



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS COUNTY

COURT NAME: MACHAKOS HIGH COURT

CASE NUMBER: HCCA/E146/2024

DOMINIC MULWA NDAMBUKI VS SAMSON MAGHANGA HAWA

JUDGMENT

(Being an appeal from the judgment of Hon S.Kandie(Resident Magistrate) delivered on 23rd April 2024 in Mavoko Chief Magistrate's Court Civil Suit No. 716 of 2020

1. By a Complaint dated 21st of April, 2023 the Respondent, sued the Appellant for a sum of Kshs587,492, for material damage allegedly caused to motor vehicle No KCK 809J, after the Appellant's vehicle No KAZ 847Z rammed into it along Mombasa Road, at Everest area on 30th of September 2017. The Respondent blamed the collision on negligence on the part of the driver of the Appellant's motor vehicle registration number KAZ 847Z.
2. Following the accident, the Respondent's insurer, AMACO Insurance repaired the Respondent's vehicle and brought the claim in the court below, under its right of subrogation.
3. The claim was vehemently resisted by the Appellant but upon hearing evidence from both sides the learned magistrate found in favour of the



Respondent and awarded him the sum sued for together with interest and costs of the suit.

4. Being aggrieved, the Appellant preferred this appeal which is premised on grounds:
 - a. That the learned Magistrate erred in law and in fact in failing to take into consideration the Appellant's evidence and submissions placed before him.**
 - b. That the learned Magistrate failed to appreciate the totality of the evidence on record and made contradictory findings thus rendering judgment that showed open bias and prejudice as against the Appellant.**
 - c. That the learned Adjudicator erred in law and in fact in failing to appreciate the evidence before him and taking into account extraneous issues hence arriving at a decision that was erroneous and against the evidence placed before him.**
 - d. That the learned Magistrate erred in law and in fact in failing to appreciate the fact that the Respondent's assessor's report unequivocally blamed the Respondent for failing to give way to the Appellant's vehicle hence causing the accident.**
 - e. That the learned Magistrate erred in law and in fact in wholly believing the Respondent's testimony despite the glaring inconsistencies and contradictions evident in the Respondent's case.**
 - f. That the learned Adjudicator erred in law and in fact by failing to appreciate the trite position that special damages must only**



be specifically claimed but also strictly proved

- g. That the learned magistrate erred in law and in fact in failing to take into consideration the fact that the plaintiff did not testify in this matter and the only evidence by the Plaintiff was of third parties who***



were not at the scene of the accident.

h. That the learned Magistrate erred in law and in fact by delivering a judgment in which the analysis of the issues was a regurgitation of the evidence on record which was not based on proper evaluation and consideration of the evidence on record, submissions and applicable laws and principles on admission of evidence.

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

6. On the issue of blameworthiness, Counsel for the Appellant it was argued that same was not proved against the Appellant; that the Appellant submitted that on two issues. It was contended that the court did not consider the evidence adduced by the Appellant; that the witness called by the Appellant (DW1) exonerated him from blame; that the witness gave clear evidence on where and how the accident occurred and that the Appellant's vehicle had the right of way as there is no U-turn at the point where the accident occurred. Further, that the evidence of PW2 and DW1 is that the Respondent's/ Plaintiff's Motor Vehicle failed to give way to the Appellant's/ Defendant's Motor Vehicle yet the Appellant/defendant had the right of way. The allegations by the Respondent that the Appellant was overlapping on the pavement, were not proved. The court was urged to find the Respondent 100% liable for the accident. Counsel for the Appellant placed reliance on the following cases: ***Evans Mogire Omwansa v Benard Otieno Omolo & another [2016] eKLR, Daniel Kimani Njoroge V James K. Kihara & another [2011] eKLR, Mbilo Nzeki Munyasa & Another vs Malde Transporters Ltd & 2 others [2015] eKLR, Jonathan Njenga -v- Hassan Fraj Aboud [1987] KLR 1, Mumbi M'Nabea v David M.Wachira [2016] eKLR as quoted in Kamau v Horeria t/a Horeria & Co & another (Environment & Land Case 1928 of 2007) [2023] KEELC 17871 (KLR).***



7. On the issue of damages, Counsel argued that as this was a subrogation claim, evidence should have been led to prove that the



respondent had been compensated for the loss suffered; that no insurance contract or sticker was produced. Counsel pointed out the testimony of PW3 who testified that all the payment vouchers did not contain ETR receipts and that the said vouchers did not contain details of the vehicle repaired, the policy number or details of the insured and submitted that is impossible to ascertain that the said payments were related to the accident in issue. The Appellant contended that the damages were not proved and hence they should not have been awarded. In support of this position, reliance was placed on the following cases; ***Timsales Limited v Harun Thuo Ndungu [2010] e KLR, Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] e KLR, Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] e KLR, Kenya Power & Lighting Company Limited v Julius Wambale & another [2019] e KLR and Doll k Limited v Invesco Assurance Company Limited & 5 others [2018] e KLR***

