



REPUBLIC OF KENYA



KENYA LAW
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Kiara v Metropolitan Cannon General Insurance Company Ltd (Civil Appeal E494 of 2022) [2024] KEHC 6098 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6098 (KLR)

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

CIVIL

CIVIL APPEAL E494 OF 2022

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

JOSEPH GIKUNDA KIARA APPELLANT

AND

**METROPOLITAN CANNON GENERAL INSURANCE COMPANY
LTD RESPONDENT**

(Being an appeal from the Judgment delivered by Mr. E. M. Kagoni Principal Magistrate on 17th June, 2022 in Nairobi CMCCC No. 2186 of 2020)

JUDGMENT

1. Joseph Gikunda Kiara the appellant was the plaintiff in the lower court case. His claim was for both general/exemplary and special damages following damage to his vehicle reg. No. KAW 698C. The respondent (Metropolitan Cannon General Insurance Company Ltd) was the defendant. It denied the claim and the matter proceeded to full hearing. A judgment was then delivered on 17/6/2022 dismissing the suit.
2. Being dissatisfied with the judgment the appellant filed this appeal on the following grounds:
 - i. That the honourable magistrate erred in law and fact by arriving at an erroneous finding that liability was not proved in the matter yet the appellant called not less than four (4) witnesses, (including a police officer who produced on OB report and a police abstract) all of whom confirmed the occurrence of the accident on 25th February, 2019
 - ii. That the honorable magistrate erred in law in fact in not appreciating the fact that the appellant's burden as expected in civil proceedings was to be discharged on a balance of probability and not proof beyond reasonable doubt as it is in criminal proceedings. PW2



having stated that the erroneous date (23/2/2019) the accident is alleged to have occurred came about because he was not the one who recorded the statement and having reiterated that the accident occurred on 25/2/2019, he needed not to adduce any further evidence to prove that the accident occurred on 25/2/2019 because he did testify on oath, Equally PW1, a police officer having produced the OB report and a police abstract confirming the occurrence of the accident on 25/2/2019, was not obligated to provide any further evidence as she produced clear records confirming the occurrence of the accident, additional to the evidence of PW4 to the effect that the police even visited the scene of the accident.

- iii. That the honourable magistrate erred in law and fact by delivering a judgment that was more like he was doing the respondent's case. He did not properly analyse the evidence thereby closing his eyes to the overwhelming evidence that was placed before him by the appellant to prove the occurrence of the accident.
- iv. That the honourable magistrate erred in law and fact by making a finding that liability had not been proved by the appellant yet there was evidence from PW4 that the appellant's motor vehicle had been towed from the accident scene as directed by the police and further there was evidence by all the witnesses that police officers visited the scene. There was therefore no doubt about the occurrence of the accident.
- v. That the honourable magistrate erred in law and fact by claiming that there was inconsistency in the appellant's evidence in court as against the witness statements filed in court and further that there was inconsistency in the evidence adduced by the appellant's witnesses yet the appellant's witnesses were all categorical that the accident occurred on 25/2/2019. They adduced believable evidence as to the occurrence of the accident with PW4 even confirming that the vehicle was towed by him and the police visited the scene. There is equally no inconsistency in the appellant (PW2) stating that he reported immediately it occurred as the accident occurred on the night of 25/2/2019 and the same was reported the next day on 26/2/2019.
- vi. That the honourable magistrate erred in law and in fact in making an adverse finding against the appellant without the benefit of the appellant's written submissions which informed, among others, the reasons for the dismissal of the suit yet the matter came up for hearing on 21/3/2022, written submissions were ordered filed and a mention was fixed for 5/4/2022 to confirm compliance and the court itself confirmed on the said date that both parties had filed written submissions after which a judgment date was fixed for 17/6/2022. For the honourable magistrate to turn around in his judgment and feign ignorance to the written submissions filed by the appellant which were duly served on the respondent is a great travesty of justice because even if the filed submissions were not available in the file, the court was obligated to reach out to the appellant's advocates to avail to the court the submissions before the delivery of a judgment.
- vii. That the honourable magistrate erred in law and fact in holding that the date of the accident as recorded with the respondent's agent was at variance with the actual date of the accident yet he goes ahead to state that according to the testimonies led at the trial by the appellant and his witnesses, the accident occurred on 25/2/2019. How the honourable magistrate turned around to only believe the witness statement recorded by the respondent's agent who never adduced evidence in court as against the evidence of the plaintiff and his witnesses, including the police officer, and the abstract OB report produced in court is not understandable.
- viii. That the honourable magistrate erred in law and fact in holding PW2, the police officer who testified in court and produced an OB report and a police abstract could not establish when the



