Mombasa Maize Millers (KSM) Limited v Catholic Medical Mission Board (Civil Appeal 134 of 2020) [2026] KECA 777 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 777 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 134 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

APRIL 24, 2026

BETWEEN

MOMBASA MAIZE MILLERS (KSM) LIMITED ..... APPELLANT

AND

CATHOLIC MEDICAL MISSION BOARD ..... RESPONDENT

(Being an appeal from the Judgment and decree of the High Court of Kenya at Kisumu (Ochieng, J.) dated 6th May, 2020 in HC. Civil Appeal No. 104 of 2018)

JUDGMENT

1. The respondent instituted a civil suit against the appellant before the Chief Magistrate's Court at Kisumu by a plaint dated 24th June, 2015. The respondent's case was that on 23rd May 2013, as its motor vehicle Registration Number KBP 755E was being lawfully and carefully driven along the Kisumu– Mount View–Kicomi Road, the appellant's motor vehicle Registration Number KBM 763S was so negligently, carelessly and recklessly driven that it lost control and collided with the respondent's vehicle, thereby occasioning extensive material damage. Particulars of negligence were duly set out in the plaint.

2. The respondent pleaded that as a result of the said accident, its motor vehicle was extensively damaged, leading to the incurrence of special damages comprising: repair costs of Kshs. 547,594/=; assessment fees of Kshs. 15,000/=; excess paid in the sum of Kshs. 203,100/=; police abstract fees of Kshs. 200/=; and costs of obtaining KRA records amounting to Kshs. 1,000/=; all totaling Kshs. 766,894/=. In the premises, the respondent sought judgment against the appellant for the said sum together with costs and interest thereon. The claim was brought for the benefit of the respondent's insurers, M/s Pacis Insurance Company Limited, pursuant to the doctrine of subrogation.

3. The appellant, in its statement of defence dated 29th September 2015, denied the averments contained in the plaint. It averred that, if any accident occurred, which was denied, the same was occasioned by

the sole and/or contributory negligence on the part of the respondent, particulars whereof were set out in the defence. The appellant further contended that, in any event, the alleged accident occurred outside its control and, as such, it could not be held liable.

4. The case was heard by way of viva voce evidence. PW1, Geoffrey Ochako Tinega, testified that he was a licensed driver employed by the Kenya Conference of Catholic Bishops and was, at all material times, assigned to drive motor vehicle registration number KBP 755E, a Toyota Hilux. He stated that on 23rd May 2013 at about 4:00 p.m., he was driving along Kisumu–Mount View Road within Kisumu City, having dropped off the respondent's staff. He was alone in the vehicle. It was in a good mechanical condition. The weather was clear with light traffic. He recalled that while driving uphill, he observed a trailer descending from the opposite direction, partially encroaching onto his lane due to a corner on the road. In an attempt to avoid collision, he veered off the road to the left and stopped. He stated that the trailer was towing another lorry.

5. It was PW1's testimony that while the first lorry passed safely, the second lorry, being towed, veered off the road and collided with his stationary vehicle. He identified the said lorry as registration number KBM 763S, belonging to the appellant. The impact caused his vehicle to be pushed and dragged for approximately five meters. He further testified that the drivers of the lorries alighted. A disagreement ensued, prompting him to call the police. Police officers attended the scene, recorded statements, and later issued him with a police abstract. He stated that the police indicated that the driver of the lorry belonging to the appellant was to blame for the accident. PW1 testified that his vehicle was subsequently inspected, assessed, and repaired. He produced evidence of expenses incurred, including assessment fees, police abstract charges, repair costs, and excess payment, all totaling Kshs. 765,894/=.

6. The appellant did not adduce any evidence or call any witnesses.

7. The learned magistrate, after hearing the parties, found in favour of the appellant, and dismissed the respondent's suit. The learned trial magistrate held that the respondent failed to sufficiently prove that the accident occurred as alleged on the material date, for the main reason that the evidence of PW1 was not corroborated by that of an independent witness.

