

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E134 OF 2024

ISAAC NZOA MUTISYA.....
.....APPELLANT

VERSUS

INSENE HALKANO JALDESA.....
RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator) delivered on 3rd June 2024 in Ruiru Small Claims Court SCCC No. E138 of 2024)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator SCCC No. E138 of 2024 a suit that arose from a material damage claim whereby the trial court found the appellant 100% liable and awarded the respondent damages in the sum of Kshs. 272,480/- and costs of Kshs. 20,000/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 17 grounds of appeal summarized as follows:-

- a) The learned adjudicator erred in law and in fact by finding that the appellant was 100% liable for the accident.

- b) The learned trial magistrate erred in law and in fact by relying on the police abstract dated 18th August 2021 and therefore finding the appellant liable for the accident whereas the police abstract dated 11th August 2021 exonerated him from any blame and blamed the respondent for the occurrence of the accident.

- c) The learned adjudicator erred in law and in fact by invoking the doctrine of subrogation in favour of the respondent's insurance, Geminia Insurance Company while the respondent did not adduce credible evidence to support the doctrine.

- d) The learned adjudicator erred in law and in fact in awarding the respondent special damages while the same had not been specifically proved.

- e) The learned adjudicator erred in law and in fact by relying the documents produced by the respondent which were inadmissible pursuant to Section 19 of the Stamp Duty Act and were photocopies which were not certified.

- f) The learned adjudicator erred in law and in fact in disregarding the appellant's pleadings, evidence, submissions and supporting law.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the respondent failed to prove her claim on a balance of probabilities as she did not produce any credible evidence. The appellant further submits that from the record, it is evident that the respondent drove her motor vehicle registration number KCQ 058U negligently and recklessly thus hitting him. The appellant submits that upon the occurrence of the accident the two motor vehicles were towed to Kiambu police station. He was then issued with a police abstract which blamed motor vehicle registration number KDB 058U. During the hearing the respondent's third witness, Lydia Kemboi testified that the police abstract dated 11th August 2021 was corrected though a second police abstract which was never produced in court as evidence. Further, the appellant argues that the second police abstract was fabricated as it blamed him for the accident.
5. The appellant submits that the second police abstract was not mentioned in the witness statement of the claimant.

Furthermore, M/s Sunrays Insurance Investigators Limited attached the said abstract to their Tracing Report dated 14th July 2023 were never called by the respondent to produce the report as evidence. The appellant further submits that the respondent's driver who was driving motor vehicle registration number KCQ 058U was never called to adduce evidence in court on how the accident occurred.

6. The appellant argues that the police officer who visited the scene and handled all the issues relating to the accident and issued the

first police abstract was not called as a witness. Further, the appellant submits that he was not charged with any traffic offence in respect of the accident.

7. The appellant submits that he was opposed to the production of hearsay evidence and inadmissible documents by the respondent's third witness and the production of the report by M/s Sunrays General Insurance dated 14th July 2023 as well as the second corrected police abstract but his objections were dismissed. However in her judgment, the learned adjudicator ruled that the appellant did not oppose the production of the documents for the documents were admissible in evidence.

8. The appellant submits that the respondent was not entitled to Kshs. 272,480/- as she failed to prove her claim through receipts. Further, the respondent did not prove

that she was paid Kshs. 555,000/- by the insurance but produced a discharge voucher made in favour of Christine Mwiti. Additionally, the documents as produced did not comply with Section 19 of the Stamp Duty Act and the respondent was duty bound to show that she had paid stamp duty.

9. The appellant argues that discharge voucher and claim payment requisition dated 17th September 2021 were photocopies and therefore their authenticity was questionable. It was further argued that the evidence of CW3 was hearsay evidence as she was not the author of the discharge voucher and the claim payment requisition nor did she witness any payment of Kshs. 555,000/-, Kshs. 25,000/-

being towing fees, Kshs. 31,000/- for tracing fees and Kshs. 6380/-

as assessment fees. The appellant argues that the claimant who could have corroborated the evidence of CW3 was never called to testify.

