



REPUBLIC OF KENYA



**Murage v Equity Bank Limited (Civil Appeal 125 of 2023)
[2024] KEHC 325 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 125 OF 2023
FN MUCHEMI, J
JANUARY 25, 2024**

BETWEEN

WILSON KAREITHI MURAGE APPELLANT

AND

EQUITY BANK LIMITED RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. D. Milimu
(SRM) delivered on 25th July 2022 in Thika CMCC No. 439 of 2018)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment in Thika CMCC No. 439 of 2018 arising from a material damage claim whereby liability was apportioned at 100% as against respondent. The appellant was awarded special damages of Kshs. 15,000/- for towing charges, Kshs. 5,000/- for assessor's fees and Kshs. 550/- for motor vehicle search fees.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds as follows:-
 - a. The learned trial magistrate erred in fact and in law in finding that special damages in a material damage claim must be specifically pleaded and proved and that a motor vehicle assessment report is not sufficient proof of the same;
 - b. The learned trial magistrate erred in fact and in law in ignoring the estimates as provided in the Assessment Report and failing to award the appellant repair costs without proof of receipts of repair costs.
3. Parties put in written submissions to dispose of the appeal.



Appellant's Submissions

4. The appellant relies on the Court of Appeal decision of *Nkuene Dairy Farmers Co-op v James Kimathi & Another* [2010] eKLR and submits that a motor vehicle assessment report is sufficient proof of material damages and thus the trial court erred by finding that he did not prove his case to the required standard by not providing receipts for repair costs. The appellant argues that during the hearing he called a motor assessor as a witness who testified as to the total costs of repair being Kshs. 264,944/- and produced the motor vehicle assessors report as an exhibit thus proving his claim to the required standard. The appellant further argues that the trial court is bound by the doctrine of stare decisis which binds all the courts and thus the trial court was bound by the aforementioned Court of Appeal decision.

The Respondent's Submissions

5. The respondent submits that although the appellant has based his appeal on the Court of Appeal decision of *Nkuene Dairy Framers Co-op Society Ltd & Another v Ngacha Ndeiya* [2010] eKLR, the facts in the said case law and the instant dispute are distinguishable as in the instant case the vehicle was repaired before the claim was filed, re-inspection report was not availed, the receipts supporting the repair expenses were available but not filed in court and the vehicle had been sold and the costs of salvage had not been provided.
6. The respondent further submits that the appellant's assessor testified and confirmed that the re-inspection report was available and was conveniently kept away from the court and that the Assessment Report was identified estimate and not proof of loss and was subject to confirmation by a re-inspection report.
7. The respondent submits that the prayer for repair costs of Kshs. 264,944/- had no invoice or receipt supporting the claim. In particular, the respondent contends that the following items mentioned in the report were not proved to have been incurred:- labour charges Kshs 22,400/-; painting charges Kshs. 20,000/-; materials Kshs 2,000/-; gas welding Kshs. 3,000/-; miscellaneous Kshs. 1,500/- and VAT Kshs. 36,544/-. The respondent further argues that a claim for refund of VAT cannot be left for conjecture and one can only claim it if indeed he has paid for it as it is meant to be a tax issue for onward transmission to the government.
8. The respondent relies on the cases of *Tahir Sheikh Transporters Ltd v Awadh Ghalib & Joseph Gichuki Waweru* (2015) eKLR; *David Langat & Another v Muturi Gachira Thenje* (2015) eKLR and *Lawrence Maina Gatiga & Another v Daniel Wachira Karitu* (2014) eKLR and submits that the appellant after pleading a specific claim for repairs had a duty to give the value of salvage labour costs, painting, materials, gas welding, miscellaneous and VAT for the court to come up with the actual loss suffered. The photos and assessment report failed to demonstrate that the appellant actually incurred the said expenses. The respondent submits that the trial court was aware and took into consideration that estimates did not necessarily mean that the sum shown is what was spent. Special damages must be proved and the appellant ought to have provided actual receipts issued in consequence of the expenditure.

