

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E174 OF 2024

**ANTHONY NGUGI
MWIHAKI.....APPELLANT**

VERSUS

**JOHN WANYANGE MWEHA.....
RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.
A. Z. Ogange (RM/Adjudicator) delivered on 5th July 2024
in Thika Small Claims Court SCCC No. E837 of 2023)**

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E837 of 2023 whereby the trial court dismissed the appellant's claim for lack of proof. The appellant had filed a material damage claim of Ksh.234,000/= special damages of Ksh.50,000/= plus costs and interests of the suit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds of appeal summarized as follows:-

- a) The learned adjudicator erred in law in rendering the judgment hinged on technicalities only without considering the merits of the claim.
 - b) The learned adjudicator erred in law in rendering a judgment contrary to the provisions of the Small Claims Court Act which emphasizes that the court is not bound by strict provisions of Civil Procedure and Law of Evidence.
 - c) The learned adjudicator erred in law in failing to analyse the evidence tendered in the suit while exclusively deciding on the claim on technicalities occasioning the appellant miscarriage of justice.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the learned adjudicator did not analyse any issues of fact and the fact that his witness statement and documents were not controverted in any way. The appellant argues that the error occurred when the learned adjudicator only considered the issue of the nature of the pleadings and specifically that the particulars of negligence were not pleaded. The appellant relies on **Sections 17, 24 and 30 of the Small Claims Court Act** and the case of **Wayego vs Hamisi (Civil Appeal E153 of 2024) [2025] KEHC 10688 (KLR) (17**

July 2025) (Judgment) and submits that it is not a requirement of the law to list particulars of negligence as long as the claim was filed under the Small Claims Court Act.

5. The appellant relies on the case of **Elrons Limited vs Basil (Civil Appeal E890 of 2022)** and argues that its claim is a material damage

claim where he placed documents of the occurrence and loss while the respondent did not controvert anything.

The Respondent's Submissions

6. The respondent refers to the case of **Ogwari vs Hersi (Civil Appeal 223 of 2022) (2023) KEHC (KLR) (3 July 2023) (Judgment)** and submits that negligence must be pleaded and particularized before it can be proved. Thus the appellant's attempt to rely on documents such as the police abstract without proper pleadings was legally defective. The respondent argues that the learned adjudicator's decision was firmly grounded in law and precedent as the failure to plead particulars of negligence was a substantive defect and not a curable irregularity.
7. The respondent further relies on **Section 24 of the Small Claims Court Act** and the case of **Raila Amolo Odinga & Another vs IEBC & 2 Others [2017] eKLR** and submits that the Act does not dispense with the requirement to plead a cause of action with sufficient

clarity. The respondent submits that without the particulars of negligence, he could not reasonably defend himself and the court could not determine liability.

8. The respondent submits that the applicant's reliance on documents such as the police abstract and assessment report could not substitute for proper pleadings as parties are bound by their pleadings and a court cannot grant relief on matters not pleaded. The respondent submits that the learned adjudicator did not ignore

evidence but found that without pleaded particulars of negligence, the evidence could not establish liability.

Issues for determination

9. The main issues for determination are:-

- a) Whether the appeal is defective.
- b) Whether the failure to plead particulars of negligence rendered the claim defective.
- c) If not, whether the appellant proved his case on a balance of probabilities.

The Law

10. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under **Section 38 of the Small Claims Court Act**, set out the duty of the second appellate court in the case of **Otieno, Ragot & Company Advocates vs**

National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

11. In distinguishing between matters of law and fact the Court of Appeal stated in **Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR** as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See **Selle and Another vs Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us,**

we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal is defective.

12. **Section 38 of the Act** provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

13. The Court of Appeal in **Mwangi vs Wambugu [1984] KLR 453** commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the

demeanor of a witness is inconsistent with the evidence in the case generally.

14. Similarly in **Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR** the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the Elections Act, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

15. I have perused the grounds in the memorandum of appeal and noted that the grounds touch on law which essentially revolve around the failure to list the particulars of negligence whereby the appellant argues that the same did not render the claim fatally defective and untenable in law.

16. It is trite law that negligence must be pleaded first before being proved. This principle was enunciated in the

case of **East Produce Kenya Limited vs Christopher Astiado Osiro in Civil Appeal No. 43 of 2001** where the court held:-

It is trite law that the onus of proof is on he who alleges where negligence is alleged the position was well laid in the case of Kiema Mutuku vs Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

17. Similarly in **Dharmagma Patel & Another vs T. A (A minor suing through the mother and next friend H.H.) [2014] eKLR**, the court held:-

I also take note of the fact that in our legal system, there is no liability without fault. In this regard see Kiema Mutuku vs Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258 where the Court of Appeal held:-

There is, as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

The fault has to be pleaded and proved by evidence at the hearing.

18. Thus the question begs whether a claim is valid in law in the Small Claims Court when a party failed to plead the particulars of negligence. **Section 3(3) of the Small Claims Court Act** provides that the court shall adopt such procedures as the court deems appropriate to ensure among other things, simplicity of procedure. Section 24 provides that every statement of claim shall contain the nature of the claim, the summary of the claim among other particulars and that such statement shall be sufficient to inform the claim. **Section 34 (1)** provides that a claim before the Small Claims Court shall be concluded within sixty (60) days, this being one reason for a simplified procedure of determining cases and giving the claimants access to justice as well as ensuring expeditious disposal of cases.

19. The learned adjudicator in her judgment stated that the appellant did not plead the particulars of negligence as against the respondent and as such she found that the appellant failed to prove liability and dismissed the suit. In the Statement of Claim dated 1st August 2023 the appellant stated:-

“On the 14/04/2023, the claimant’s motor vehicle registration number KBJ 513X was being driven Kandara Thika road near Sansiro area, when suddenly due to the dangerous

driving and negligence of the 1st respondent being the 2nd respondent’s driver, agent and/or servant who was in actual control of motor

vehicle registration number KCR 888C crashed into the claimant's motor vehicle causing it extensive damages.

