



Transeast Kenya Limited v Mombasa Cement Limited (Civil Appeal E248 of 2024) [2025] KEHC 12080 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 12080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E248 OF 2024**

**F WANGARI, J
MAY 30, 2025**

BETWEEN

TRANSEAST KENYA LIMITED APPELLANT

AND

MOMBASA CEMENT LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. J.W Mwangi, ADJ/
RM delivered on 31/07/2024 in Mombasa SCCC No. E178 of 2024)*

JUDGMENT

1. The Appellant who was the Claimant in the lower court filed a Statement of Claim dated 03052024 under the doctrine of subrogation. The Claimant stated that its motor vehicle registration no. KBV 876F, was involved in an accident with the Respondent's vehicle registration no. KDB 653N and blamed it on the negligent driving of the Respondent's driver.
2. The Claimants vehicle was so extensively damaged that it had to be sold as a salvage. The claim was for Kshs. 527,958 as tabulated in paragraph 4 (x) of the Statement of Claim.
3. The Respondent filed the Response to a Statement of Claim dated 13062024 denying the allegations by the claimant and put the Claimant to strict proof thereof. The Respondent blamed the Claimants driver for the accident giving particulars of negligence in paragraph 4 of the response.
4. The trial court heard the Claimant's case. The Respondent did not adduce any evidence and the case was closed. The court dismissed the Claim on grounds that 'no liability was pleaded and proved'. The trial court stated that Kshs. 504,408= would have been awarded if liability had been proved.
5. Aggrieved by the finding of the trial court, the Appellant lodged a Memorandum of Appeal dated 19082024 hence this Appeal. The appeal was canvassed by way of written submissions. Both parties complied with the directions.



Analysis

6. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)
7. Upon considering the written submissions by the parties, the issues for determination are;
 - a. Whether there was proof of negligence on the part of the Respondent
 - b. Whether special damages have been proved
8. It is disputed that the Claimant pleaded and proved liability. The trial court dismissed the claim on this ground. The Respondent relied on the case of *Ogwari v Hersi* (Civil Appeal No. 223 of 2022) where Magare J. held that negligence must first be pleaded before it is proved.
9. On the other hand, the Claimant Appellant stated that it is a misapprehension of the law that the sub-heading of ‘Particulars of Negligence’ must appear in the Statement of Claim. It was submitted that the evidence of negligence was pleaded in para 3 and 4 of the Statement of Claim.
10. This court has had different positions on whether or not particularization of negligence is mandatory in the pleadings. In *Elrons Ltd v Basil* (Civil Appeal E890 of 2022) [2024] KEHC 6614 (KLR) (Civ) (6 June 2024) (Judgment), Musyka J. departed from the position as held by Magare J in the *Ogwari* case (*supra*). He stated as hereunder;

“The approach, by the trial court, echoes the thoughts in *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J), which, in a way, with utmost respect, claws back on the design to move away from the complexities of procedure and evidence, meant to enable ordinary citizens, with small claims, have an easier access to, and time in, the courts. It could spell doom to the Small Claims Court, reducing it to just another Magistrate’s Court, or the High Court for that matter, bound, as they are, by layers of complex rules of procedure and evidence.”
11. Further, the Judge in *Elrons* case took the position taken by Ong’udi J. in the case of *Kenyatta National Hospital v Dorcas Odongo & another* [2021] eKLR in finding that particulars of negligence in pleadings were not mandatory as long as the acts of negligence have been alleged in the pleadings. I am persuaded by this position and find that the failure by the Claimant to plead particulars of negligence was not fatal to the Claimant’s case as the acts of negligence have been pleaded.
12. On whether the Claimant proved negligence, I have perused through the witness statements of the Claimant’s witnesses. I have considered the independent evidence by the Investigating Officer in the traffic matter and whose findings were produced in court by CW4, one Sgt. Jacob Nyambu who testified on behalf of the Investigating Officer, PC Michael Kajoli.
13. It was his evidence that the Respondent’s vehicle was heading to the opposite direction of the Claimant’s vehicle, was overtaking but did not complete the overtaking. The Claimant’s driver tried to avoid a head-on collision by swerving to the left, but was hit at the rear by the Respondent’s vehicle causing it to overturn and roll. He blamed the Respondent’s driver for the accident.
14. The Respondent did not adduce any evidence. The evidence by the Claimant remains unrebutted. I find that negligence has been proved by the Claimant.



15. On special damages, the same has been pleaded. From the documentary and oral evidence on record. The Claimant produced documents in support of paragraph 8 and 9 of the Statement of Claim. There being no evidence to the contrary, I find the special damages have been proved. The Claimant has discharged the burden of proof as per section 107 of the *Evidence Act*. I find the appeal has merits.
16. On costs, the appeal being successful, I hereby exercise the discretion of the court and order that costs be awarded to the Appellant both in the lower court and the appeal.

Determination

17. In the upshot, I make the following orders: -
 - a. The Appeal has merits.
 - b. The Judgment of the lower court dated 31072024 is hereby set aside and substituted with Judgment in favour of the Claimant as prayed in the Statement of Claim.
 - c. Costs awarded to the Appellant.It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 30TH DAY OF MAY, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Oloo Advocate for the Appellant

Mr. Chamwanda Advocate for the Respondent

MS Norah, Court Assistant

