Fish Processors (Two Thousand) Limited v Pabari Enterprises Limited (Civil Appeal E131 of 2024) [2025] KEHC 10945 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 10945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E131 OF 2024

JM OMIDO, J

JUNE 26, 2025

BETWEEN

FISH PROCESSORS (TWO THOUSAND) LIMITED ..... APPELLANT

AND

PABARI ENTERPRISES LIMITED ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. J.P. Mkala, Resident Magistrate/Adjudicator delivered on 7th June, 2024 in Kisumu SCCC No. E111 of 2024)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. J.P. Mkala, Resident Magistrate/ Adjudicator delivered on 7th June, 2024 in Kisumu SCCC No. E1111 of 2024.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 1st July, 2024 upon which it seeks to upset the judgement and decree of the lower court are as follows:
    i. The learned Adjudicator erred in law in applying the wrong principles when making his judgement against the Appellant and therefore arrived at an erroneous determination on merit.
    ii. The learned Adjudicator erred in law in when he considered matters which he ought not to have considered when entering judgement against the Appellant and therefore arrived at an erroneous determination on merit.
    iii. The learned Adjudicator erred when he considered an email printout, payment vouchers, invoices and a discharge voucheras sufficient evidence when proving damages in a material damage claim, and therefore arrived at an erroneous determination on merit.

iv. The learned Adjudicator erred in law when he failed to consider matters he ought to have considered when entering judgement against the Appellant and therefore arrived at an erroneous determination on merit.

v. The learned Adjudicator erred when he failed to consider that the Respondent herein failed to produce an assessment report/loss adjuster's report breaking down and assigning values to the damages occasioned to the Respondent's premises, and therefore arrived at an erroneous determination on merit.

vi. The learned Adjudicator erred when he failed to consider that the Respondent herein failed to produce any receipts showing that repairs were conducted on the Respondent's premises and therefore arrived at an erroneous determination on merit.

vii. The learned Adjudicator erred in law when he failed to appreciate and apply our rich jurisprudence regarding the award of special damages, specifically in material damage claims, when entering judgement against the Appellant and therefore arrived at an erroneous determination on merit.

viii. The learned Adjudicator erred in law by failing to consider the numerous case law cited and included in the Appellant's submissions filed before the court, and thereby arrived at an erroneous determination on merit.

3. The Appellant proposes that the appeal be allowed with costs and that this court sets aside and/or reviews the trial court's judgement delivered on 7th June, 2024 and proceeds to dismiss the suit before the trial court.

4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] EA 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In Sielle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of *Peters v Sunday Post Limited* [1958] EA 424 in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> " i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

7. This court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions.

8. The matter before the trial court, based on tortious liability (a material damage claim), was commenced by way of a statement of claim dated 14th March, 2024 filed by the Respondent herein (the Claimant before the trial court), under the doctrine of subrogation.

9. The Respondent pleaded that on or about 16th March, 2021, its premises, a commercial building T Plot No. Kisumu Municipality Block 3/58 was damaged when the Appellant's motor vehicle registration number KBD 274U lost control and rammed into the front door of the Respondent's building.

10. The Respondent pleaded that the said accident as a result of the careless and or negligent manner in which the Appellant's vehicle was driven and/or controlled by the Appellant's servant and/or agent. The Respondent listed 7 particulars of negligence that it attributed to the Appellant's servant and/or agent, and held the Appellant vicariously liable for the negligence of its servant and/or agent.

11. The Respondent pleaded that as a result of the accident, the Respondent's premises were damaged for which the Respondent expended the following amounts:Tracing fees Ksh. 24,330/-.Cash in lieu Ksh.164,911/-.Total Ksh.189,241/-.

12. The Respondent stated in its statement of claim that as at the time of the accident, its premises were insured by APA Insurance Company Limited *vide* policy number 70/401/0010006 and that the said insurers suffered the losses particularized above and that the claim was in the premises brought for the benefit of the said insurers in exercise of its rights under the doctrine of subrogation, having fully indemnified the Respondent.

13. The Respondent sought against the Appellant judgement in the sum of Ksh.189,241/-, costs and interest.

14. The Appellant resisted the claim by filing a response to statement of claim dated 8th April, 2024 denying liability in toto to the Respondent. The Appellant denied ownership of motor vehicle registration number KBD 274U and denied the occurrence of the accident described by the Respondent in the statement of claim. The Appellant denied that the commercial premises described building T Plot No. Kisumu Municipality Block 3/58 belonged to the Respondent or that the same were damaged as claimed the Respondent.

15. The Appellant denied all the particulars of negligence that the Respondent attributed to the Appellant.

16. The matter before the trial court proceeded *vide viva voce* evidence. The Respondent called Jiten Pabari who testified as its first witness and adopted the contents of his statement dated 14th march, 2024.

17. In his statement, the witness stated that he was a director of the Respondent and that the Respondent owned a commercial building along Obote Road in Kisumu, which he described as commercial building T Plot No. Kisumu Municipality Block 3/58.