8. Aggrieved by this decision, the respondent lodged a first appeal before the High Court of Kenya at Kisumu. In its memorandum of appeal dated 5th November, 2018, the respondent contended that the learned trial magistrate erred both in law and in fact, in dismissing the suit by improperly requiring corroboration of the respondent's evidence, and in holding that the respondent had failed to establish a case against the appellant. The respondent argued that the trial court misdirected itself on the standard of proof by finding that the case had not been proved on a balance of probabilities, despite the fact of the occurrence of the accident being demonstrated.

9. The respondent also faulted the trial court for treating the unchallenged evidence as mere allegation, thereby failing to properly evaluate and give due weight to the respondent's testimony. The respondent further contended that the magistrate erred in concluding that the evidence adduced was insufficient. Lastly, the respondent asserted that the trial magistrate disregarded material evidence favourable to the respondent, and improperly relied on extraneous matters, conjecture, and suppositions not supported by the record, thereby arriving at an erroneous decision to the detriment of the respondent.

10. The learned Judge (Ochieng, J.), upon re-evaluating and re- assessing the evidence before the trial court, overturned the decision of the trial magistrate. The learned Judge, in allowing the appeal, determined that there was no legal basis requiring corroboration by an independent witness of the evidence adduced by the respondent's witness. The learned Judge found that the exhibits produced by the respondent which showed the damage to the respondent's vehicle, and extent of repairs undertaken, corroborated PW1's evidence. The learned Judge further noted that the evidence by the respondent

was uncontroverted as the appellant did not adduce any evidence to the contrary. In the end, the learned Judge found that the appellant was liable for the accident that resulted in damage to the respondent's motor vehicle and entered judgment in favour of the respondent for the sum of Kshs.766,894/=.

11. The appellant, aggrieved by the decision of the first appellate Court lodged the present appeal before us. In summary, in the memorandum of appeal dated 4th August, 2020, the appellant was aggrieved that the learned Judge treated the evidence and submissions on liability and quantum superficially, thereby arriving at a wrong conclusion. The appellant faulted the learned Judge for failing to consider the evidence on record, and written submissions filed by the appellant. The appellant was also aggrieved that the learned Judge found that the respondent had sufficiently proved negligence as against the appellant.

12. The appeal was canvassed by way of written submissions. Ms. Miheso learned counsel appeared for the appellant. It was her submission that the respondent's suit was predicated upon tort of negligence, and that the respondent bore the burden of proving negligence on the appellant's part, and further show a causal link between the damages incurred and the appellant's alleged negligence. She was of the view that the respondent failed to discharge that burden. It was her submission that the respondent did not avail any evidence that confirmed that the alleged accident occurred, and that there was no independent witness who could corroborate the respondent's assertions. On quantum, Ms. Miheso faulted the learned Judge for failing to give reasons for awarding the respondent Kshs. 766,894/=.

13. In rebuttal, Mr. Karanja learned counsel for the respondent, submitted that the learned Judge properly re-analyzed all the evidence on record, and found that the evidence adduced by the respondent was sufficient and unchallenged. He pointed out that the appellant did not adduce any evidence before the trial court, and that the evidence by the respondent's driver gave an unchallenged account of how the accident occurred. He submitted that the learned Judge correctly held, as a matter of law, that the evidence of PW1 did not require corroboration, and that the respondent had proved its case on a balance of probabilities. He urged that the fact of the occurrence of the accident was capable of proof without the production of a police abstract report to that effect. On quantum, counsel for the respondent submitted that the learned Judge clearly indicated that the special damages awarded to the respondent were established by the receipts produced by the respondent before the trial court. Counsel reiterated that the appellant did not contest the assessment of the said damages before the two courts below.

