

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E1079 OF 2024**

**KITHINJI VINCENT KATHURIMA .....**

**APPELLANT**

**VERSUS**

**RAM HARDWARE SUPPLIERS LIMITED .....**

**RESPONDENT**

***(Being an appeal from the judgment of Hon. H.M.  
Ng'ang'a (PM) delivered on 5th September 2024 in  
Nairobi (Milimani CMCC No. E1582 of 2021).***

**JUDGMENT**

**Background**

1. The Appellant instituted a claim before the trial court seeking general damages, special damages, costs, and interest arising from a material damage claim in the sum of Kshs. 220,992, allegedly incurred following damage to his motor vehicle. The claim was brought under the doctrine of subrogation on behalf of the Appellant's insurer.
2. By consent of the parties recorded on 20th May 2024, liability was apportioned at 75%:25% in favour of the

Appellant, leaving only the issue of quantum for determination.

3. Upon consideration, the trial court awarded Kshs. 54,920 as special damages, comprising car hire, assessment fees, and partially proved tracing fees. After factoring contributory negligence, the net award was Kshs. 41,190, together with costs and interest.
4. Dissatisfied with the assessment of quantum, the Appellant preferred this appeal.

### **The Appellant's Submissions**

5. The Appellant submitted that the trial court erred in law and fact in failing to award the full sum of Kshs. 220,992. It contended that it produced sufficient documentary evidence including; repair invoices (Kshs. 158,472), assessment and re-inspection reports, receipts for car hire, assessment fees, and tracing fees together with the payment remittance records.
6. The Appellant faulted the trial court for failing to consider its List and Bundle of Documents, and Further Bundle of Documents demonstrating payment and assessment of loss.
7. It was submitted that the trial court misapplied the law by insisting on proof of actual payment rather than proof of loss. Reliance was placed on ***Nkuene Dairy Farmers Co-operative Society vs. Ngacha Ndeiya [2010] eKLR***, where the Court of Appeal held that proof of actual

payment is not mandatory in material damage claims and that assessment reports can sufficiently establish quantum.

8. The Appellant further submitted that the award of of Kshs. 54,920 was inordinately low and that the trial court ignored binding authorities and comparable awards including the assessment and re-inspection reports which provided credible and consistent valuation of repair costs.

### **Respondent's Submissions**

9. The Respondent opposed the appeal and submitted that the trial court properly applied the law. It emphasized that under Sections 107 and 108 of the Evidence Act, the Appellant bore the burden of proof and that special damages must be strictly proved.
10. On repair costs, the Respondent submitted that while the Appellant pleaded Kshs. 158,472 as repair costs, the primary assessment report initially estimated repairs at Kshs. 137,112, while a later re-inspection report revised the figure upward. It therefore contended that the re-inspection report is unreliable and inconsistent as it lacks a proper breakdown of costs. According to the Respondent, the said report appears to have been generated under the authority of the Appellant's insurer thereby raising questions as to its independence.
11. It was submitted that proof of payment was deficient, as the payment advice produced did not correspond with

the pleadings and lacked supporting documentation such as policy details, invoices, or identifiable references to the vehicle or transaction. The Respondent added that there was no sufficient evidence to show that the insurer actually indemnified the insured which is a requirement under the doctrine of subrogation.

12. The Respondent relied on judicial authorities to argue that subrogation requires proof of an insurance contract, crystallization of risk, and actual indemnification.
13. On tracing fees, the Respondent submitted that even though Kshs. 25,000 was claimed under this heading for tracing fees, only Kshs. 17,400 was supported by a receipt and that the additional remittance relied upon was inconsistent and did not substantiate the full claim. It was the Respondent's case that the unproven balance of Kshs. 7,600 was not recoverable.
14. The Respondent argued that the trial court correctly applied the law on proof of special damages by limiting the awards to amount strictly proved.
15. It was submitted that the re-inspection report lacked breakdown, supporting documentation and appeared to originate from the insurer thereby raising concerns as to its independence.
16. It was the Respondent's case that the Appellant failed to prove payment as the payment advice of Kshs. 150,275 did not correspond with the pleaded sum. The Respondent claimed that no policy documents or claim

forms were produced and that there was no identifiable link between payment and the specific motor vehicle or claim.

17. The Respondent contended that the requirements for subrogation were not met and that there was no proof of indemnification of the insured.

## **Analysis and Determination**

18. From the Memorandum of Appeal, Record of Appeal, and submissions by both parties, I find that the main issue for determination is whether the trial court properly applied the principles governing proof of special damages.

19. The appeal raises competing approaches to proof of special damages in material damage claims. The Appellant's position emphasizes a more flexible approach, relying on assessment reports and the principle that actual payment need not be strictly proved where loss is demonstrable. The Respondent's position, on the other hand, stresses strict proof, particularly documentary proof of payment, consistency of evidence and compliance with the requirements for subrogation.

20. The court must therefore consider the evidentiary weight of invoices versus receipts, the probative value of assessment and re-inspection reports, the threshold of proof required under Kenyan law, and the extent to which subrogation must be strictly demonstrated.

