Kasaam Hauliers Limited & another v Shreeji Enterprises (Civil Appeal E20 of 2023) [2025] KEHC 12039 (KLR) (11 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E20 OF 2023

TM MATHEKA, J

AUGUST 11, 2025

BETWEEN

KASAAM HAULIERS LIMITED ..... 1ST APPELLANT

ALI KOKI ..... 2ND APPELLANT

AND

SHREEJI ENTERPRISES ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. B. Ireri (SPM) in the Senior Principal Magistrate's Court at Makindu, Civil Case No.296 of 2018, delivered on 20th March 2023)

JUDGMENT

Introduction

1. The Respondent Shreeji Enterprises filed Makindu, Civil Case No.296 of 2018 against Kasaam Hauliers Ltd &ali Koki for seeking compensation damage caused to its motor vehicle KBF 760H/ZC 9677 pursuant to a road accident on 13/01/2016 along the Mombasa – Nairobi highway at Kambu area. It was the Respondent's case that on the material day, its authorized driver was driving the said motor vehicle when the 2nd Appellant, being the 1st Appellant's driver, drove motor vehicle KCB 028T/ ZC 9677 so negligently that it lost control, collided with motor vehicle KBF 760H/ZC 9677 and caused it extensive damage, and the respondent suffered loss and damages. The Respondent sought the following;

    a. Kshs 7,400,000/= being the pre-accident value of its motor vehicle, less the salvage value.

    b. Kshs 192,000/= being costs incurred to retrieve goods from its motor vehicle at the scene of the accident.

    c. Kshs 25,000/= being the professional/survey fees for the assessment of damages on its motor vehicle.

d. Compensation for loss of income.

e. Costs of the suit.

f. Interest on a, b, c & d.

2. The Appellants filed a joint statement of defence whereby they denied all the allegations in the plaint and put the respondent to strict proof thereof. They admitted that an accident occurred on the material day but denied that it occurred in the manner and/or circumstances pleaded in the plaint. They averred that the accident was solely caused and/or substantially contributed to by the negligence of the driver of KBF 760H.

3. After the preliminaries, the matter proceeded to full hearing where the plaintiff called three witnesses. The defendant did not call any witnesses and closed their case. The trial magistrate delivered trial judgment on 20th February 2023 in favor of the Respondent as follows;

Liability.....100percent

Pre-accident value.....kshs 7,400,000

Costs of retrieval of goods from scene.....kshs 192,000

Assessors' costs.....kshs 25,000

Witness costs.....kshs 10,000

Total.....kshs 7,627,000

The Appeal

4. Aggrieved by the judgment, the Appellant filed this appeal on the following grounds;

a. The learned trial magistrate erred in law and fact in finding the Appellant 100percent liable for the accident despite the absence of evidence to support such a finding.

b. The learned trial magistrate erred in law and fact in the manner that he assessed special damages and in awarding damages that were excessive in the circumstances.

c. The learned trial magistrate erred in law and fact in failing to consider adequately or at all, the submissions on liability and quantum that had been tendered by the Appellant and the authorities therein and in so doing he erred.

5. The parties elected to canvass the appeal through written submissions and appropriate directions were given. Accordingly, the parties complied and filed their respective submissions.

Submissions by the Appellant

6. With regard to liability, the Appellants submitted that the investigating officer was not called to shed light on the accident and that although the police abstract indicated that motor vehicle KCB 028T was to blame for the accident, no sketch map was produced to show the point of impact or ascertain how the accident occurred. It was contended that the abstract was not conclusive proof of liability and reliance placed on Kennedy Nyangoya -vs- Bash Hauliers [2016] eKLR where the court stated;

> " .even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it."

7. It was submitted that being blamed by the police was not proof that the Appellants caused the accident as they were never been charged with any traffic offence, and are presumed innocent till proven guilty in a court of law. Reliance was placed on Mwema Musyoka -vs- Paulstone Shamwamam Sheli [2020] eKLR where the court stated;

> "I do not agree with the Respondent's submission that the Appellant's vehicle was held liable upon investigations by the Nakuru Traffic Officers on whose behalf no evidence was tendered other than on the alleged investigation and findings. Other than a police abstract, no other document was produced by the investigating officer, having not testified. An entry in a police abstract is not proof of the cause of an accident. Evidence ought to be called to support the credibility or otherwise of the entry more so in a civil suit."

