



**Rono v Mwichigi (Civil Appeal E033 of 2024)  
[2025] KEHC 17665 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17665 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E033 OF 2024  
CM KARIUKI, J  
NOVEMBER 28, 2025**

**BETWEEN**

**MERCY CHELANGAT RONO ..... APPELLANT**

**AND**

**JOSEPH NGATA MWICHIGI ..... RESPONDENT**

*(Being an appeal against the Judgment of the Small Claims Court at Narok by Resident Magistrate /Adjudicator Hon. E.M MUTUKU in NAROK SCCC No. E041 of 2024 delivered on 22nd October 2024)*

**JUDGMENT**

**Introduction**

1. This is an appeal arising from the judgment of the Small Claims Court at Narok (Hon. E.M. Mutuku, Resident Magistrate/Adjudicator) delivered on 22nd October 2024 in SCCC No. E041 of 2024, wherein the court entered judgment in favour of the Claimant, now the Appellant, Mercy Chelangat Rono, against the Respondent, Joseph Ngata Mwichigi, for material damages and loss of user arising from a road traffic accident.
2. The Appellant had instituted the claim before the Small Claims Court vide a Statement of Claim dated 31st July 2024, seeking compensation for loss and damage to her motor vehicle KAR 292S following a road traffic accident that occurred on or about 28th November 2023, quantified at Kshs. 408,050, together with compensation for loss of user, costs, and other appropriate reliefs.
3. As presented before the trial court, the Appellant averred that on the material date, her motor vehicle KAR 292S, while being driven along the Narok–Mai Mahiu Road near the Pinyiny black spot, was extensively damaged when the Respondent’s motor vehicle KCP 191N, driven by the Respondent or his authorized driver, agent, servant, or employee, negligently attempted to overtake other vehicles and collided with her vehicle—also causing contact with another vehicle, KDL 127V/ZH 1570. She relied



- on an assessment report by Primedots Auto Valuers, estimating repair costs at Kshs. 401,500/–, and produced receipts for assessment fees and search fees.
4. The Respondent, through a Response to the Statement of Claim dated 16th September 2024, denied liability, disputed the occurrence of the accident as narrated, and alternatively pleaded contributory negligence on the part of the Appellant. He further challenged the claims for special damages and loss of user and denied service of demand and notice of intention to sue.
  5. On 15th October 2024, the parties recorded a consent on liability at 90:10 in favour of the Claimant against the Respondent and agreed that their respective pleadings and documentary evidence be adopted as evidence in chief.
  6. Upon considering the evidence and submissions, the Small Claims Court found that the Appellant had proved special damages totaling Kshs. 408,050 and, applying the principles governing claims for loss of user, awarded a further Kshs. 150,000 as general damages for loss of user, resulting in a total award of Kshs. 558,050, less 10% contributory negligence, culminating in a net award of Kshs. 502,245, with interest.
  7. Aggrieved by that decision, the Appellant lodged the present appeal vide Memorandum of Appeal dated 15<sup>th</sup> November, 2024, on the following grounds;
    1. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in awarding Ksh 150,000/= for loss of earnings, which award is inordinately too low to represent an erroneous estimate of damages payable.
    2. That the Learned Trial Magistrate/Adjudicator erred in law and in fact by failing to award the Appellant costs, yet she was entitled to the same
    3. That the Learned Trial Magistrate/Adjudicator erred in law and in fact in failing to apprehend and consider the Appellant's submissions.
  8. The Appellant made the following prayers;
    - a) That the finding of the Trial Magistrate/Adjudicator on quantum be set aside, be reviewed and/or revised, and/or be substituted with the judgment of this Honourable Court.
    - b) That this Honorable Court do make such further orders as it may deem fit.
    - c) That this Appeal be allowed with costs to the Appellant.

#### **Directions of the court**

9. The appeal was canvassed by way of written submissions.

#### **The Appellant's submissions.**

10. Counsel for the Appellant submits that the appeal turns on two issues: whether the award for loss of user was inordinately low, and whether the trial court exercised its discretion on costs judiciously.
11. On the first issue, it is argued that the Appellant proved, through PSV daily earnings and expenses receipts covering 9th to 27th November 2023, that her motor vehicle generated an average daily profit of Kshs. 15,188, and that she operated the vehicle daily, not only 15 days per month as assumed by the trial magistrate. Counsel contends that the trial court provided no evidential or legal basis for adopting a daily profit of Kshs. 5,000 or limiting operational days, and therefore misapprehended the evidence. This, it is submitted, led to an award that was wholly erroneous and inordinately low. Reliance is placed



on *Butt v Khan* [1978] eKLR for the principle that an appellate court is entitled to interfere where the trial court acted on wrong principles or misapprehended the evidence.