8. For the Respondent, it was contended that evidence was tendered to prove liability against the Respondent. That the police abstract attributed blame on the driver of the Appellant's vehicle; that the abstract was produce without any objection and that its contents were not contested but on the other hand, DW1's evidence was not corroborated and it ought to be disregarded for lacking credibility and reliability.
9. On the damages, Counsel submitted that the same were proved vide the Assessment Report dated 3rd October, 2017 and the Supplementary Assessment Report dated 18th October, 2017 whichas were sufficient proof of the extent of damage. Further, that the authenticity of the reports was not challenged at the Trial Court. Counsel stated that the Policy produced as PEX 6 was proof that there was a contract of insurance between the Respondent and his insurer at the time of the accident.
10. Counsel placed reliance on the following cases; ***Joel Muna Opija Vs. East African Sea Food Limited (2013)***



***eKLR, Muriungi Kanoru Jeremiah Vs Stephen Ungu
M'mwarabua [2015] Eklr, Jackson Mwabili Vs.
Peterson Mateh (2020) eKLR, Nkuene Dairy***



Farmers Co-Operative Society Limited Vs. Ngacha Ndeiya [2010] eKLR, David Bagine Vs. Martin Bundi (1996) eKLR, Independent Electoral And Boundaries Commission & Ano. Vs. Stephen Mutinda Mule & 3 Others (2014) e KLR, Leli Chaka Ngoro Vs. Maree Ahmed & S.M Lardhib (2017) Eklr.

Analysis and determination.

11. As the first appellate court I have reconsidered and evaluated the evidence in the court below so as to arrive at my own independent conclusion whilst bearing in mind that I did not hear or see the witnesses who testified.
12. This appeal hinges on; firstly, the issue of liability and secondly on whether the sum claimed was proved on a balance of probability.
13. That an accident involving the two vehicles, occurred on the date and place alleged is not in dispute. What is in contention is the manner in which the accident occurred and which of the drivers was to blame.
14. On his part, the Respondent called a police officer who produced an abstract which blamed the driver of the Appellant's motor vehicle KAZ 547Z for the accident. However, the witness confirmed that he was not the investigating officer and stated that the accident was investigated by one PC Kiboi. The other witness called by the Respondent was also a police officer who blamed the accident on a motor vehicle No KAZ 871Z which he stated belonged to Dominic Mulwa Ndambuki. To support his evidence the officer produced a report dated 14th June 2018 which states as follows at paragraph 6.1;

“during our interview, it was evident that your insured did not give way to the third party hence causing the accident.



However, the police officer handling the



matter blamed the third party vehicle instead of your insured vehicle...”

15. In the conclusion at paragraph 14.0, the report leaves no doubt that the Respondent’s vehicle was to blame. It states: **“However, considering the circumstances leading to the accident your insured was to blame for causing the accident and not the third party vehicle driver.”**
16. The above report forms part of the Respondent’s evidence yet it clearly absolves the Appellant from blame. The author of the report seems to suggest that the Respondent was held liable because he was capable of reimbursing the Appellant’s insured. In my view that is and can never be the test for blameworthiness. A person can only be held liable if negligence is proved. It is my finding that the particulars of negligence attributed to the Appellant having not been proved on a balance of probabilities and the Respondent’s evidence also having absolved him from liability, the learned magistrate misdirected himself in arriving at the conclusion that he did.
17. As regards the damages, it is my finding that whereas the doctrine of subrogation, applies to the Respondent and his insured there was no evidence that the insured paid the sum claimed to the Respondent or used the said sum to repair the vehicle. No receipts were tendered to prove payment. An invoice cannot be treated as a receipt as an invoice may have been issued but not settled.
18. The upshot is that the claim against the Appellant was not proved on a balance of probabilities and accordingly this appeal is allowed.
19. The judgment of the learned magistrate is set aside and is substituted with an order of dismissal of the Respondent’s case.
20. The Appellant is awarded the costs of this appeal and of the case in the court below.



Orders accordingly.

Judgment signed, dated and delivered virtually on this 19th March 2026.

IN PRESENCE OF:

**Ms Mutuku for Ms Gichuki Adv for the
Appellant. Mr Ogweno for the Respondent.
Mary -Court Assistant.**

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SIGNED BY/FOR:
HON. LADY JUSTICE E.N. MAINA



THE JUDICIARY OF KENYA.
MACHAKOS HIGH COURT
HIGH COURT DIV
DATE: 2026-03-25 09:01:38