accident happened and the circumstances thereof yet she produced the OB report and a police abstract to confirm the occurrence of the accident which evidence was adequate and met the threshold of proof of a civil claim on a balance of probability.

- ix. That the honourable magistrate erred in law and fact and contradicted himself in his own judgement as he clearly stated that the appellant confirmed that the accident which occurred on 25/2/2019 around 8pm was reported soon thereafter. It is not therefore a contradiction of PW1's evidence as she stated that the accident was reported on 26/2/2019 which was merely a few hours from the date and time the accident occurred. The honorable magistrate therefore made an erroneous finding that PW1 and PW2 contradicted themselves as to the day and time the accident was reported.
 - x. That the honourable magistrate erred in law and fact by having expected PW4 to have produced evidence of having towed the accident motor vehicle yet he took oath and adduced evidence in court confirming the fact that he himself towed the said motor vehicle after being summoned by the police to do so. More importantly he did also confirm that the accident occurred on 25/2/2019.
 - xi. That the honourable magistrate erred in law and fact by relying on evidence of the respondent's agent, (the investigating officer) who never testified and/or produced any supporting evidence in court such that his evidence, if at all, was not tested by way of cross examination.
 - xii. That the honourable magistrate erred in law and fact by delivering an ambiguous, inconsistent, erroneous judgment thereby misinterpreting and misconstruing the facts after the matter and the legal principles applicable on the burden of proof in civil proceedings.
3. A summary of the case before the lower court is that the appellant was driving his motor vehicle KAW 498C on 25/02/2019 when he was knocked by an unidentified hit and run motor vehicle along north airport road Nairobi at eastern bypass near the army barracks at around 8.00pm. His motor vehicle had a comprehensive insurance cover with the respondent under policy No. comp/01/07/0880/14 expiring on 16/05/2019.
 4. The appellant who testified as PW2 stated that he reported the accident to the respondent the next day after the accident. However, the respondent has refused to honour the agreement by identifying him for the damages incurred. Five witnesses him included testified on his behalf.
 5. PW1 No. 81695 P. C Jackline Maeku from Embakasi police station she confirmed the occurrence of the accident on 25/2/2019. The report as per the O.B is No. 98/26/2/2019 at Embakasi police station having been recorded by Cpl Limiri. The witness did not visit the scene.
 6. PW3 Sammy Muthiyi Kinyua was called to go and pick the appellant from the scene of accident. He did not find the appellant at the scene. PW4 Peter Mbugua Gathui offers breakdown services in Embakasi within Nairobi. He confirmed being called and asked by a police officer on 25/02/2019 to go to the roundabout 75 eastern bypass Nairobi. He found a motor vehicle registration No. KAW 498C having been involved in an accident. There was no other vehicle there. He towed it to Embakasi police station.
 7. PW5 Kenndy Tabake works with Reagents Auto Valuers and Assessors as a valuation manager. He produced a report dated 10/12/2019 in respect of motor vehicle KAW 498C. He said the inspection was done on 12/11/2019. He did not know when accident occurred.
 8. The respondent called one witness Edwin Karanja Njau (DW1) the respondent's senior claims officer. He said around 22/3/2019 the respondent received a report from the appellant in respect of his vehicle insured by them. The report was that the said vehicle was involved in an accident. The appellant



filled up a Claims form and furnished them with a copy of the police abstract from Embakasi police station. The respondent immediately instructed Triple seven investigators to investigate the accident and circumstances surrounding the occurrence of the accident. The result revealed that this was a fictitious incident.

