



REPUBLIC OF KENYA



KENYA LAW
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**Mwihia v Kamau & 2 others (Civil Appeal E082 of 2022)
[2024] KEHC 7710 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E082 OF 2022**

**H NAMISI, J
JUNE 28, 2024**

BETWEEN

MOSES MUNDERU MWIHIA APPELLANT

AND

LUCY WANGARI KAMAU 1ST RESPONDENT

LOISE NYAMBURA MWANGI 2ND RESPONDENT

LUCY NYOKABI MWIHIA 3RD RESPONDENT

*(Being an Appeal from part of the judgement and Decree of Hon. O Wanyanga (Mr)
Senior Resident Magistrate delivered on 4th April 2022 in Thika CMCC No. 61 of 2020)*

JUDGMENT

1. This appeal arises out of an accident that occurred on 22nd November 2019 in which motor vehicle registration KBR 021G lost control, veered off the road and crashed into Plot No. 2 at Gatwanyaga Shopping Centre, Thika, Kiambu county. By Plaint dated 20th February 2020, the 1st Respondent instituted proceedings against the 2nd Respondent seeking payment of Kshs 169,550, costs of the suit and interest thereon.
2. The Appellant did not enter appearance nor file a defence within the prescribed time. The matter proceeded to formal proof on 27th February 2020, when the 1st Respondent testified and produced her bundle of documents. The trial court then entered judgement on 20th August 2020 in favor of the 1st Respondent against the 2nd Respondent. The Judgement was later set aside.
3. By Application dated 10th March 2021, the 1st Respondent amended the Plaint, to include the Appellant and 3rd Respondent as beneficial owner and/or driver of the motor vehicle registration number KBR 021G. The Appellant entered appearance and filed her Statement of Defence dated 3rd September 2021. The Appellant's defence was that at the time of the accident, the title of the motor



vehicle had not been legally transferred by the 2nd Respondent and therefore the property and risk of loss in the aforesaid motor vehicle remained with the registered owner.

4. At the hearing on 19th January 2022, the 1st Respondent adopted her amended witness statement dated 16th June 2021 as her evidence in chief and produced her bundle of documents. The 2nd Respondent equally adopted her witness statement dated 11th December 2022 and produced a bundle of documents. The Appellant adopted his witness statement dated 3rd November 2021 and produced a bundle of documents.
5. The trial court then delivered the impugned judgment on 4th April 2022, as follows:
 - i. 2nd and 3rd Defendants found 100% liable for the accident
 - ii. Plaintiff is awarded Kshs 169,550 against the 2nd and 3rd Defendants;
 - iii. Plaintiff is awarded costs of the suit;
 - iv. The Plaintiff is awarded interest on (ii) above at court rates from date of judgment till payment in full;
 - v. 1st Defendant costs to be paid by the 2nd & 3rd Defendant
6. The Appellant, being dissatisfied by the judgement of filed a Memorandum of Appeal dated 29th April 2022 on the following grounds:
 - i. That the learned Magistrate erred in fact and in law in failing to appreciate and apply the well settled principle of law that special damages must be pleaded and strictly proved;
 - ii. That the learned Magistrate erred in fact and in law in holding and finding that the special damages of Kshs 169,550/- had been strictly proved by the 1st Respondent whereas no evidence was tendered to that effect;
 - iii. That the learned Magistrate erred in fact and law by admitting into evidence and relying on an expert opinion to quantify special damages pleaded being the Valuation Report dated 26th November 2019 without the maker appearing in court;
 - iv. That the learned Magistrate erred in fact and law by admitting into evidence and relying on a Valuation Report by an unqualified maker as a Land Economist is not competent to assess structural damage
7. Directions were given that the appeal would be canvassed by way of written submissions. The Appellant filed submissions dated 24th July 2023. The 1st Respondent's submissions are dated 25th July 2023. The other parties did not file submissions

Issues for Determination

8. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by the parties. The issues to be determined are:
 - i. The admissibility of the Valuation Report in support of the special damages pleaded;
 - ii. Whether the special damages of Kshs 169,550/- were pleaded and proved;

