

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
THIKA LAW COURTS
CIVIL APPEAL NO. E219 OF 2024

JOHN NGIGI KIROBI.....APPELLANT

VERSUS

CHEMLINE AFRICA LIMITED.....1ST
RESPONDENT

ROSE HENREITTA MASABA.....2ND
RESPONDENT

AND

JUBILEE GENERAL INSURANCE LTD.....THIRD
PARTY

*(Being an appeal from the judgment of Hon. J.K.Tawai R.M/
Adjudicator in the Small Claims Court at Ruiru, delivered on the
26th July, 2024 in Ruiru SCC/E236/2024)*

JUDGEMENT

1. The background to this appeal is that the appellant moved the trial court via a Statement of Claim dated 9th May 2024 seeking compensation for loss or damage to property which occurred on or about the 13th May 2021 in the sum of Kshs. 418,670.00.
2. The Appellant alleged that he is the owner of motor vehicle registration number KCJ 662R. On 13th May 2021 and that at around 6.20 am he was driving along Kiambu-Ruiru road near Kirigiti when his vehicle was rammed from the rear by the Respondent's motor vehicle KBM 650B, causing extensive damages to his motor vehicle.
3. It was his case that the accident was caused by the Respondents' negligence, recklessness and disregard to

other road users. Investigations by Kiambu police station revealed that the Respondents were to blame for the accident.

4. Following the accident, the appellant's vehicle was written off and he incurred expenses of Kshs. 650,120.00 for his motor vehicle while the salvage was sold at Kshs. 233,000. He therefore claimed Kshs. 418,670 which the Respondent had refused to pay despite demand being made.
5. The Respondent filed a Statement of Response dated 7th June 2024 denying owing the appellant any money and pleaded contributory negligence by the appellant. They also joined the third party to the suit.
6. The matter proceeded to trial where No. 107918 PC James Kimeu from Kiambu traffic testified by producing a police abstract and OB of an accident that occurred on 13th May 2021. The police abstract was dated 14th May 2021. It was his testimony that the accident involved motor vehicle registration number KCJ 662R and KBM 650D. KCJ 662R was from Kiambu direction towards Ruiru general direction and KBP 660D was heading in general opposite direction. Upon reaching the scene of the accident, motor vehicle KBM 650B failed to keep on its proper lane and collided with KCJ 662R resulting in extensive damage of KCJ 662R. The driver of KBM 650B was held responsible for the accident. He clarified that although he visited the scene, he did not witness the accident. The point of impact was on the right side facing Kiambu general direction from Ruiru direction. No criminal charge was preferred as the matter was referred to insurance. The road was not properly marked and KBM 650B was not on its proper lane.
7. The appellant testified as CW2, he adopted his witness statement and bundle of documents. It was his testimony that the accident occurred on 13th May 2021. He was not anticipating the accident as the vehicle overtook suddenly

and at a close distance. The motor vehicle was damaged on the driver's side. He could not avoid the accident as the driver of KBM 650B overtook him suddenly. He was fully compensated by his insurer for the repairs as his motor vehicle had comprehensive insurance.

8. Rose Henrietta Masaba testified as RW1 by adopting her witness statement and bundle of documents. It was her testimony that the accident involving motor vehicle registration number KBM 650B and KCH 650R occurred on 13th May 2021.
9. She reported the matter to his insurer, Jubilee Insurance, and she was given a claim form. Her insurance cover was valid and she did not receive any correspondence repudiating her cover.
10. The 3rd party testified that she did not have any data base information on the claim by the 1st Respondent. No claim notification was ever received by them nor were they aware of the claim filed in court until service of 3rd party notice. The matter was not reported within seven days as required. However, the notice of intention to sue was served upon the third party via email.
11. The trial court found that the appellant had failed to prove its case on a balance of probability and therefore dismissed his claim against the Respondents. On quantum, the trial court relied on **Bungoma Line Sacco society Limited vs Super Bargains Hardware (K) Limited (2021)eKLR** to find that where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value. Therefore, the Appellant would have been entitled to Kshs. 417,920.00 being the difference between the total expenses and the salvage value.