Issue for determination.

9. The main issue for determination is whether the appellant proved his claim for material damage to the required standard.



The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

11. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

12. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That 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 it; and
 - c. That 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.

Whether the appellant proved his claim for material damage to the required standard.

13. The appellant maintains that the trial court erred in law and in fact in finding that in the absence of receipts for the sum of Kshs. 264,944/- being the costs of repairs, the claim for material damages being a special damage claim was not proved to the required standard. The respondent supports the holding of the trial court and states that the absence of receipts was fatal to the appellant’s claim for repair costs as the assessment report failed to demonstrate that the appellant actually incurred those expenses.
14. It is trite law that he who alleges must prove. The appellant testified that he was driving motor vehicle registration number KBL 579S on the material day, when the respondent’s motor vehicle registration number KBY 139H rammed into his motor vehicle from behind. The appellant further testified that he repaired the motor vehicle and although he had receipts for the repair, he had not filed them in court. The appellant called an assessor as PW2 who testified that he assessed the motor vehicle registration number KBL 579S and prepared a report which he produced in evidence. The total cost for repair was Kshs. 264,944/- according to the assessor. On cross-examination, PW2 testified that the assessment report was an estimate of the costs. The witness further testified that payments could only be proved by way of receipts. PW2 further stated that he also did a re-inspection report which he gave to the appellant.



15. From the evidence of the appellant it is evident that no receipts for repair costs were produced to demonstrate that payment had been made in respect of the costs. Thus the bone of contention is whether the failure to produce receipts or payment vouchers in respect of costs of repairs would affect the claim for special damages. In the case of *Nkuene Dairy Farmers Co-operative Society & Another v Ngacha Ndeiya* (2010) eKLR the Court of Appeal held:-

In our view special damages in a material damage claim need not be shown to have actually incurred. The claimant is only required to show 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. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty. In *Ratcliffe v Evans* (1892) 2 QB 524 Bowen LJ said:-

The character of the acts themselves which produce 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 particularity and certainty 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.

16. The Court of Appeal in *David Bagine v Martin Bundi* (1996) eKLR in asserting the probative value of an assessor's report reiterated that:-

The assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim.

17. In another case of the Court of Appeal Nairobi Civil Appeal No.154 of 2005, Bosire J.A, Onyango Otieno J.A. and Nyamu J.A. found that the motor vehicle assessment report was sufficient to prove a material damage claim without repair receipts and dismissed the appeal. The High Court judge had set aside the judgment of the magistrate who had denied the owner of the vehicle his claim special damages of KSh.16,800 for failure to produce receipts for repair. The court observed that the assessors report was made after obtaining cost of spare in the motor spare shops and as such production of repair receipts was unnecessary.

18. It is therefore clear that the appellant only needed to prove the extent of the damage to his motor vehicle and what it would cost to repair it without necessarily proving that the repairs were actually done and paid for. In civil cases, the burden of proof on the appellant is at all times on a balance of probabilities and not beyond reasonable doubt. The value of the damage was assessed by PW2 and he produced a report in support of his evidence whose authenticity was not challenged. The respondent did not adduce any evidence to counter that of the appellant. It was therefore not necessary to demonstrate that indeed the costs of repairs were incurred because the report was sufficient proof on a balance of probabilities. Relying on the Court of Appeal cases (*supra*), the report of the assessor who is an expert is in my view, sufficient proof of loss incurred by the appellant. In the circumstances, this court has reason to interfere with the judgment of the trial court which in my considered view was erroneous. The appellant had specifically pleaded the special damage of KSh.264,944 and proved it through the evidence tendered before the court.



19. Consequently, the judgment of the court below is hereby set aside and substituted with judgment in favour of the appellant:-

- a. Cost of repair - 264,944
 - b. Breakdown charges - 15,000
 - c. Assessor's report - 5,000
 - d. Vehicle search 550
- Total - 285,494

20. The costs of this appeal and of the court below will be met by the respondent.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JANUARY 2024

F. MUCHEMI

JUDGE

