



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E032 OF 2024

JAMES BAITHUMBI T/A MUTWIRI
GARAGE.....APPELLANT

VERSUS

PAUL MURIUKI.....
RESPONDENT

***(Being an Appeal from the Judgement of Hon. L. Wangari Maina
(Adjudicator) delivered on 29th February, 2024 in Meru SCCC No. E004
of 2024)***

JUDGEMENT

1. This Appeal arises from the aforementioned Judgment in which the Respondent (as the Claimant) instituted a claim against the Appellant (as Respondent) seeking compensation for loss alleged to have been suffered by the Respondent as a result of a fire that razed down his Motor Vehicle. The Appeal is against the trial Court's decision on both liability and quantum.

2. The background of the matter is that the Respondent vide an amended statement of claim filed on 13th February,2024 pleaded that on or about 10th June,2023, he took his Motor Vehicle Registration Number KCM 026 F for repair at the Appellant's garage as it had an engine problem and the Appellant undertook to repair the same.
3. He asserted that on or about 6th September,2023, he was notified that his said Motor Vehicle had been totally destroyed by a fire at around 04.40 Hours and resultantly declared a total loss. He blamed the fire on negligence on the part of the Appellant and listed five particulars of such negligence and also particularized the loss incurred at Kshs 630,000/-. He further prayed for Ksh. 5,000/- being assessment fee and Ksh.5,000/= as assessor's court's attendance fee. He also sought damages as aforesaid, plus interest and costs of the suit.
4. The Appellant filed his Amended Response to Statement of Claim dated 19th February,2024 wherein he denied, inter alia, occurrence of the incident at his premises and the particulars of negligence or liability alleged. The Appellant

further averred that the sum claimed of Ksh.640,000/- was speculative and unjustified.

5. In his defence he averred that customers park the vehicles at the garage at their own risk and as such he was not liable and did not assume any responsibility for any damage, fire theft or loss.
6. The matter proceeded to full trial whereof each party called one witness in support of their respective cases.
7. After the trial, the trial court delivered its judgement on 29th February,2024 as follows;
 - a. Liability is entered at a ratio of 50% as against the Respondent.
 - b. Liquidated damages are awarded at Ksh.640,000/= less 50%. Grand Total Ksh.320,000/=
 - c. Costs of the suit and interest at court rates from the date of judgement until settlement in full.
8. Dissatisfied with the Judgment, the Appellant filed this Appeal on 3rd September,2024, premised on the following grounds: -

- a) That the Learned Adjudicator erred in Law in finding that the claimant had discharged the burden of proof under Section 107 of the Evidence Act.
- b) That the Learned Adjudicator erred in Law and fact in apportioning liability at a ratio of 50% against the Appellant whereas there was uncontroverted evidence that the Appellant was not to blame for the occurrence of the fire incidence.
- c) That the Learned Adjudicator erred in Law and fact in failing to find that there was no credible documentary evidence tendered to ascertain the pre-accident value of the Motor Vehicle at Ksh.630,000/=
- d) That the Learned Adjudicator erred in Law in finding that the Motor Vehicle Assessor's evidence satisfied the Provisions of Section 48 of the Evidence Act.
- e) That the Learned Adjudicator erred in Law and fact in failing to find that the Appellant owed no duty of care to the Respondent as the Motor Vehicle was parked at the garage at the owner's risk.

f) That the Learned Adjudicator erred in Law and fact in failing to consider in totality the evidence and submissions filed on behalf of the Appellant in support of its defence therefore thus arriving at a wrong decision.

9. The Appellant thus prayed that the trial's court judgement be set aside and be substituted with an order dismissing the claimant's case with costs.

10. The Appeal was canvassed by way of written Submissions.

Appellants' Submissions

11. The Appellant faulted the trial magistrate for holding him 50% liable for the accident on ground that there was no concrete evidence to show he deliberately caused the fire.

12. The Appellant argued that there was no evidence adduced to show that the assessor was an authorized one or was an expert authorized to act for Kenya Pride Automobile Valuers and Assessors LTD, in order for the court to test the accuracy of his opinion as envisaged under Section 48 of the Evidence Act. To further buttress this position, the Appellant relied on the cases of **Patrick Wambugu Gitahi t/a**

Wambugu Garage vs Kenya Power Limited Company
[2010] eKLR and **Garissa Maize Millers Ltd v Attorney**
General & 2 other [2016] eKLR.