8. It was submitted that the evidence of the Company's Administration Clerk, PW3, had no bearing on the question of liability as he did not witness the accident and his evidence was based heavily on hearsay; that the trial magistrate was not in a position to ascertain the point of impact leaving no clear picture of how the accident occurred. Reliance was placed on Benter Atieno Obonyo -vs- Anne Nganga & Anor [2021] eKLR where the court stated;

> "As can be deduced from all the cited authorities, the key issue is to prove. It is not enough to allege as done by the Appellant herein and expect the court to agree with you. As expected under section 107 and 108 of the *Evidence Act*, the burden squarely is upon the Appellant. As a matter of fact, the traffic police ought to have clarified how the accident may have happened by producing the sketch maps of the scene and any other relevant evidence."

9. It was submitted that the Respondent failed to prove the Appellant's negligence and the causal nexus between the alleged negligence and the accident. Reliance was placed on Masembe -vs- Sugar Corporation & Anor (2002)2 EA where the Supreme Court of Uganda stated;

> "Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage of injury complained of and where the damage was caused by the negligent acts of different persons, to asses the degree of their respective responsibility and blameworthiness and apportion liability between or among them accordingly...there is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

10. It was submitted that the drivers of the respective vehicles did not testify hence it is a fit case to apportion blame equally.

11. With regard to damages, it was submitted that the same must be strictly proved by way of receipts. That the trial magistrate erred in regard to invoice No. TR16415 of kshs 192,000/= which was purported to have been paid by Geminia Insurance. That the same was disputed during cross-examination of PW3 who stated that it was not paid by Geminia Insurance. It was contended that the amount was not proved and should not be awarded.

12. It was conceded that the pre-accident value of ksh 7,400,000/= and assessment fees of kshs 25,000/= were proved.

Submissions by the Respondents

13. On liability, the Respondent submitted that the circumstances leading to an accident are construed from the whole evidence on record and that a sketch map is just but one factor as to how an accident occurred. That it is prepared after the accident and therefore not an eyewitness account. That, although it has some probative value, its absence is not fatal to the case. Reliance was placed on the case of Equator Distributors -vs- Joel Muriu [2018] eKLR where the Court of Appeal (Nambuye, Makhandia & Otieno-Odek JJ. A) held as follows: -

> " 35. On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eye witness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is upon the court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered..."

14. It was submitted that the evidence of PW2 was based on the certified copy of the Police Abstract and the OB, which are public documents, and the fact that he was not the investigating officer does not water down the evidence contained in those documents. Reliance was placed on the case of John Kibicho Thirima -vs- Emanuel Parsmei Mkoitiko (2017) eKLR where the court stated that;

> " ...OB extracts and police abstracts are public documents which can be produced by any police officer serving in a police station, whether he was an investigating officer or not, as it is in the public knowledge that public officers get transferred from their stations from time to time while public records remain."

15. Consequently, it was submitted that the trial court was right to accept the evidence of PW2 as contained in the said documents. It was contended that whereas the Respondent had no eye witness as its driver died inside the cabin, the Appellants' driver was an eye witness but he failed to testify despite having several opportunities to do so hence the evidence of PW2 was not controverted.

16. Further, it was submitted that the failure to testify by the 2nd Appellant gave credence to the testimony of PW2 that he had absconded hence his conduct is clearly of a guilty person. It was submitted that as much the plaintiff has the burden of proving negligence on the part of the defendants, the defendants' testimony is also relevant in assisting the court to arrive at the correct finding. Reliance was placed on the case of Nadwa -vs- Kenya Kazi Ltd (1988) eKLR where the Court of Appeal observed:

> " In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs' favour unless the defendant's evidence provides some answer adequate to displace that inference."

17. It was submitted that the Appellants have failed to challenge the Respondent's evidence on liability hence the Respondent is entitled to judgment on 100percent basis against the Appellants. Reliance was placed on the case of Masembe -vs- Sugar Corporation and Another (supra), where the court held;

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it...A

reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object...Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently....."

18. Further reliance was placed on the case of Wellington Nganga Muthiora -vs- Akamba Public Road Services Limited & Another [2010] 2 KLR 39 where it held that:

> " The appellant produced a police abstract which stated that the first respondent was the owner of the vehicle and that was prima facie evidence. The first respondent did not challenge the production of the police abstract by the appellant on the basis either that he was not the maker of it or that the contents were not admissible or were not correct. The first respondent let it be produced without raising a finger. In cross- examination by the learned Counsel for the first respondent, the allegation in the police abstract that the first respondent was the owner was not challenged, though the other contents of the abstract such as whether indeed the appellant was a passenger in the same bus were challenged by clear questions as to whether the appellant's name was in the passenger manifest and whether he had a ticket as evidence that he was in the passenger bus. In such a situation where the police abstract's contents pertaining to ownership of the vehicle was not challenged, it remained prima facie evidence and when the respondents offered no evidence in their defence, such prima facie evidence was not rebutted and it remained valid, unrebutted evidence before the court."