9. In cross examination he said from their investigations, the scene was not attended to by the police. There were inconsistencies in the date of incident. They did not however engage the police directly.
10. The appeal was canvassed by written submissions

Appellants submissions

11. These were filed by N.O. Sumba & company advocates and are dated 27th November, 2023. Counsel submitted that the appellant adduced sufficient evidence and there was no good reason for dismissal of his case. Referring to pg 10, last line of the record of appeal counsel submitted that they filed and served the appellants submissions which are at pg 25-25 of the record of appeal, (ROA) counsel queried the reliance by the court on the investigation report by Triple Seven Investigators dated 22/10/2020 (pg 83-124 ROA which was never produced.
12. Counsel again referred to what the trial court stated at pg 20 of the R.O.A in respect of the reporting of the incident by the appellant and the evidence by PW1. He further contended that the trial court ignored the evidence of PW4 who towed the motor vehicle for no good reason. He termed the judgment as ambiguous, inconsistent and erroneous.

Respondents submissions

13. These were filed by MNM advocates and are dated 4th February, 2024. Counsel supports the trial courts findings on inconsistencies. The first one is on the date of occurrence of the incident and when it was reported. This involved PW1 and the appellant. Counsel mentioned the element of unconsciousness by the appellant. On the other hand, he submitted that the respondent's witness explained why the respondents repudiated its contract with the appellant, because of the inconsistencies on the dated of accident. He referred to the case of National Bank of Kenya Ltd Vs Pipe plastic [2001] eKLR. The late reporting of the accident raised suspicion.
14. Counsel further submitted that loss of user in Insurance policy is consequential loss and which is excluded under the Insurance policy between the appellant and respondent. Reference was made to the case of Joseph Maingi Thuo V Occidental Insurance Company Ltd [2019] eKLR where in Concord Insurance Company Ltd V David Otieno Alinyo & others the Court of Appeal in Civil Appeal No. 30 of 2005 held thus:

- “ 1. The normal measure of damages in insurance claims is the cost of preparing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceed the value in the market of the damages article.
2. Where a vehicle is damaged by the negligence of a 3rd party, the owner suffers an immediate loss representing the diminution in value of the damaged vehicle.
3. Consequential loss is not recoverable in a standard form policy of insurance unless expressly covered by the policy.
4. Claims based on loss of user of the insured article occur subsequently to the breach of policy and is in essence, consequential loss which is irrecoverable under a standard form policy.



5. An insured cannot recover losses which were avoidable and which he had a duty in law to mitigate.
15. He further submitted that any claim under that cannot be granted as it was not proved, as required by the law. He cited the case of James Thiongo Githiri Vs Nduati Njuguna Ngugi [2012] eKLR where the court stated:

“special damages are those damages which a plaintiff is entitled to claim, but which without a special claim the law does not assume to follow from the wrongful act, as opposed to general damages which the law presumes to be the direct and natural or probable consequences of the act complained of... special damages on the other hand, are such as the law will not presume from the nature of the act.... They must therefore be claimed specially and proved strictly. The term “special damages” denoted the actual pecuniary loss arising out of the special circumstances of the case, and is to be super added to the general damages implied by the law as flowing if the plaintiff has been caused pain, suffering or wounds/injuries of any description. A claim for special damage must be specifically pleaded by the plaintiff setting out each particular item and the amount claimed in respect of it. Such damage not being presumed by the law, the plaintiff must expressly prove his special damage and if he fails, either to plead or to prove it, he is not entitled to recover”.

