



**Mburati v Akram General Enterprises Limited (Civil Appeal  
E218 of 2021) [2024] KEHC 10307 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 10307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E218 OF 2021  
F WANGARI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**SAMMY BENSON MBURATI ..... APPELLANT**

**AND**

**AKRAM GENERAL ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment and decree of Hon. G. Kiage, Senior Resident Magistrate dated 5/11/2021 arising from Mombasa CMCC No. 1020 of 2019. The Memorandum of Appeal substantially raises the following grounds:
  - a. The Trial Court erred in failing to Award the Appellant the costs of repairs.
  - b. The Trial Court misapprehended the evidence in arriving finding that the repair costs were proved.
  - c. The Trial Court failed to appreciate the tenure of the pleadings filed by the Appellant.
  - d. The Trial Court misapprehended the standard of proof in civil cases against the Appellant.
  - e. The Trial Court erred in failing to appreciate the issues and submissions by the Appellant.
2. The Plaintiff dated 2<sup>nd</sup> July 2019 claimed repair costs and incidental expenses arising from an accident that occurred on 7/7/2016 in which the Respondent's Motor Vehicle Registration Number KBG 513E is said to have negligently rammmed into the Appellant's Motor vehicle registration No. KBK 381B at Masters Area.
3. The Plaintiff set forth particulars of negligence for the accident motor vehicle. The Plaintiff also pleaded Kshs. 397,150 as Special Damages and interest plus costs. The Appellant entered appearance



and his Statement of Defence denying the particulars of negligence and injuries pleaded in the Plaint. The Trial Court heard the parties and proceeded to render judgement on 4<sup>th</sup> November 2021.

4. In the Judgement, the Court awarded the Plaintiff as follows:
  - a. Loss Assessment Report Kshs. 5,000/=
  - b. Towing charges Kshs. 10,000/=
  - c. Motor vehicle Kshs. 550/=Total Kshs. 15,550/.
5. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

### **The Appellants' case**

6. The Plaintiff testified in court and adopted his witness statement where he reiterated the averments in the Plaint and blamed the Defendant for the accident and damage caused to the Motor vehicle registration No. KBK 381B. He also produced receipts in support of the special damages. It was his testimony that he was driving his brother's matatu.
7. PW2, one Sammy Benson Mburati testified that he was the owner of Motor vehicle registration No. KBK 381B. He produced documents in evidence.
8. PW3 was the Police Officer. He testified that the Motor vehicles were moving in the opposite directions. The driver of the Motor Vehicle Registration Number KBG 513E was to blame.
9. PW4, the Motor Vehicle Assessor also testified in Court in support of the Plaintiff's case. He produced his report and it was his case that the damaged Plaintiff's motor vehicle incurred repair cost.
10. The Defendant closed their case without calling any witness.

### **The Appellants' Submissions**

11. The Appellants filed submissions dated 12<sup>th</sup> July 2023. It was submitted that the Trial Court erred in the assessment of special damages constituting cost of repairs and misapprehended the evidence produced by the Appellant.
12. It was the submission of counsel that the special damages were well pleaded and proved by way of the receipts produced in Court. Reference was made to an array of receipts produced as exhibits.
13. Counsel further submitted that the Appellant's case had not been controverted as the Respondent did not call any witnesses. Cited in support of this argument were authorities of *Mary Njeri Murigi v Peter Macharia & Another* (2016) eKLR North End Trading Co. Ltd v City Council of Nairobi (2019) eKLR.
14. It was their case that they pleaded and proved all the special damages and the Trial Court erred in not fully granting them as prayed. Reliance was further placed on Section 107 of the *Evidence Act* to cavass the argument that the Appellant proved his case on a balance of probabilities and so discharged the requisite burden of proof.



## **The Respondent's submissions**

15. The Respondent filed submissions dated 1<sup>st</sup> August 2023. It was their submissions that Trial Court correctly appreciated the standard of proof. Reliance was pegged on the case of Karugi & Another v Kabiya & 3 Others [1983]eKLR that the burden of proof was regardless whether the proceedings were by way of formal proof.
16. It was submitted that special damages must be strictly pleaded and proved and the court correctly found that the Appellant had not proved the impugned costs. They relied on Ryce Motors Ltd v Elias Muroki [1996] eKLR. This court was urged to dismiss the Appeal.

## **Analysis**

17. 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.
18. In the cases 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...”
19. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

“...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 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...”
20. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages”.
21. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British



Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

22. This Appeal is on quantum only. The issue is whether the Learned Trial Magistrate erred in the assessment of the special damages allegedly pleaded and proved by the Appellant.
23. The Appellant submitted that the Trial Court misapprehended evidence and ended up to an erroneous award of cost of repairs without regard to the documentary evidence produced in Court.
24. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
25. Furthermore, in light with the Motor Vehicle Assessor’s Report produced in evidence in this court, it is trite law that it guides the court but is necessarily binding. In *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- “Because this is the evidence of an expert, I believe it....”

26. There is no dispute that the Respondent caused the accident in which Appellant’s motor vehicle was damaged. It is also not in contest that the Appellant incurred costs in repairs and spare parts to revamp the motor vehicle after the accident.
27. I note that the main grievance laid down by the Appellant is that the Trial Court undervalued the special damages that were pleaded and proved. This is therefore not a case for general damages.
28. 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 where it was 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.”

29. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the trial court failed to award special damages that were pleaded and proved.
30. In *Joseph Kipkorir Rono v Kenya Breweries Limited & Another* Kericho HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore, in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallized and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

31. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa*



Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji v Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

32. The Appellant pleaded as follows
- a. Cost of repairs Kshs. 246,400/=
  - b. Loss of user Kshs. 135,000/=
  - c. Towing charges Kshs. 10,000/=
  - d. Police Abstract Kshs. 200/=
  - e. Motor vehicle Assessment Report fees Kshs. 5,000/=
  - f. Motor vehicle search Kshs. 550/=
- Total Kshs. 397,150/.
33. The Trial Court ended up awarding only loss of assessment report, towing charges and motor vehicle search. The rest of the prayers were dismissed. The court noted that the receipts would accrue as and when they were incurred and it was not credible for the Appellant to have incurred repair costs in cash and only obtain a single receipt for the same later.
34. This court is alive to the position that degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of. The Court of Appeal in Jackson K Kiptoo v The Hon Attorney General [2009] KLR 657 stipulated that:
- “The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”.
35. Therefore, in my re-evaluation of the evidence, I proceed to take into consideration the trial court’s award against the Appellant’s pleaded and proved claim. I note that the Appellant pleaded cost of repair of Kshs. 246,400 and the court dismissed it for want of proof. Similarly, loss of user was pleaded Kshs. Ksh. 4,500 per day for 30 days with total of Kshs, 135,000 but the court dismissed it as unsubstantiated.
36. Indeed, in *Hahn v Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”.
37. I have carefully analyzed the pleadings and the evidence produced before the Trial Court. I note that the Appellant, in his Pleint pleaded for the cost of repairs. During the trial, the Plaintiff produced receipt dated 15<sup>th</sup> August 2016 for the cost of repairs amounting to Kshs. 246,400. It arose from an Invoice issued on 15<sup>th</sup> July 2016 for the same amount. It was the testimony of PW2, the owner of the motor vehicle that it took about 30 days to repair the motor vehicle. This, I note, tallied with the duration between the invoice and the receipt.
38. I also note that the Motor vehicle assessor who testified indicated per the Assessment Report dated 19<sup>th</sup> July 2016 that the repairs would cost an estimated Kshs. 245,572.



39. I have also perused the said Motor Vehicle Assessment Report dated 19<sup>th</sup> July 2016 and note its contents largely tally with the nature of damages noted in the Invoice. I am left with no doubt that there was no basis for the Trial Court to find that the Appellant had not proved repair costs simply because there were no interim receipts as and when every expense was incurred.
40. I think the court erroneously trekked into the freedom of the parties to contract. I say so because there was nothing unlawful for the mechanic and the owner of the damaged motor vehicle to agree that payments would be done after the entire work.
41. It would not be said in such circumstances that immediate receipts must be raised for each payment. Even in this case, it was not necessary for the Appellant to be issued with immediate receipts for each of the repair works. This was a continuing service. As the Receipt dated 15<sup>th</sup> August 2015 was produced in evidence, it was wrong for the trial court to decline it on the stated reasons. As was held in *Midado Communications Limited v Total Kenya Limited* [2016] eKLR.

“The appellants conduct in invoicing Kengen for the amount of fuel that was supplied by the Respondent implies that the fuel was part of the supply pursuant to the tender won by it”

42. Coupled with the circumstances of this case and the consistency of the witnesses and documents produced in court, I have no doubt that the pleaded amount of Kshs. 246,400 worthy of repair costs was proved vide the receipt dated 15<sup>th</sup> August 2016. The Respondent did not challenge the receipt and did not produce any controverting evidence. I would have held otherwise if only the invoice was produced for an invoice is not a receipt. As was held in *Total Kenya Ltd formerly Caltex Oil (K) Ltd v Janevams Ltd* [2015] eKLR where the court stated in the case of *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority* [2000] eKLR 720 on the production of invoices, the court stated thus”

“What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word “paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt”.

43. Therefore, in disregarding the receipt, the trial court disregarded the common intention between Gordy Auto Works that issued the invoice and receipt and the Appellant who enjoyed the services. It thus meant that the motor vehicle though repaired was not repaired at any costs at all which was not the case. In the case of *Rose and Frank Co. v J R Crompton & Bros Ltd* [1923] 2 KB 293, Atkin, LJ stated that: -

‘To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.’

44. As to the loss of user at Kshs. 4,500 per day for 30 days amounting to Kshs. 135,000, I note that the Appellant produced a note book to proof the amount claimed. The court established that the notebook was not a book of account and did not as such there was no evidence that the Plaintiff actually received the mounts indicated therein. I tend to agree with the Trial Court.
45. The handwritten note book could have been prepared to reflect amounts that were based on the Appellant’s own opinion. It was incredible that the amount of Kshs. 4,500/- and no less, no more, would be returned on each day for the duration stated as April 1, 2016 to July 7, 2016, in a normal transport business. There should have been a document acknowledging that Kshs. 4,500 was received.



In the absence of this, I find no basis to interfere with the Trial Court's finding. The court was left in conjecture on the actual amount earned per day and the amount received by the Appellant. Therefore, the Appeal partially succeeds.

**Determination**

46. In the circumstances, I make the following orders: -
- a. Judgement of the trial court dismissing the prayer for cost of repairs is set aside and substituted with an award of Kshs. 246,400.
  - b. The appeal on the loss of use is dismissed.
  - c. As the appeal partly succeeds, each party shall bear own costs in the Appeal.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

.....

**F.M WANGARI**

**JUDGE**

In the presence of: -

M/S Lang'at Advocate for the Appellant

M/S Lanjoo Advocate h/b for M/S Kobole Advocate for the Respondent

Barile, Court Assistant