18. The witness stated that on 16th March, 2021, the Appellant's vehicle registration number KBD 274U was negligently driven as a result of which it rammed into the said premises, causing damage to the same. He further stated that the premises were insured by APA Insurance Company Limited, who

fully indemnified the Respondent for the damage to the premises. The accident was reported to the police and a police abstract issued, which the witness produced as an exhibit.

19. The second witness that the Respondent called was Vivian Kibathi, a legal officer with APA Insurance Company Limited. The witness adopted the contents of her statement dated 14th March, 2024 in which she stated that her employer had insured the Respondent's premises and that the accident was reported to the insurer.

20. That the insurer subsequently expended Ksh.24,300/- as tracing fee and Ksh.164,911/- in recompensing the Respondent, and sought to recover the said amount from the Appellant, vide the claim, in exercise of its right of subrogation.

21. The witness produced the following documents in support of the Respondent's case:Copy of records for motor vehicle registration number KBD 274U.Impact damage breakdown.Discharge voucher.Claim payment voucher.Invoice and attached receipt by Sunrays General Insurance Investigators.Claim fee voucher in favour of Sunrays General Insurance Investigators.Demand letter dated 22nd February, 2024.

22. The Appellant did not call any witnesses.

23. In his judgment rendered on 7th June, 2023, the trial court found in favour of the Respondent and proceeded to grant the following reliefs orders:

    a. Judgement in the sum of Ksh.189,241/-.

    b. Costs of the claim assessed at Ksh40,000/-.

    c. Interest at court rates from the date of judgement until payment in full.

    d. There shall be stay of execution for 30 days.

24. I have considered the grounds of appeal, the submissions of the parties and the record of the lower court. I discern the issues for determination to be as follows:

    a. Whether on the basis of the evidence on record, liability was proved against the Appellant, and to what extent.

    b. Whether the learned Adjudicator reached the correct finding on the award that he made.

    c. Who should bear the costs of this appeal.

25. The first issue for me to address is whether on the basis of the evidence on record, liability was proved against the Appellant, and to what extent. It is instructive from the record of the trial court that the only evidence available as to how the accident occurred is that of the Respondent.

26. The Respondent stated that the Appellant's motor vehicle was carelessly and/or negligently driven as a result of which the accident occurred. The police abstract that was produced confirmed the occurrence of the accident and the damage to the Respondent's premises.

27. Further, the abstract and the copy of records that was produced indicate that indicates that that the Appellant was the owner of the said vehicle. The Appellant did not call any witness or provide any

evidence that would rebut the evidence of the Respondent. In the case of *Kimatu Mbuvi v Benson Ngale* [2012] eKLR, Lenaola J. (as he then was) held:

> "Liability cannot be challenged where a party calls no evidence to rebut the allegation of negligence and hardly challenge the circumstances of the accident".

28. There being no evidence to rebut the position proffered by the Respondent as to causation and negligence, it is my persuasion that the learned Adjudicator reached the proper finding that the Appellant was wholly to blame for the accident.

29. The second issue for determination is whether the learned Adjudicator reached the correct finding on the award that he made. Notably, what the Appellant challenges is the award of ksh.164,911/- being the payment that APA Insurance Company Limited claims to have made to the Respondent and which the said insurer sought to recover from the Appellant, under the doctrine of subrogation.

30. From its grounds of appeal and submissions, the Appellant challenges the said amount on the ground that no assessment report was produced to particularize the damages to the Respondent's premises. The Appellant took the position that it was not sufficient for the Respondent to produce documents that indicate that the said amount was paid without an assessment of the damage that was occasioned to the premises, and the repairs, if any.

31. On its part, the Respondent took the view that having proved that it had been compensated by its insurers, it was entitled to recover the amount paid from the Appellant on behalf of its insurers.

32. While I agree with the Appellant that the ideal situation would have been for the Respondent to prove the particularized damage to its premises, it must be remembered that this was a matter filed in the Small Claims Court and Section 31 of the *Small Claims Court Act* was operative. Let us read the said provision:

> 31. Court not bound by strict rules of procedure or evidence -
>
> In the conduct of any proceedings before it, the Court shall not be bound by the strict rules of procedure or evidence.

33. In my view, considering the import and application of the above provision, it was sufficient, considering that the Appellant did not call any evidence to controvert that of the Respondent, for the Respondent to demonstrate that the insurer paid the said amount in compensation for the damage caused by the Appellant's vehicle, which the Respondent did, in my persuasion.

34. In civil cases, the standard of proof is that of a balance of probabilities. What amounts to proof on a balance of probabilities was discussed by Kimaru J. (as he then was) in the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 where the court held as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. In the same breath, the Court of Appeal in the case of *Palace Investment Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR observed as follows:

> " Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:
>
> > " "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.""

36. In view of the above and the operation of Section 31 of the *Small Claims Court Act*, I am of the inclination that the Respondent proved the amount of 24,330/- and Ksh.164,911/-, expended by its insurers as tracing fees and compensation respectively, on a balance of probabilities. I note that the decision of the trial court on costs and the assessment thereof was not challenged.

37. That said, I reach the finding that the present appeal lacks merit and I proceed to dismiss the it with costs to the Respondent, which I assess at Ksh.25,000/-.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 26TH DAY OF JUNE, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: No Appearance.

For Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.