



REPUBLIC OF KENYA



**Ng'ang'a v Eldavine Investment Limited (Civil Appeal 577 of 2018)
[2024] KEHC 1724 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 577 OF 2018

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

GEORGE GATHUKI NG'ANG'A APPELLANT

AND

ELDAVINE INVESTMENT LIMITED RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. E. K. Usui, CM dated 16th November 2018 at the Magistrates Court at Milimani in Civil Case No. 7123 of 2016)

JUDGMENT

1. The appeal challenges the judgment of the Subordinate Court dated November 16, 2018 which awarded the Respondent Kshs. 187,972.00 on account of repair costs. The claim was precipitated by a road traffic accident which took place on October 16, 2013 near Yaya Center, Nairobi involving motor vehicle registration number KBT 737B belonging to the Respondent and motor vehicle registration number KAT 414C belonging to the Appellant.
2. The Appellant's appeal is grounded on the Memorandum of Appeal dated December 6, 2018. The parties have filed written submissions which I have considered.
3. The Appellant submits that the Respondent did not prove the case to the required standard. He contends that the Respondent ought to have sued the driver of motor vehicle KAT 414C and the testimony of the Respondent's witnesses was inconsistent and that the court ought to have disregarded the document which were not produced by their makers. He relied on *Midans Services Limited & another v Ronald Kapute* [2020]eKLR for the proposition that where the evidence tendered is inconclusive, no liability can attach on a party. He cites *Linus Fredrick Msaky v Lazaro Thuram Lichoro & another* [2016]eKLR to underscore the importance of an assessment report linking the damage of the vehicle to the accident.



4. The Respondent supports the findings of the trial court's finding on both liability and quantum of damages awarded. It cites *Philisila Njiru v Rosemary Kanambu* [2019] eKLR to demonstrate that the police abstract being a public document need not necessarily be produced by its maker.
5. The issue of who caused the accident and the apportionment of liability is a question of fact which requires this court to re-analyze the evidence adduced before the court of first instance and arrive at its own independent conclusion always making an allowance for the fact that appellate court never heard or saw the witnesses testify (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
6. There is no dispute that the accident occurred. The drivers of both motor vehicles involved in the accident confirmed in their testimonies during the hearing of the case that the accident occurred. As stated in *Florence Muthelu Musembi & Godfrey Mutunga Kimiti v Francis Kareng'e* [2021]eKLR, a police abstract usually carries weight in proving the occurrence of a particular accident. It is not very useful in apportioning blame for the accident. Since the parties have agreed that the accident in question occurred involving the two motor vehicles in question, there is no need to deliberate on the police abstract.
7. It is true that the two drivers gave varying testimonies on how the accident occurred hence leaving the court to decide who is to blame for the accident. The driver of motor vehicle KBT 737B averred that motor vehicle KAT 414C drifted backwards and collided with his motor vehicle. On the other hand, the driver of motor vehicle KAT 414C stated that KBT 737B failed to break in time and knocked his vehicle from behind. The distance between the two motor vehicles, as stated by the driver of KBT 737B was only about 3 meters as opposed to the recommended distance of 50 meters. Much as the trial court assailed the driver of KAT 414C for failure to keep a proper look for other road users, the driver of KBT 737B was equally to blame for failure to keep a safe distance. In the judgment, the trial magistrate did not give consideration of the Appellant's testimony or otherwise explain why she disregarded it in favour of the Respondent's testimony. This is a case fit for equal apportionment of liability at 50:50.
8. Regarding quantum, the Respondent's claim was for repair costs amounting to Kshs. 159,500.00 and investigation fees being Kshs. 28,427.00. The law regarding special damages requires that they must be specifically pleaded and proved (see *Hahn v Singh* [1985] KLR 716). The Respondent produced the assessor's report accompanied by ETR receipts from the garage. This shows that the vehicle was repaired and the Respondent expended the amount quoted towards repair and investigations. I do not find fault in the same being awarded as prayed.
9. In conclusion therefore, the judgment of the trial court on the issues of liability is varied to the extent that liability shall be borne by each party equally. Consequently, the Respondent shall be entitled to damages amounting to Kshs. 93,986.00 together with interest at court rates from the date of filing suit until payment in full.
10. The Respondent shall bear costs of the appeal assessed at Kshs. 20,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mr Ongaki instructed by Eric N. Amati Company Advocates for the Appellant.

Ms Wambui instructed by Eboso and Company Advocates for the Respondent.