10. The appellant submits that no credible evidence was tendered to prove that M/s Regent Automobile Valuers and Assessors did any valuation to assess the extent of the damages to the respondent's motor vehicle and appropriate compensation payable to her as they were never summoned to give evidence on behalf of the claimant.

11. The appellant argues that the respondent did not produce any evidence to show that M/s Universal Assessors and Valuers were paid Kshs. 6380/- or that Kshs. 25,000/- was paid to M/s Sunrise Breakdown services, as CW3 only produced an invoice for the said amount. Additionally the respondent failed to prove that Kshs. 31,000/- was paid to M/s Sunrays General Insurance Investigators Ltd. The appellant argues that the sum of Kshs. 50,000/- was not specifically pleaded in the Amended Statement of Claim and no evidence was produced to show that the same was paid by the claimant to Geminia Insurance Company Ltd. The appellant refers to the case of **Civil Appeal No. 135 of 2014 Henry Wafula Khaemba vs Nzoia Sugar Company Limited KECA 355 (KLR)** and submits that special damages must be specifically pleaded and strictly proved.

The Respondent's Submissions

12. The respondent relies on the cases of **Kenya Breweries Ltd vs Godfrey Odoyo [2010] KECA 498 (KLR)**; **Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] KESC 8 (KLR)** and **Mwangi vs Mburu [2025] KEHC 6942 (KLR)** and submits that the appeal is defective as it invites the court to review the determination of facts of the trial court. The appellant wants this court to examine the evidence produced in

court and further make its own determination of facts on the evidence which is beyond the jurisdiction of this court.

13. The respondent submits that the police abstract was admitted in evidence and accepted by the learned adjudicator with a believe that the same was credible and trustworthy in alignment with Section 32 of the Small Claims Court Act.

14. The respondent submits that special damages were pleaded and proved. The respondent further submits that the assessment was sufficient to prove the pre-accident and salvage value as pleaded. The respondent relied on the case of **David Bagine vs Martin Bundi [1997] KECA 201 (KLR)**. The respondent relies on the case of **Kibos Sugar & Allied Industries Ltd vs Ayub (Civil Appeal E018 of 2021) [2023] KEHC 17387 (KLR)** and submits that the appellant's claim that the assessor's report is not sufficient proof and not credible evidence amounts to shifting the standard of proof from a balance of probability to the degree of reasonable doubt. The respondent

submits that the discharge voucher was sufficient proof of payment of the claim to the insured as it showed that the insured agreed to be paid Kshs. 555,000/- by the insurer and further the amount to be credited in her account. The respondent submits that she filed a claim payment requisition proving that Kshs. 555,000/- was paid to the insured to settle the claim. Further CW3 indicated to the

court on re-examination that it shows payment was made for the insured and thus sufficient proof of the settlement of the claim to the insured.

15. Relying on the case of **Jackson Kariuki Kahungura & Another vs John Karanja Kihagi & 5 Others [2018] KEELC 3659 (KLR)**, the respondent submits that the receipts were not inadmissible because they lacked stamp duty.

Issues for determination

16. The main issues for determination are:-
- a) Whether the appeal is properly before the court.
 - b) If so, whether the respondent proved her claim for material damage to the required standard.

The Law

17. 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.

18. 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.

19. **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.

20. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of fact save for the ground on special damages not being specifically proven. The appellant is aggrieved that the learned adjudicator found him liable for the accident and awarded the respondent damages in the sum of Kshs. 272,480/-.The learned adjudicator in hearing and determining the claim considered the evidence presented by both parties and their oral testimonies and found that the respondent had proved her claim to the requisite standard. The grounds as raised by the appellant touch on matters of fact which will require this court to scrutinize and re-evaluate the evidence which task the magistrate had performed in preparing her judgment as shown by the record. In my considered view this appeal is not in harmony with the provisions of **Section 38 of the Small Claims Court Act** which only allows appeals only on matters of law from Small Claims Court to the High Court .