19. Consequently, it was submitted that it is too late in the day to raise the issue of admissibility of the police abstract and that by attempting to do, the Appellants are attempting to close the stable after the horse has bolted.

20. With regard to the claim of loss of damage and related costs, the Respondent submitted extensively on the pre-accident value of kshs 7,400,000 and assessors' fees of kshs 25,000/= but I will not delve into the said submissions as the two claims have been conceded.

21. With regard to the contested award of kshs 192,000/=, the Respondent submitted that special damages were specifically pleaded and proved via receipts which were attached to the plaint. Consequently, it was submitted that the trial court was correct in holding that loss and damage had been proved to the required standard.

22. As to whether the case was proved on a balance of probabilities, reliance was placed on the case of William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLR 526 where the court held that;

> " 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 51percent as opposed to 49percent 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."

23. It was submitted that the trial court analyzed the full circumstances of the case and the evidence of both parties and arrived at the correct finding that the Plaintiff had proved her case against the Defendant on a balance of probabilities.

Duty of Court

24. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. This position was stated in Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 123as follows:-

> " ... This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen nor heard the witness and should made due allowance in that respect ..." [See also Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425]

25. Properly guided, I have carefully considered the grounds of appeal, the record, the rival submissions, and the issues for determination are two:

    a. Whether the finding on liability should be disturbed.

    b. Whether the claim of kshs 192,000/= was sufficiently proved.

Whether the finding on liability should be disturbed

26. The only evidence on liability was that of PW2, PC Paul Ongulo of Mtito Andei police station traffic department. He testified that he was aware of an accident which occurred on 13/01/2016 and was reported to their station. It involved two trucks registration No. KBF 760H/ZC 9677 make volvo, driven by Eliab Kipngetich Koech from Mombasa headed to Nairobi and KCB 028T/ZE 0440 driven by Mwanzau Ali Kiki. The records indicated that at the location of the accident at Kambu, motor vehicle KCB 028T/ZE 0440 was overtaking and collided with KBF 760H/ZC 9677 which caught fire as a result of the impact and was completely burnt with the driver inside. The driver of KCB 028T/ZE 0440 was to be charged with causing death by dangerous driving but he escaped after the accident and has never been traced. He produced an abstract dated 31/01/2017 as P.Ex 3.

27. On cross-examination, he said that he was not the investigating officer (I.O) and did not visit the scene and had no sketch plans of the scene. He said that Ali Koki disappeared and no warrant was issued.

28. It is settled that a police abstract is not conclusive evidence of liability and that the contents therein must be proved. PW2 was not the I.O and could not authoritatively give the circumstances of the accident as he was not an eye witness and did not visit the scene. He referred to records in his testimony on how the accident occurred but the said records were not produced in evidence hence reducing his evidence to hearsay. In the persuasive case of Dikir & another -vs- Kimary (Civil Appeal 316 of 2013) [2022] KEHC 12733 (KLR) (Civ) (30 August 2022) (Judgment), the court (Majanja J) stated;

> "Since the Investigating Officer was not called as testify as to the circumstances of the accident, the reports produced amount to hearsay evidence and cannot be proof of how the accident took place. At the very least, the report is only proof that the accident involving several motor vehicles took place on the material date (see Peter Kanithi Kimunya v Aden Guyo Haro NRB HCCA No. 307 of 2008 [2014] eKLR). As to which party was to blame for the accident is a question of evidence and the remarks in the OB about blameworthiness

> is hearsay as the investigating officer was not called a witness. The conclusion therein are matters of opinion which are inadmissible to prove facts."

29. Production of a police abstract by any police officer in the relevant police station is not in issue. A police abstract shows that an accident was reported in a certain police station and its contents must be substantiated. In this case there was no eye witness. The I.O did not testify. The circumstances of the accident as recorded in the abstract unless conceded required the evidence of the plaintiff/or the plaintiff's witness in the absence of which, they were not proved.

30. Further, the capacity of PW2 to testify on the circumstances of the accident was clearly challenged on cross-examination hence the cases of John Kibicho Thirima (supra) and Wellington Nganga Muthiora (supra) are distinguishable.

31. Having opined that PW2's evidence had no probative value and in the absence of sketch plans, this court is only sure that an accident occurred on the material day between two trucks but has no evidence as to how it happened in order to apportion blame. In the circumstances, it is trite that liability should be apportioned equally. In the case of Lakhamshi -vs- the Attorney General (1971), the Court of Appeal held that; 'where it cannot be precisely determined who between two drivers was to blame for the accident, the liability is shared equally'.