Analysis and determination

16. I have carefully considered the grounds of appeal, record of appeal and the submissions by both parties and the law. The issue I find falling for determination is whether the trial court was right dismissing the appellants claims.
17. This hearing a first appeal this court has a duty to re-consider and re-evaluate the evidence and arrive at its own conclusion: It must also be remembered that unlike the trial court this court did not hear nor see the witnesses. See *Selle V Associated Motor Boat Company* (1968) E. A. 123 (ii) *Peters V Sunday Post Limited* (1958) E. A 424.
18. In his plaint the appellant pleaded that the accident occurred on 25th February, 2019. Further that a report was made at Embakasi police station. PW1 who is a police officer from the said station stated that she was not the investigating officer. However, she confirmed that the accident occurred on 25/2/2019 at about 2000 hrs at the North Airport road. However, the accident report was made on 26/2/2019 as O. B 98/26/2/2019, and abstract issued on 27/2/2019 (EXB1).
19. This document was not produced in its original form. The copies in the ROA and the original are not clear at all. The appellant, his friend (PW3) and PW4 told the court that the accident took place on 25/2/2019. PW4 towed the motor vehicle to Embakasi police station on the same day. During cross examination an issue came about the investigator having been told by PW3 that the accident took place on 23/5/2020. That a statement was even recorded to that effect. PW3 explained that the investigator recorded 23/5/2020 at the date of accident but the statement was never read to him. The trial court appears to have bought into that.
20. The investigator was doing this work on behalf of the respondent and so was the respondent’s witness who never testified. Even though I have seen his report in the file and even ROA this report was never produced as evidence in the trial court. The same could not be used as evidence to lead to the finding that it was not clear whether the accident occurred on 23/5/2019 or 25/5/2019.



21. There is no dispute that as at the time of the accident the appellant had a comprehensive insurance cover with the respondent. Part of the reason why the respondent repudiated the contract was because of the revelations by the investigator in his report. This is the same investigator who did not turn up to testify on 15/11/2021.
22. From the above my finding is that there is sufficient evidence proving that the accident occurred on 25/2/2019. Further there is no good reason for the repudiation of the insurance contract between the appellant and the respondent since the investigator did not appear to give evidence nor produce his report.
23. The above being the position I find that the respondent was bound to repair the appellant's motor vehicle. PW5 produced the accident report. (EXB 2). He also produced documents, showing that Reagents Auto solution & Assessors was registered and operational (EXB 5a-c) The assessment report (EXB 2) put the grand total at Ksh 140,940/= which the appellant claimed from the respondent.
24. The next item was the loss of user at Ksh 2,000/=. This is a special damage as rightly stated by the trial court. The appellant had a duty to strictly prove this damage. See *Capital Fish Kenya Ltd V The Kenya Power & Lighting Company Ltd* [2016] eKLR (ii) *Jackson Mwabili V Peterson Mateli* [2020] eKLR (iii) *James Thiong Githiri* (supra)
25. First of all, the appellant sought to be paid for loss from the 25/2/2019 to date of repair of the vehicle. In his evidence he never stated when he repaired the vehicle. The inspection was done by PW5 on 12/11/2019. Equally he did not avail any evidence to show that he hired any vehicle and how much he was paying.
26. From the witness statement of PW3, the appellant owned another vehicle KBU 715V Toyota Allion which he had given to PW3 as he took the KAW 498C RAV 4. He cannot therefore without evidence claim to have been hiring a vehicle at Kshs 2,000/= per day for use. I therefore find that the appellant failed the test of proof of special damages.
27. The next prayer is the one for general/exemplary damages. Again, on this point the appellant ought to have expressed the inconvenience he suffered as the vehicle was being repaired and for how long. As already stated he had another vehicle for use.
28. From the above analysis I come to the conclusion that:
 - a. The Appeal partially succeeds and I hereby set aside the judgment by the lower court and substitute it with a judgment for Ksh 140,940/= with costs
 - b. Interest on this sum at court rates from date of filing the suit
 - c. All the other prayers are dismissed.
29. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