12. It is further submitted that claims for loss of user of a profit-earning vehicle constitute general damages proved on a balance of probabilities, not strict proof as in special damages. Counsel cites *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] KECA 691 for the proposition that the loss of use of a profit-making chattel is compensable as pecuniary loss, and that the court should apply the principle of *restitutio in integrum*. The Appellant therefore urges this Court to enhance the award to reflect her demonstrated average daily profits.
13. On the second issue—costs—counsel submits that the Appellant, having been the successful party in the Small Claims Court, was entitled to costs, and that the trial magistrate misdirected herself by denying costs merely because a demand letter and notice of intention to sue were not produced. It is argued that the Respondent fully defended the claim to conclusion, and the absence of a demand letter does not constitute a “good reason” under section 27(1) of the *Civil Procedure Act* to depart from the general rule that costs follow the event. Counsel places reliance on *Njoroge v Kamau* [2024] KEHC 10415 (KLR) and *Stanley Kaunga Nkarichia v Meru Teachers College & Another* [2016] eKLR, which hold that a successful litigant should not be denied costs absent clear and justifiable reasons, and that failure to serve a demand notice is not, by itself, a sufficient ground.
14. The Appellant accordingly prays that this Court sets aside the award on loss of user and substitutes it with an enhanced award consistent with the evidence, and further sets aside the order denying costs and awards her costs both in the lower court and on appeal.

#### **The respondent’s submissions.**

15. The Respondent submits that the appeal is unmerited and should be dismissed. Counsel began by setting out the appellate principles, arguing that although this Court must re-evaluate the evidence afresh as established in *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123 and *Peters v Sunday Post Ltd* [1958] EA 424, it should not interfere with findings of fact unless the trial court misapprehended the evidence or applied wrong principles.
16. On the first issue—whether the trial court erred in awarding Kshs. 150,000 for loss of user—the Respondent argues that a claim for loss of user is in the nature of special damages and must be specifically pleaded and strictly proved, relying on *Ndungu Transport Co. Ltd & Another v Daniel Mwangi Waithaka Leteipa* [2018] eKLR and *Jackline Njeri Kariuki v Moses Njung’è Njau* [2021] eKLR. It is submitted that the Appellant produced only handwritten daily sheets, which did not clearly demonstrate actual profits or how they were computed. Counsel maintains that the trial court correctly held that the evidence did not support the alleged daily profit of Kshs.15,188 and reasonably adopted a daily rate of Kshs.5,000, supported by the documents on record.
17. The Respondent further supports the trial court’s finding that the Appellant had a duty to mitigate loss. The court’s award of loss of user for only two months is said to be consistent with the principle in *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] KECA 691, where the Court of Appeal emphasised that a defendant cannot be held liable for delays caused by the claimant’s inaction or slow prosecution. It was, therefore, proper, the Respondent argues, for the court to limit the award to a reasonable period.
18. On the second issue—failure to award costs to the Appellant—the Respondent submits that costs are discretionary under section 27(1) of the *Civil Procedure Act*. The trial court’s refusal to award costs due to lack of proof of service of demand and notice of intention to sue was, in the Respondent’s view, a



proper exercise of judicial discretion. Counsel urges this Court not to interfere with the said discretion as no misdirection has been shown.

19. The Respondent therefore prays that the appeal be dismissed with costs and that the trial court's awards be upheld in their entirety.

### **ANALYSIS AND DETERMINATION.**

20. This appeal arises from the judgment of the Small Claims Court at Narok in SCCC No. E041 of 2024, in which the Appellant, Mercy Chelangat Rono, was awarded special damages for the repair of her motor vehicle and Kshs. 150,000 for loss of user, with a deduction of 10% contributory negligence. The Appellant challenges the quantum of loss of user and the trial court's failure to award costs.
21. The Court is therefore tasked with determining two principal issues:
  - a) Whether the trial court erred in awarding Kshs. 150,000 for loss of user, allegedly inordinately low; and
  - b) Whether the trial court exercised its discretion on costs judiciously.

