Njoroge v Murithi (Civil Appeal E163 of 2023)
[2025] KEHC 9022 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E163 OF 2023

TW OUYA, J

JUNE 26, 2025

BETWEEN

PAUL MUTUNGU NJOROGE ..... APPELLANT

AND

JAMES MURITHI ..... RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment delivered on 24th February 2023 in Nairobi SCCC No. E1857 of 2022. The suit commenced through the statement of claim dated 9th July 2022. The claim was for special damages of kshs. 355,199.00 arising from a road traffic accident on or about 27th July 2019 along Eastern Bypass Road. It was alleged that the Claimant's authorized driver, agent and or servant was lawfully driving motor vehicle KCC 889K make Toyota Wish along Eastern Bypass when at a junction in Bypass Centre, the Respondent so negligently drove, managed and controlled motor vehicle registration number KAT 368V that he allowed the same to hit the Claimant's said motor vehicle at the front thereby causing extensive damage.

2. Upon service of summons, the Respondent entered appearance and filed a Response to Claim dated 23rd August 2022. The Respondent denied the key averments in the claim and liability. Alternatively, the Respondent pleaded contributory negligence against the Appellant by setting out the particulars thereof in his response to the statement of claim. The Respondent submitted that he had been sued by virtue of being the registered owner of the motor vehicle. Therefore, the claim was based on vicarious liability. No evidence was adduced to show that the said driver, one Paul Wanjohi, was actually employed by the Respondent or was in the course of employment or that the Respondent derived any benefit from the actions of the said Paul Wanjohi, or that the Respondent exercised authority over the said Paul Wanjohi, or acted in any way jointly with the driver.

3. The matter proceeded to full trial and 24th February 2024 judgement was entered in favour of the Claimant for Ksh.110,653 plus interest at cost rates from the day of filing the claim upon finding that the Respondent was 100% liable for the accident on the basis that this was proved by both the Witnesses and the police abstract which held the Motor vehicle registration number KAT 368V responsible for the accident.

4. Aggrieved by the award on quantum, the Appellant preferred the instant appeal on quantum only on the following grounds:

    a. The learned magistrate erred in law and in fact by failing to appreciate the evidence placed before her;

    b. The learned magistrate erred in law and in fact by disallowing a claim which the Appellant had proven to have satisfied beyond reasonable standards;

    c. The learned magistrate erred in law and in fact by failing to take into consideration the Appellant's evidence in reaching her decision

    d. The judgment of the learned magistrate was against the weight of the evidence.

5. The Respondent neither entered appearance nor filed any response to the Appeal.

6. The appeal was disposed by written submissions.

7. The appellant submitted that he had specifically pleaded special damages amounting to kshs. 355,199.00 as particularized under paragraph 5 of the statement of claim. He maintained that the trial court disregarded the evidence placed before her and erred in awarding a sum of kshs. 110,659.00 as opposed to the KShs. 355,199.00 pleaded and proved.

8. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a subordinate court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another v Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

9. The duty of the first appellate court was set out in the case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

10. The Court is to remember that it has neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak

for themselves. The observation of documents is the same as that of the lower court, as parties cannot read into those documents matters extrinsic to them. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

11. The burden of proof was also addressed by the Court of Appeal in the locus classicus case of Anne Wambui Ndiritu –v- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the said court 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."

12. In Evans Nyakwana –v- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

13. The position is also that the evidence must carry a reasonable degree of probability, but not so high as is required in a criminal case. In Palace Investment Ltd –v- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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."

14. The appeal herein is on quantum. Looking at the totality of the evidence, I note that the police abstract dated 29th July 2019 showed that motor vehicle registration KAT 358V was blamed for the accident. The record shows that the decision of the lower court to apportion 100% liability on the Respondent was based on the fact that the police abstract indicated that the Respondent's registered motor vehicle was blamed for the accident.

15. On the question of quantum of damages, with special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

16. Chesoni, J (as he then was) stated in the case of Ouma v Nairobi City Council (1976) KLR 304 that:

> " Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533; -
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> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

17. Therefore, a person claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. As a result, a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent out to the party by a third party. In this regard, courts have held that an invoice is not proof of payment and that only a receipt meets the test. Total Kenya Limited Formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR

18. The Appellant pleaded special damages of Kshs. 355,199.00 plus costs and interest as follows:

    Repairs Kshs. 110,659.00

    Spares Kshs. 203,000.00

    Assessment Fees Ksh 9,860.00

    Reinspection Fees Ksh. 2,900.00

    Tracing Fees Kshs. 28,780.00

19. The Appellant attached several invoices to his claim. However, having established that an invoice is not proof of payment, it follows that the only payment proved through actual receipts was ETR Receipt of Kshs. 110,659.12 from Prime Auto solutions Limited dated 27.08.2019.

20. I therefore find no reason to disturb the decision of the trial court on quantum as the only component of the special damages that was pleaded and proved was the cost of repairs at KSh. 110,659.00

21. The appeal is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26th JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Appellant..... Kirui

For Respondent.....No appearance

Court Assistant.....Brian