32. In Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi - Deceased) v Joseph Kiprono Ropkoi & Four by Four Safaris Company Ltd [2004] KECA 65 (KLR) the court of appeal also had this to say;

> We have looked at the pleadings on the both sides in this matter. The plaintiff asserted that the accident was solely caused by the negligence of the defendant's driver and gave particulars of such negligence which the defendants denied. The defendant also asserted that the accident was solely caused by the negligence of the motorcyclist and gave particulars of contributory negligence. Issues were subsequently joined on such pleadings. In the event each party was under a duty to prove their own assertions but they did not do a good job for it.
>
> We have considered the submissions of both counsel, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50.

33. In apportioning liability, the trial magistrate stated that; "From the pleadings and evidence herein, there is no doubt that the accident occurred and that the defendant's driver was to blame for the accident as he overtook carelessly thereby colliding with the plaintiffs motor vehicle which got damaged...". In accepting the testimony of PW2 as evidence of what happened without taking into account the facts that he was neither the I.O nor an eyewitness the trial magistrate erred in the apportionment of liability .

34. The correct position supported by the lack of sufficient evidence to apportion blame was to spread liability in equal shares in the ratio of 50:50 between the parties.

Whether the claim of kshs 192,000/= was sufficiently proved.

35. The Respondent pleaded that it incurred kshs 192,000/= to retrieve goods from its motor vehicle from the scene of the accident. The Respondent's Administration Clerk, PW3, produced an invoice as P. Ex 8 but, contrary to the Respondent's submissions, no receipt was produced to show that the money was actually paid. A similar situation was addresses in the persuasive case of Idris & another v Lime & another (Suing as the legal representatives in the Estate of Samson Ndunde Lime (Deceased)) (Civil Appeal E20 of 2022) [2023] KEHC 18062 (KLR) (26 May 2023) (Judgment) as follows;

    31. It is true that the trial court found that an expense of the sum of Kshs 1,724,347/= stated in the invoice from St. Luke's Orthopedic and Trauma Hospital had been proved. It is however not in dispute that indeed no receipt was produced to support this alleged expenditure. It is also a well settled principle of law that an invoice is not proof of payment and that special damages can only be proved by producing actual receipts or invoices endorsed with the word "Paid" (see Total (Kenya) Limited (formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR.

    32. Regarding the said sum of Kshs 1,724,347/= claimed as medical expenses, the respondents did not produce any receipts in support thereof. What they produced and solely relied upon was an invoice. The respondent's Counsel argues that the award was properly made because the appellant's did not at the trial court, object to the production of the invoice. The respondent's Counsel has missed the point here. The appellants never challenged the admissibility of the invoice, what they challenged was the argument that an invoice alone, without any further proof that payment was in fact made, can support an award of special damages.

    33. I also note from the judgment that although the appellant's counsel raised the said challenge, the trial magistrate did not mention or refer to it at all in his judgment. Evidently therefore, the magistrate did not direct his mind on the issue nor did he interrogate or analyze it.

    34. In the circumstances, I find that the learned trial magistrate erred in including the said sum of Kshs 1,724,347/= as part of the aggregate special damages awarded at Kshs 2,064,847. What was produced in support of that amount was only an invoice with no receipt or any other acceptable evidence to prove actual payment. The amount of Kshs 1,724,347/- is therefore deducted from the aggregate amount of Kshs 2,064,847/- awarded as special damages.

36. The requirement that specials damages are pleaded and strictly proved applies. The respondent did not prove that the same was paid. The trial court ought to have refused the claim.

37. In the circumstances I find that the appeal is merited and I allow it .

38. The judgment of the subordinate court be and is hereby is set aside and substituted as follows:

    Liability..... 50:50

    Pre-accident value.....kshs 7,400,000

    Assessors' costs..... kshs 25,000

    Witness costs..... kshs 10,000

    Total.....kshs 7,435,000

    Less 50percent.....kshs 3,717,500

    Net Award..... kshs 3,717,500

39. Judgment be and is hereby entered for the appellant against the respondent for the sum of Ksh 3,717,500, plus interest. The appellant will half the costs of the appeal.

DATED SIGNED AND DELIVERED VIA CTS ON 11TH AUGUST 2025

MUMBUA T MATHEKA

JUDGE

Appellants' Advocates

Munene Wambugu & Kiplagat Advocates

Respondent's Advocates

Were & Oonge Advocates