### **Principles Governing Appeal.**

22. It is well established that an appellate court in Kenya has the duty to re-evaluate evidence afresh, as laid down in *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123 and *Peters v Sunday Post Ltd* [1958] EA 424. However, interference with the trial court's findings of fact is warranted only if there is a misapprehension of evidence, application of wrong principles, or a clearly erroneous estimate of damages. It is not sufficient for the appellate court merely to prefer its own view.

### **Loss of User**

23. The Appellant contends that the trial court erred by awarding Kshs. 150,000 for loss of user, claiming that her vehicle generated an average daily profit of Kshs. 15,188 and operated daily. She produced PSV's daily earnings and expenses receipts to substantiate her claim. She argues that the trial magistrate misapprehended the evidence by adopting a daily rate of Kshs. 5,000 and limiting operations to 15 days per month. She relies on *Butt v Khan* [1978] eKLR and *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] KECA 691 to assert that loss of use of a profit-making chattel constitutes general damages, compensable on a balance of probabilities, applying the principle of *restitutio in integrum*.
24. The Respondent, conversely, submits that loss of user is a claim in the nature of special damages requiring specific pleading and proof (*Ndungu Transport Co. Ltd & Another v Daniel Mwangi Waithaka Leteipa* [2018] eKLR; *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR). He argues that the Appellant's handwritten receipts were insufficiently clear to substantiate actual daily profits, and that the trial court reasonably adopted a conservative daily sum of Kshs. 5,000, taking into account intermittent operation and the Appellant's duty to mitigate losses.
25. On examination of the evidence, the Court notes:
  - a) The Appellant produced handwritten records indicating daily earnings; however, these documents did not provide a clear methodology for computing net profit after expenses. The receipts are therefore insufficiently reliable to establish an average profit of Kshs. 15,188 with the requisite certainty.
  - b) The trial court's approach in limiting the vehicle's operation to 15 days per month is reasonable, taking into account likely downtime for maintenance or other operational



interruptions, consistent with the principle of mitigation in *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] KECA 691.

- c) The award of Kshs. 150,000 reflects a fair and moderate estimate of loss of use over a reasonable period of two months. There is no evidence that the trial court proceeded on a wrong principle or misapprehended the facts in a manner that renders the award wholly erroneous.
26. In light of the above, the Court finds no merit in the Appellant's submission for enhancement. The award for loss of user by the trial court is neither inordinately low nor unsupported by the evidence.

### **Costs**

27. The Appellant contends that she was entitled to costs as the successful party and that the trial court erred in declining to award costs merely because a demand letter and notice of intention to sue were not produced. She relies on *Njoroge v Kamau* [2024] KEHC 10415 (KLR) and *Stanley Kaunga Nkarichia v Meru Teachers College & Another* [2016] eKLR to support the proposition that costs follow the event and that discretion must be exercised judiciously.
28. The Respondent submits that costs are at the discretion of the court under section 27(1) of the *Civil Procedure Act*, and that the trial court properly exercised discretion in declining costs due to lack of proof of demand and notice.
29. On review, this Court observes:
- a) Section 27(1) of the *Civil Procedure Act* provides that costs are generally at the discretion of the court, but that the successful party is ordinarily entitled to costs unless good reason exists to depart from this rule.
  - b) In the present case, the Appellant was the successful party, and the Respondent fully defended the claim. While the absence of a demand letter is noted, it does not, in this instance, constitute a compelling reason to deny costs.
  - c) The trial court did not adequately articulate reasons to justify departing from the principle that costs follow the event.
30. Accordingly, the Court finds that the trial court erred in law and fact in declining to award costs to the Appellant.

### **Conclusion and Orders**

31. In summary, the Court makes the following findings:
- a) The trial court's award of Kshs. 150,000 for loss of user is reasonable and will not be disturbed.
  - b) The trial court erred in declining to award costs to the Appellant; costs of the proceedings in the Small Claims Court are hereby awarded to the Appellant.

### **Orders**

32. Accordingly, the appeal is partly allowed as follows:
- i. The award of Kshs. 150,000 for loss of user by the Small Claims Court is upheld.
  - ii. The trial court's order on costs is set aside, and the Appellant is awarded costs of the proceedings in the Small Claims Court.



iii. The Appellant is also awarded costs of this appeal.

33. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,  
THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2025**

.....

**CHARLES KARIUKI**

**JUDGE**