The accident was solely caused by the negligence of the 1st respondent being the 2nd respondent's driver, agent and/or servant who was in actual control of motor vehicle registration number KCR 888C at the time of the accident as he did not exercise caution on the road. Due to the accident, the claimant incurred a lot of expenses in repairing his motor vehicle registration number KBJ 513X and loss of earnings for the days his motor vehicle was being repaired. Severally, the claimant has demanded the cost of repairs but the demand letter has gone unanswered necessitating this suit."

20. The claim giving rise to the appeal was filed under the Small Claims Court Act where the procedure is relaxed and flexible. **Section 17 of the Act** gives the Small Claims Court control of its own procedure in hearing and determining claims before it. **Section 30 of the Act** allows parties during hearing of their case to choose to proceed by way of documents only without giving oral evidence before the court.

21. Musyoka J in **Elrons Limited vs Basil (2024) KLR** emphasized on the need to adopt a relaxed and simplified

nature of proceeding before the Small Claims Court as provided for by the Act. The

honourable judge went further to observe that the simplified procedure in the Small Claims Court was aimed at **“moving away from the complexities of procedure and evidence to enable ordinary citizens with small claims to have an easier access and time in the courts”**. He further stated: -

“It could spell doom to the Small Claims Court, reducing it to just another Magistrates Court, or High Court for that matter, bound as they are, by the layers of complex procedure and rules of evidence.”

22. The learned adjudicator found that the claim of the appellant was not proved for the reason that the particulars of negligence had not been pleaded. The court relied on the case of **Mombasa High Court Civil Appeal No. 223 of 2022 Jerusha Ogwari vs Ibrahim Hersi** in which the court upheld the dismissal of the appellant’s claim due to failure to plead particulars of negligence before the Small Claims Court. In my considered view, this decision went outside the letter and spirit of the Small Claims court Act. On the other hand, I find the case of **Elrons Limited** carried the spirit of the Small Claims Court Act of a simplified procedure.

23. In this appeal, I find that the adjudicator erred in dismissing the appellant's claim for the reason that it was not proved. In my view, the statement of claim spelt out clearly the alleged negligence against the respondent and it was not a requirement of the law to list particulars of negligence so long as the claim was filed under the Small Claims Court Act. I therefore find that the appellant's claim was valid rightly framed and was properly before the Small Claims Court.

24. On the issue of liability, the appellant stated in his claim that on 14th April 2023 an accident occurred along Kandara Thika road between his motor vehicle registration number KBJ 513X and motor vehicle registration number KCR 888C which belonged to P Mweha Njoroge, the 2nd respondent in the lower court suit and was being driven by the respondent herein. The appellant further stated that the accident was caused by the respondent's negligence. He produced a police abstract with details of the accident and which blamed motor vehicle registration number KCR 888C for the accident. From the record, the said motor vehicle was owned by P. Mweha Njoroge as per the motor vehicle copy of records. On perusal of the record, counsel for the appellant informed the trial court that the 2nd respondent, P. Mweha Njoroge was deceased and he confirmed that he wished to proceed with the case as it was. The respondent filed his response to the claim and denied all the averments set out in the claim and averred that if an accident

occurred, the same occurred due to the negligence of the appellant.

25. The appellant testified that it was the 1st respondent who was driving the vehicle reg. No. KCR 888 C along Thika Kandara road. The 2nd respondent in the lower court suit was the passenger in the said vehicle. He was also the owner of the vehicle that caused the accident. The evidence of the appellant that it is the respondent herein who failed to exercise caution on the road and caused the accident was fortified by the police abstract. The respondent did

not adduce evidence to blame the appellant but only made allegations that the appellant caused the accident without substantiating how it happened.

26. Upon analyzing the evidence of both parties, it is my considered view that the respondent caused the accident and was negligent in the manner he drove his vehicle. I find the respondent was to blame for the accident due to his negligent driving and hold him fully liable.

27. The court below did not assess damages despite dismissing the suit. The trial court ought to have assessed damages as failing to do so was manifestly erroneous as was espoused in the case of **Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR** where the court held that:-

Indeed even when the learned magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.

28. Similarly in Lei Masaku vs Kaplana Builders Ltd [2014] eKLR it was observed thus:-

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious

indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court need to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

29. It is trite that where the trial court fails to do its duty, the appeal court shall do what was not done: This court shall proceed to assess the damages payable to the appellant. The appellant sought judgment in the sum of

Kshs. 234,000/- for cost of repairs and loss of user of Kshs. 50,000/-. It is trite law that material damage claim is a special damage claim and thus it ought to be specifically pleaded and proven. The appellant pleaded for a sum of Kshs. 234,000/- and produced receipts totaling to Kshs. 237,600/- being receipts for repairs of his vehicle as Kshs. 213,600/-, towing and recovery for Kshs. 16,500/-, Assessment report for Kshs. 7,000/- and copy of records for Kshs. 550/-. I hereby proceed to declare an award all inclusive claim of Kshs. 234,000/- which was specifically pleaded and proved. The court however declines to award the sum of Kshs. 50,000/- for loss of user as the same was not proved.

30. Thus the judgment by the learned adjudicator dismissing the claim is hereby set aside and substituted with judgment on liability in favour of appellant against the respondent. The award of Ksh. 234,000/= as special damages is hereby awarded to the appellant.

31. The appellant shall have the costs of the suit with interests on the award and costs until full payment.

32. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF FEBRUARY 2026.

F. MUCHEMI

JUDGE