REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. E074 OF 2023

DAVID NJENGA.....1ST APPELLANT

DAVID OCHIENG.....2ND APPELLANT

VERSUS

BETTROSE NJOKI NGUGI.....DEFENDANT

JUDGEMENT

1. Before this Court is the Memorandum of Appeal dated **15th November 2023** by which the Appellants **DAVID NJENGA** and **DAVID OCHIENG** seeks the following orders:-

"(a) THAT this appeal be allowed and the judgment and

decree of the trial court be set aside and in its place an order be made dismissing the Respondent's suit in the subordinate court with costs to the Appellant.

(b) <u>THAT</u> the Appellant be awarded costs of this appeal."

2. The Respondent **BETTIROSE NJOKI NGUGI** opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated **4th June 2025**, whilst the Respondent relied on her written submissions dated **6th November 2025**.

<u>BACKGROUND</u>

3. This appeal arises from an accident which occurred on **25th March 2022** along the Sagana-Karatina Nyeri road at Kangocho area. The Respondents vehicle Registration No. **KDB 383 Q** - Toyota Hiace Matatu was hit by a motor vehicle Registration **KBJ 909J** Mitsubishi Lorry owned by the 1st Defendant and being driven by the 2nd Defendant.

4. As a result of the accident the Respondent's matatu was written off. The Respondent then filed in the Magistrates Court at Karatina Civil Suit No. **E024 of 2023** vide the Plaint dated **27th April 2022** seeking the following orders:-

"(a) Payment of Kshs. 1,204,660 being the total cost of repairs inclusive of labour and parts and tax.

(b) Payment of a further sum of Kshs. 34,000/= being total towing and recovery charges inclusive of Valuation fees.

(c) The Plaintiff does claim a daily sum of Kshs. 6000/= per day being cost of daily income from the matatu business from 25/3/2022 to the date of the judgment or as the court may determine."

5. Being aggrieved by this judgment the Appellant filed this present appeal which was premised upon the following grounds:-

"1. <u>THAT</u> the learned Trial Magistrate erred in law and in fact in finding that the defendants were 100% liable without any basis in law or in fact.

2. <u>THAT</u> the learned Trial Magistrate erred in law and in fact in basing her findings of liability on irrelevant issues not supported by evidence adduced or the applicable law, as clearly captured in his judgement."

<u>ANALYSIS AND DETERMINATION</u>

6. I have considered the appeal before this court, the record of the proceedings before the Lower Court as well as the written submissions filed by both parties.

7. This is a first appeal and in this regard I take cognizance of the holding in **Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)** in which the **Court of Appeal** stated as follows:-

This being a first appeal it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal is 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 allowances in this respect. (See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L)

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in <u>Peters -vs- Sunday Post Ltd [1958] EA 424</u>. In its own words:-

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide….."***

8. The first issue for determination is that of liability. The trial court made a finding of **100%** liability in favour of the Respondent.

9. **PW3 CORPORAL ELIZABETH SUMUGWO** of **Karatina Police Station** produce the police abstract in relation to the accident (**Page 82**, Record of Appeal). The lorry was

heading to Nairobi direction from Karatina whilst the matatu was being driven in the opposite direction.

10. **PW3** stated that the brakes on the lorry failed causing it to collide head on with the matatu. In the police abstract the lorry driver was blamed for the accident. However **PW3** did not herself witness the accident. Her evidence was only to the effect that the occurrence of the accident was reported to the police.

11. **PW4 SAMUEL WANJOHI MURIUKI** was the driver of the matatu. He told the court that the lorry swerved into his lane causing a head on collision. The evidence of **PW4** has not been controverted and is a first hand account of how the accident occurred given by an eye witness. The Appellant did not call any witness to challenge the testimony of **PW4**.

12. In Bernard **Philip Mutiso v Tabitha Mutiso [2022] eKLR Justice Odunga** (as he then was) stated as follows:-

> **In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant.**

Pw2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

13. The court has only one consistent set of evidence, that of the **PW4** that accident was caused by the Appellant's driver - there was no evidence to the contrary. Likewise no evidence was tendered by the Appellant to show or prove any contributory negligence on the part of the matatu driver.

14. In the persuasive case of **Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2 KAR 258**, the **Court of Appeal**, stated that

"There is as yet no liability without fault in the legal system in Kenya and a <u>plaintiff must prove some negligence against the defendant where the claim is based on negligence</u>." [Emphasis my own]

15. In **Gideon Ndungu Nguribu & another v Michael Njagi Karimi [2017] eKLR**, the **Court of Appeal** stated that "**determination of liability in a road traffic case is not a scientific affair**" and proceeded to quote **Lord Reid in Stapley v Gypsum Mines Ltd (2) [1953] A. C. 663 at p. 681** as follows;"

> **To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it……. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people**

have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

16. Based on the evidence available I do agree with finding of **100%** liability

made against the 2nd Appellant.

17. On the award of damages, there appears not to have been any challenge

to the award made in this regard. The Appellant only challenged the

finding on liability in this Memorandum of Appeal. However for purposes

of completeness I will consider the awards made under this heading.

18. The Plaintiff had pleaded for **Kshs. 1,204, 660/=** as costs of repair

inclusive of labour. **Pw2 JAMES KARUGA KARIUKI** was the motor

Vehicle Assessor. He produced his report dated **29th March 2022** (see

Page 44 of the Record of Appeal). This report set out all the accident

damages on the vehicle.

19. The Respondent told the court that the vehicle had not been repaired.

The trial court considered whether the Respondent was required to

prove actual repair to the damages on the vehicle in order to be

awarded damages. She cited the case of **NKUENE DAIRY FARMERS CO-OPERATIVE SOCIETY & Another -vs- NGACHA NDEIYA** **[2010] eKLR** where the Court stated as follows;-

> **"In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show that the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty. [Own emphasis]**

20. The Assessors report did prove the extent of the damages incurred by

the matatu as a result of the accident. The Respondent was not

required to show that the necessary repairs had been undertaken.

Therefore the award of **Kshs. 1,204,660/=** was justified.

21. The Respondent did also prove the claim of **kshs. 34,000/=** as towing charges by way of the copy of receipt appearing at **page 51** of the Record of Appeal.

22. Finally the Respondent made a claim for Loss of user of the matatu of

Kshs. 6,000 per day from the date the accident occurred until the date when judgment was delivered. It is trite law that special damages must be specifically proved.

23. The trial court relied on the case of **NDUGU TRANSPORT COMPANY**

LIMITED & Another -vs- DANIEL MWANGI WAITHAKA LETEIPA

[2018] eKLR, where it was held that:-

"a claim for loss of user is a special damage claim. Not only must it be specifically proved, it

must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, "do the best it can" and make an award on a claim that was neither pleaded nor proved-see David Bagaine vs Martin Bundi [1997] eKLR".

24. The Respondent claimed loss of user at **Kshs. 6,000/=** per day. She has not adduced any evidence at all to prove firstly that the vehicle was being used as a matatu and secondly that the daily earnings were **Kshs. 6,000**/=. I do agree with the decision of the trial court to dismiss this

claim.

25. Finally I find no merit in this appeal. The same is dismissed in its

entirety. The judgment of the trial court is confirmed and upheld.

Costs are awarded to the Respondent.

Dated in Nyeri this 20th day of February, 2026

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MAUREEN A. ODERO
JUDGE