12. Aggrieved and dissatisfied with the decision of the trial court, the appellant lodged the instant appeal urging the following grounds:
- i. The honourable magistrate erred in law and fact by failing to acknowledge that the Claimant had adequately pleaded the particulars of negligence in the statement of claim dated 9th May 2024.
 - ii. The Honourable Magistrate erred in fact and law by failing to recognize that the pleading in paragraph 6 of the Statement of claim dated 9th May 2024 was sufficient to establish particulars of negligence.
 - iii. The Honourable magistrate erred in law and fact by misapprehending the concepts of liability and balance of probability to dismiss the claims.
 - iv. The Honourable magistrate erred in law and fact by failing to apply the 'oxygen principle' in determining the matter.
13. The Appellant prayed that the appeal be allowed and the judgment and decree of *Hon. J.K Tawai, Adjudicator* dated 26th July 2024 be set aside/dismissed.
14. The court directed that the appeal be canvassed through written submissions.
15. The appellant submitted that the trial magistrate failed to appreciate that the appellant had adequately pleaded the particulars of negligence in his statement of claim. This claim was proved by the police abstract hence the appellant complied with the requirements of **section 107 of the Evidence Act**. Moreover, the Respondent did not lead any evidence to controvert the evidence by the appellant. Hence, the appellant had proved his case on a balance of probabilities. Therefore, the appeal should be allowed as prayed.

16. The Respondents submitted that the Appellant had failed to plead and prove negligence to the required standard. The Appellant had failed to particularize the manner in which the Respondent negligently caused the accident. Failure to particularly plead and prove negligence did not give the Respondent an opportunity to defend themselves against the claim. Ultimately, the appellant failed to establish that an accident occurred which was caused and or attributable to the negligence of the Respondent and therefore the Respondents were liable for the accident. Also, while the appellant alleged that he was rammed from the rear, the accident assessment report stated that the impact was square at the front, from front to rear. It is trite that parties are bound by their pleadings, the appellant failed to produce any document to support his assertion that he was rammed from the rear. The failure to plead that damage to his motor vehicle on the front side was not a mere technical error but an aspect that goes to the root of the claim and the only viable option is to dismiss the appeal. Furthermore, the oxygen principles could not be invoked to aid a case that fails to abide by clearly statutory principles.

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand. In the case of **Mbogo and Another v. Shah [1968] EA 93**, the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. The first question before me is whether the lower court erred in dismissing the appellant’s claim.

19. The burden of proof is on whoever alleges. This is succinctly set out in **Sections 107-109 of the Evidence Act, Cap 80 Laws of Kenya** as hereunder:

107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 526** stated that:

“In ordinary civil cases, a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of

51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

21. The Appellant’s case is that the court erred in not apportioning liability. Before the court apportions liability, there must be a pleading to that effect. **Order 4 Rule 4(2)1**, provides that particulars of negligence must be pleaded before they are proved. The same states as hereunder:

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example, performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise;

22. **Order 2 Rule 10(1)** of the Civil Procedure Rules provides as follows:

1. Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing:

a. particulars of any misrepresentation, fraud, breach of trust, wilful default, or undue influence on which the party pleading relies; and

b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any

malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

23. A perusal of the Statement of Claim demonstrates that the Appellant did not in any way specifically plead the particulars of negligence as required by law. Without negligence being pleaded and proved, the questions became irrelevant to the matter before the court. The only plausible explanation is found in **Section 112 of the Evidence Act**. It states:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

24. The Appellant having failed to specifically plead and prove negligence could not turn around and fault the trial court for dismissing his claim. There is no basis for which the trial court could apportion liability for the Respondent. I find no basis to interfere with the discretion of the trial court. Furthermore, CW1 testified that no one was ever charged or held criminally liable for the accident as the matter was referred to insurance. Further, there was no evidence by the police that any party was ever held liable for the accident.

25. Flowing from the above I uphold the finding of the trial court on both liability and quantum and proceed to dismiss the appeal. Costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF FEBRUARY, 2026.

HON. T. W. Ouya

JUDGE

For Appellant.....Ouma H/B Muriithi

For Respondent.....Gor H/B Njoki

COURT ASSISTANT.....Brian

ORIGINAL