13. The Appellant submitted that there was no credible evidence to ascertain the pre- accident value of the Motor Vehicle of Ksh,630,000/- as the assessor in his evidence admitted that he had not undertaken any valuation on the motor vehicle to ascertain the same and could not confirm whether the replacement parts indicated in his report were there prior the incident. In support of his submissions, he placed reliance on the case of **David Bagine v Martin Bundi (1997) eKLR.**
14. On the question of whether the Respondent proved their claim of negligence, the Appellant submitted that the trial court failed to determine whether he owed a duty of care to the Respondent, noting that there was uncontroverted evidence of a disclaimer in the garage stating that vehicle owners would park at their own risk. The Appellant therefore argued that the Respondent failed to establish the existence of a duty of care, without which the court could not properly hold him negligent. In support of his submissions, the

Appellant relied on the case of **Dennis Awunya v Crater Automobile (Nbi) Ltd. & another [2016] eKLR.**

Respondent's Submissions

15. *The Respondent submitted that his motor vehicle was at the garage when the fire broke out and that the issue of parking at owners' risk was not applicable to him as his motor vehicle was at the garage for repair and not parking.*
16. He therefore argued that the Appellant was fully responsible of the safety of the said motor vehicle.
17. On the issue of whether the special damages of Ksh. 640,000/- were proved before the trial court, the Respondent submitted in the affirmative. He argued that the valuation report confirmed the pre-accident value of the subject motor vehicle, and that the receipts produced in evidence established that the assessor charged Ksh. 10,000/= for preparation of the report and attendance in court.
18. The Respondent urged this court to dismiss the appeal with costs to him pursuant to Section 27 of the Civil Procedure Act.

Analysis and Determination

19. The court has carefully considered the appeal, the entire record of the trial court, and the parties' rival submissions. This court is reminded of the provisions of Section 38 of the **Small Claims Court Act** which limits appeals from the Small Claims Court to matters of law only. Therefore, I must first address the issue as to whether this Appeal is on matters of law.

20. Section 38 of the Act provides;

1. A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

2. An appeal from any decision or order referred to in subsection (1) shall be final.”

21. A matter of law or issue of law is a question of law as defined in Black's Law Dictionary, 9th Edition, as follows:

“An issue to be decided by the judge, concerning the application or interpretation of the law; or A question that the law itself has authoritatively

answered, so that the court may not answer it as a matter of discretion; or

An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide, what the true rule of law is.”

22. In the case of **J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another [2017] eKLR**, in addressing a point of law and a point of fact, Justice Mativo stated thus:

“In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. In law, a question of fact, also known as a point of

fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

23. Having perused the Memorandum of Appeal, I note that the grounds therein are on both fact and law. However, guided by the foregoing authority, this Court will identify the issues for determination and confine itself strictly to matters of law. Therefore, the issues arising for determination are;
- a) Whether the respondent proved his case against the appellant on the balance of probabilities, if yes, whether the trial Court properly entered liability against the Appellant.
 - b) Whether the trial court's award of damages was legally justified.

24. I will now proceed to determine the above issues.
25. The law on the burden of proof is found under Section 107(1) of the Evidence Act which provides:

“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.”

26. In other words, a party claiming a right or asserting a liability carries the burden of proving the facts on which the claim is based.
27. Section 109 of the said Act further reinforces that the burden of proof as to any particular fact lies on the person who asserts its existence.
28. In civil matters, the standard of proof is on a balance of probabilities, the court must be satisfied that the facts asserted are more likely than not. See **William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR.**

29. The Court of Appeal in **Palace Investments Limited v Geoffrey Kariuki Mwenda & Another** [2015] KECA 616 (KLR), citing Denning J. in ***Miller v Minister of Pensions*** [1947] 2 ALL ER 372, explained the standard as follows:

“The evidence must carry a reasonable degree of probability, but not as high as in a criminal case. If the tribunal can say, ‘We think it more probable than not,’ the burden is discharged. If the probabilities are equal, it is not. Proof on a balance of probabilities means a narrow win is sufficient; a draw is not enough. Where the evidence is equally (un)convincing, the party bearing the burden of proof loses.”

30. In **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another** [2005] 1 EA 334, the Court of Appeal held that: -

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative

of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

31. In the instant case, the Respondent testified that he took his motor vehicle Registration No. KCM 026F to the Appellant’s garage for repair on 10th June, 2013. On 6th September, 2023, he was notified that the vehicle had been completely destroyed by a fire and declared a total loss. He alleged the fire resulted from the Appellant’s negligence.
32. On cross-examination, the Respondent admitted that the vehicle had an engine problem and that he had no documents or invoices to prove it was taken for repair.
33. CW3, PC Ngethe, produced an abstract confirming that the vehicle was involved in a fire incident on 6th September 2023 while at the garage. He, however, was unaware of any prior criminal charges or findings against the Appellant.

