Appellant was without it, an award of Kshs. 100,000/= as general damages for loss of use is reasonable and fair.

54. In the final analysis, this appeal succeeds on both liability and the claim for loss of user.

55. The judgment of the trial court delivered on 28th April 2022 is hereby set aside entirely and is substituted with a judgment in favour of the Appellant as follows:

(i) Liability: The Respondent is found to have been 100% liable for the accident that occurred on 18th December 2006.

(ii) Quantum:

a. Special Damages as found by the trial court: Kshs. 145,800/=

b. General Damages for loss of user: Kshs. 100,000/=

Total Award: Kshs. 245,800/=

(iii) The decretal sum shall attract interest at court rates from the date of the judgment in the subordinate court (28th April 2022) until payment in full.

(iv) The Appellant shall also have the costs of this appeal and the costs of the suit in the court below.

56. It is so ordered

**Dated, signed and delivered this 15th day of October 2025 in
open court at Voi High Court.**

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....**for the Appellant**

.....**for the Respondent**

ORIGINAL