14. This being a second appeal, our duty was well stated in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, where this Court held:

> "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. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> "We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

15. Having considered the record of appeal, the submissions by parties to the appeal, and the applicable law, we have distilled the issues for our consideration as follows:

    i. Whether the learned Judge erred in law in his determination on liability; and,

    ii. Whether the first appellate court erred in law in its determination on quantum of damages.

16. Turning to the first issue, the gravamen of the appellant's appeal is that the learned Judge erred in law in finding that the respondent had proved negligence on a balance of probabilities. The appellant's argument is anchored on two limbs: first, that the respondent failed to prove the occurrence of the accident; and second, that the evidence of PW1 required corroboration by an independent witness. In this case, the onus was on the respondent to demonstrate that the accident occurred, and that it resulted from the appellant's negligence. This Court in the case of Moi v Muriithi & another [2014] KECA 642 (KLR) had this to say:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."

17. According to the record, the respondent's case before the trial court was supported by the evidence of PW1, who testified as to the fact of occurrence of the accident and the circumstances under which it took place. He further produced documentary evidence, including receipts in respect of repairs undertaken on the respondent's motor vehicle. It is our view that the evidentiary value of a testimony does not depend on the number of witnesses called, but on the credibility and weight of the evidence tendered. Section 143 of the *Evidence Act* outlines that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

18. We agree with the finding of the learned Judge that there was no reason or justification why the evidence of PW1 was rejected by the trial Court. The appellant did not adduce any evidence before the trial court to challenge the evidence that was adduced by the respondent's witness. The effect of this omission was that the respondent's evidence remained uncontroverted. While the legal burden of proof does not shift, the absence of evidence in rebuttal entitled the court to accept the unchallenged testimony of the respondent, if it is credible and consistent. In the present case, PW1 gave a coherent account of the fact of the occurrence of the accident, which was further supported by documentary evidence, including receipts for repairs and related expenses. The learned Judge, in re- evaluating that evidence, was entitled to find that it established, on a balance of probabilities, that the accident occurred in the manner that was testified to by the respondent's witness.

19. We are also satisfied that the learned Judge did not err in drawing an inference of negligence on the part of the appellant. The evidence on record indicated that the appellant's motor vehicle, while being towed, veered off the road and collided with the respondent's stationary vehicle. In the absence of any explanation from the appellant, such conduct is consistent with negligence. In the premises, we find no basis for interfering with the learned Judge's determination on liability.

20. On the second issue, the appellant contended that the learned Judge erred in law by awarding the sum of Kshs. 766,894/= without giving reasons. The principles that guide an appellate court in exercising its mandate in appeals against quantum have been enumerated in many authorities. This Court in the case of Mariga v Musila [1984] KECA 59 (KLR) observed as follows:

> "...assessment of damages is more like an exercise of discretion and the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages unless it is satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reason made a wholly erroneous estimate of the damage suffered. I agree with that statement. It is not what the appellate court would have awarded, but whether the judge has acted on wrong principles."

21. The law is also settled law that special damages must not only be specifically pleaded but must also be strictly proved. The record showed that the respondent pleaded the various heads of special damages with particularity and produced receipts in support thereof during the trial. The learned first appellate Judge, in allowing the appeal, expressly found that the respondent had produced documentary evidence substantiating the pleaded amounts. The learned Judge noted as follows:

> "In this case, I find that the evidence tendered by the plaintiff proved on a balance of probabilities that:
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> ...
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> (c) The cost of the repairs was Kshs. 766,894 as demonstrated through the receipts which the plaintiff produced in court."

22. Although the reasoning on quantum was concise, it is evident that the award was grounded on the evidence on record. There is nothing to suggest that the learned Judge proceeded on any wrong principle or misapprehended the evidence. Consequently, we find no basis upon which to interfere with the award on quantum.

23. In the end, we find that this appeal is devoid of merit. The learned Judge properly applied himself on both liability and quantum, and arrived at a conclusion that is well supported by the law and the evidence on record.

24. The appeal is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL,2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.