21. On the issue of special damages, the law is clear that special damages ought to be specifically pleaded and proven. The appellant

maintains that the learned adjudicator erred in law in awarding special damages while the respondent failed to adduce evidence of the claim by way of receipts. The appellant further argues that the documents ought not to have been admitted in evidence as they were not produced by the maker and further that they were copies that were not certified. I have perused the record and noted that the learned adjudicator admitted the said documents pursuant to **Section 32 of the Small Claims Court Act**. It provides:-

1)The court shall not be bound wholly by the rules of evidence.

2)Without prejudice to the generality of sub section (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

22. In my view, the said documents were admitted to evidence without calling the makers in accordance with Section 32 of the Act. It is further noted that the

respondent filed her claim on 19th March 2024 and served the appellant with all the pleadings including the list of documents. On 8th April 2024 when the appellant's counsel made an application to be supplied with legible documents, he ought to have also applied to be supplied with the original documents. If the appellant wanted the makers of the said documents called, then his advocate ought to have raised the issue during the hearing which

he failed to do. The appellant's claim that the documents were inadmissible for they were not the originals or that they were not produced by the maker is an afterthought. That notwithstanding, Section 32 of the Act allows the said documents to be produced and admitted to evidence as they were with the consent of the parties. The appellant who was represented by an advocate did not oppose the production of the documents in form of copies. I find no merit in this ground of appeal.

23. The appellant further argues that no receipts for repair costs were produced to demonstrate that payment had been made in respect of the costs but instead the respondent produced an assessment report showing the pre-accident value of the motor vehicle and the salvage value. Thus the bone of contention is whether the failure to produce receipts or payment vouchers in respect of the costs of repairs would affect the claim for special damages.

24. In Nkuene Dairy Farmers Co-operative Society & Another vs Ngacha Ndeiya (2010) eKLR the Court of Appeal held:-

In our view special damages in a material damage claim need not be shown to have actually incurred. The claimant is only required to show 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. In Ratcliffe vs Evans (1892) 2QB 524 Bowen LJ said:-

The character of the acts themselves which produce damage, and the circumstances under which these acts are done, must regulate the degree of certainty, and particularity with which the damage done ought to be stated and proved. As much particularity and certainty must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.

To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

25. The Court of Appeal in **David Bagine vs Martin Bundi (1996) eKLR** in asserting the probative value of an assessor's report reiterated that:-

The assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim.

26. It is therefore clear that the respondent only needed to prove the extent of the damage to her motor vehicle and the loss or the cost of repair through a loss assessor who is an expert whose evidence is admissible as sufficient proof. It is not necessary for a party claiming in such a case to prove that the repairs were actually done and paid for. The evidence of CW2 who produced the loss report was in my view sufficient proof. The motor vehicle in issue was declared a

write off and as such, the respondent was only entitled to the pre-accident value less the salvage value. The assessment report dated 13th August 2021 provided that the salvage value was Kshs. 320,000/-. The valuation report indicated that the value of the motor vehicle KCQ 058U was Kshs. 530,000/-. Thus the respondent was entitled to Kshs. 210,000/-. The respondent produced a receipt for towing fees at Kshs. 25,000/-, an invoice for Kshs. 31,100/- for tracing fees and a fee note for Kshs.

6,380/- as assessment fees. Thus in my considered view, the claim of Kshs. 272,480/- was sufficiently proved.

27. The appellant further argued that the receipts did not comply with Section 19 of the Stamp Duty Act. In the cases of **Benjamin Muela Kimono vs Daniel Kipkirong Tarus & Another [2011] eKLR** and **Joseph Kimani & Another vs James Kangara Kahanya [2017] eKLR**, both courts held that it is the duty of the receiver of the money who has the duty to affix the revenue stamps, not the payee who cannot be penalized for omissions of the receiver.

28. Moreover the Court of Appeal in **Paul N. Njoroge vs Abdul Sabuni Sabonyo [2015] eKLR** stated that before holding a document inadmissible in evidence on the sole ground that it was not properly stamped was erroneous. It was held that the court ought to give an opportunity to the party producing such document to pay the stamp duty and penalty but not to reject the document.

29. Thus it is my considered view that the sum of Kshs. 272,480/- was pleaded and proved.

30. Consequently, I find that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

31. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 19TH DAY OF MARCH 2026.***

F. MUCHEMI
JUDGE