34. The Appellant on his part testified that the cause of the fire was unknown and beyond his control and therefore he could not be held liable. He stated that his garage displayed a warning that vehicles were parked at the owner's risk, and that customers were aware of this.
35. On cross-examination, the Appellant stated that repairs were done during the day and overnight parking was at the owner's risk and that the Respondent's vehicle had been at the garage for three months prior to the incident.
36. On re-examination, the Appellant stated that the vehicle had been brought for an engine change, negotiations over the service fee were unsuccessful and he advised the Respondent to take the vehicle but he advised him to keep it.
37. RW2, John Koro, confirmed the vehicle was destroyed by fire at the Appellant's garage and corroborated the Appellant's testimony that the cause of the fire was unknown and vehicles were parked at owners' risk, and as such, the Appellant could not assume responsibility.

38. Negligence is defined in the Black's Law Dictionary, 10th Edition as:

“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. . . . The elements necessary to recover damages for negligence are (1) the existence of a duty on part of the defendant to protect the plaintiff from the injury complained of, and (2) an injury to the plaintiff from the defendant’s failure.”

39. To succeed in a claim of negligence, the Plaintiff must establish that the Defendant owed him a duty of care, that there was a breach of the duty of care and as a result of that breach, the plaintiff suffered damages. The principles in negligence claim were established in the case of [Donoghue v Stevenson \(1932\) UKHL 100](#), where it was held:-

“The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such

circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty.”

40. The Respondent pleaded the following particulars of negligence of the Appellant: -

- a. Intentionally introducing fire to Motor Vehicle Registration No. KCM 026F.
- b. Burning down the Claimant’s Motor Vehicle Registration Number KCM 026F.
- c. Failing to take any steps to put off the fire that completely burnt down the claimant’s motor vehicle.
- d. Subjecting the Claimant’s Motor Vehicle to risk of danger of which he knew
- e. Causing the accident.

41. Although the Respondent did not adduce evidence to substantiate all allegations of negligence, the Appellant did not dispute the allegation that he failed to take any steps to prevent or control the fire that destroyed the Respondent's motor vehicle. It was pleaded that the fire broke out at 04:40 Hours. The Appellant led no evidence to show that any efforts were made to salvage the vehicle or that someone was left to supervise the garage in his absence. The assertion that vehicles were parked at owners' risk was inapplicable as the subject motor vehicle was in the garage for repair and not merely for parking. In the circumstances, it is reasonable to infer that the Appellant was negligent and bears responsibility for the loss.
42. The Appellant in my view ought to have been held 100% liable for the incident but considering there is no cross appeal from the Respondent, this court will not interfere with the trial's court holding on liability.
43. It is trite law that special damages should be specifically pleaded and strictly proved.

44. It is also trite that an assessor's report that itemizes damage and assigns values is sufficient proof on a balance of probabilities. In ***Nkuene Dairy Farmers Co-operative Society & Anor v 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 been 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.”

45. It is therefore clear that the Respondent was only required to prove the extent of damage to his motor vehicle and the estimated cost of repair, without necessarily showing that the repairs had actually been carried out or paid for. It must always be remembered that the burden of proof on the Respondent was, at all times, on a balance of probabilities and not higher.
46. The Respondent pleaded for Ksh.630,000/= being the pre accident value. He produced the assessors report to buttress this position. He also adduced receipts to prove the assessor's service fee and court attendance costs totaling to ksh.10,000/=. The trial court therefore rightly awarded damages in accordance to the law.
47. I have noted the Appellant's sentiments discrediting the Assessors qualifications. These are matters of facts which cannot be canvassed at this stage. Additionally I find this position misconceived considering they did not adduce any other evidence to counter the assessor's report on record and also Section 32 of the Small Claims Court Act provides

for a less stringent application of the rules of evidence to advance the court's purpose and objectives.

48. The Small Claims court by its very nature is intended to be simple and devoid of procedural and other technicalities.

49. In conclusion, I find no grounds to set aside the lower court's findings on liability.

50. On the damages awarded, I allow the claim for the pre-accident value and the assessment costs. The award for court attendance is not a special damages claim but is added to costs and disbursements.

51. Therefore the judgment is reviewed to Ksh. 635,000/-.

52. Other than the adjustment on the issue of the court attendance fee, I find that the appeal is devoid of merit and it is hereby dismissed with costs to the Respondent.

53. It is so ordered.

Dated, signed and delivered at Meru this 7th day of May, 2026.

HESTON M. NYAGA

JUDGE