21. Section 107 of the Evidence Act provides that:

***“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.”***

22. Section 108 further provides that:

***“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.”***

23. In ***Hahn vs. Singh (Civil Appeal No. 42 of 1983) [1985] KLR 716*** the Court of Appeal held that:

***“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act.”***

24. In ***Great Lakes Transport Co. (U) Ltd vs. Kenya Revenue Authority (2009) eKLR***, the Court stated:

***“A mere invoice as the one produced in evidence was incapable of proving purchase. An invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which the invoice was prepared were paid for... one would normally expect endorsement such as the word ‘PAID’ on the invoice and that would turn the status of the invoice into a receipt.”***

25. In ***Nkuene Dairy Farmers Co-operative Society & Another vs. Ngacha Ndeiya*** (supra) 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 that 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.”***

26. Similarly, in ***David Bagine vs. Martin Bundi*** Civil Appeal No. 283 of 1996:

***“...a motor vehicle assessor’s report would provide acceptable evidence to prove the value of material damage to a motor vehicle...”***

27. The doctrine of subrogation was discussed in ***Kibe & 2 others vs. Martin*** (Civil Appeal E182 of 2021) [2024] KEHC 12961 (KLR) where the Court held:

***“For the doctrine of subrogation to be invoked properly, there are conditions precedent. First, there must be in existence a contract of insurance, risk must have crystallized and there must be actual payments made in order to indemnify the insured.”***

## **Proof of Special Damages**

28. The Appellant relied on an invoice for Kshs. 158,472 based on payment remittance records, assessment and re-inspection reports.

29. The trial court however rejected the claim on the basis that the invoice was not proof of payment and that the re-inspection report lacked clarity and consistency.

30. This Court finds that while it is incorrect that an invoice alone is not proof of payment as was stated in **Great Lakes Transport** (supra), the decision in **Nkuene Dairy Farmers** (supra) recognizes that proof of actual payment is not strictly required in material damage claims where the extent of loss is established. For this reason, I find that the trial court adopted a strictly rigid approach requiring proof of actual payment, particularly in relation to repair costs. I find that such an approach did not fully align with the jurisprudence in **Nkuene Dairy Farmers** (supra), which recognizes that material damage claims may be proved through credible assessment reports without strict proof of payment.

31. The law in respect to material damage claims calls for a balanced approach, not a mechanical insistence on receipts where the extent of loss is otherwise ascertainable.

### **Repair Costs**

32. The Appellant produced an invoice for Kshs. 158,472, payment remittance records together with assessment and re-inspection reports. My view is that while there are noted discrepancies between the initial assessment and re-inspection figures, the mere existence of multiple reports does not invalidate the claim but reflects a reassessment of damage, which is not uncommon in insurance claims.

33. My take is that the re-inspection report, read together with the initial assessment, provides sufficient indication of the extent of damage and cost of restoration. Moreover, the Respondent did not tender contrary expert evidence to challenge the valuation. Guided by the decision in **David Bagine** (supra), I find that the assessor's reports constitute an acceptable and sufficient evidence of the quantum of material damage.

34. Accordingly, this Court finds that the Appellant sufficiently proved the repair costs on a balance of probabilities.

### **Tracing Fees**

35. The Appellant claimed Kshs. 25,000 and produced a receipt for Kshs. 17,400 and evidence of payment remittance.

36. While the trial court awarded only the receipted amount, this Court finds that the combined documentary evidence supports the claim for tracing services. I find that the absence of a receipt for the entire amount is not fatal where there is corroborative documentary evidence more so since the Respondent did not rebut the evidence of payment. This Court is therefore satisfied that the tracing fees were sufficiently proved.

### **Subrogation**

37. The Respondent argued that subrogation was not proved due to absence of policy documents and clear proof of indemnification. The record however shows a series of

correspondence between the insurer and the Appellant together with the various establishments/companies that were engaged in the motor vehicle assessment and repairs. I further note that the claim was expressly brought on behalf of an insurer, payment remittance records were produced and the Respondent did not challenge the existence of the insurance relationship at the trial. I find that subrogation, being an equitable doctrine, does not require a hyper-technical evidentiary threshold where the surrounding facts demonstrate indemnification.

### **The Award**

38. It is trite that an appellate court may interfere with an award where the trial court applied wrong principles; or where the award is manifestly high or inadequate.

**39.** In this case, I find that the trial court misdirected itself by insisting on strict proof of payment contrary to established authority on material damage. I also find that the trial court failed to properly evaluate the assessment reports, excluded material evidence placed before it thereby coming up with an award of Kshs. 54,920 which was inordinately low and did not reflect the proven loss.

### **Disposition**

40. Having regard to the reasons and findings that I have made in this judgment, I find that the appeal is merited and I therefore allow it in the following terms: -

- a) The judgment of the trial court on quantum is set aside.**
- b) Judgment is entered for the Appellant as follows:**
- i) Special Damages: Kshs. 220,992**
  - ii) Less 25% contribution: Kshs. 55,248**
  - iii) Net Award: Kshs. 165,744**
- c) The Appellant shall have costs of the appeal and of the suit in the lower court, together with interest at court rates from the date of filing suit till payment in full.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2026.**

**HON W. A. OKWANY**  
**JUDGE**

**In the presence of**  
**Ms Figei for Appellant**  
**No appearance for Respondent**  
**Abdirzak - Court Assistant**