Analysis & Determination

9. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its



own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

10. At the hearing, the 1st Respondent produced Police Abstract dated 4th December 2019, Demand Letter dated 9th December 2019, Statutory Notice dated 9th December 2019, Valuation Report dated 26th November 2019, Letter of Allotment from Thika County Council dated 8th May 1999 and Receipt dated 26th November 2019 for the Valuation Report.
11. On the issue of the admissibility of the Valuation Report dated 26th November 2019, the Appellant relied on the provisions of Sections 48, 62 and 63 of the *Evidence Act*. The Appellant further relied on the cases of *Mutonyi -vs- Republic* [1982] KLR 203 at 210 and *Maina Thiongo -vs- Republic* [2017] eKLR, in submitting that the trial court deprived itself of the opportunity to interrogate and satisfy itself of the expert’s opinion and that the Appellant was denied the opportunity to test the accuracy of the expert’s opinion by way of cross examination.
12. On her part, the 1st Respondent submitted that the Appellant did not object to the production of the Valuation Report, neither did he object to its contents when the Report was produced at the hearing. The 1st Respondent contended that by virtue of the Appellant not tendering his own evidence in rebuttal, the Valuation Report remained unchallenged and uncontroverted.
13. I have read the proceedings in the Record of Appeal and it is clear that the Appellant was duly represented by counsel. At no time during the hearing did the Counsel for the Appellant raise any objection to the production of the exhibits, much less the Valuation Report. Even at cross examination of the 1st Respondent, no questions were posed concerning the content of the Report. Therefore, it is my view that there was agreement by the Advocates on the production of documents, including the Valuation Report, which was produced by the 1st Respondent, who was not its maker.
14. I am guided by the Learned Justice Mugambi, in the case of *Hezekiah vs Mbugua (Civil Appeal E187 of 2021)* [2023] KEHC 1946 KLR, who opined thus:

‘Ideally matters of admissibility should be raised during the trial, not after the case has been closed. The Appellant did not object to the production when the documents were tendered in evidence by the Respondent. He did not even bring the issue of the production of the documents during cross-examination. He waited and brought it up in his final submissions and submitted that the medical legal report should be disregarded because the maker was not called to produce the same.

Despite the appellant being present in court throughout the trial, he did not raise any objection when those documents were tendered in evidence. By conduct, the Appellant acquiesced on their production and in my view, he is not different from a person that has consented to the production only to change his mind later on. I do not therefore think



the decision in Karauri case or Mailanyi case (supra) which he cited can save him from his indolence. His belated objection is just an afterthought.’

15. The Valuation Report was prepared by one S.M. Muiruri, B.A (Land Economics), M.I.S.K, Registered & Practising Valuer. The Appellant has challenged the preparation of the Report by the said individual on the basis that he is an unqualified expert to assess structural damage. However, at the trial court, the Appellant did not adduce any evidence nor submit on the qualifications required for one to be able to assess structural damage on property. I find that this argument is too late in the day, unsubstantiated and must, inevitably, fail.
16. Turning to the issue of the special damages, while it is true 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, it would depend on the character of the acts producing damage and the circumstances under which those acts were done. There are several cases that speak to this, including 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 vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.
17. In Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657, the Court of Appeal held 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.”
18. Similarly, in *Hahn vs. 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.”
19. In this instance, the 1st Respondent produced the Valuation Report which assessed the cost of rebuilding and loss of income at Kshs 156,000/-. There is also a receipt dated 26th November 2019 for the Valuation Report. However, what is conspicuously missing are receipts or evidence to substantiate the claim of Kshs 5000/- for damage letters and Notices, as well as Kshs 550/- for the motor vehicle search. There is no Certificate of Motor vehicle search amongst the documents produced by the 1st Respondent. In the circumstances, I find that these two amounts have not proved.
20. I, therefore, find that the appeal succeeds only to the extent of the special damages awarded. The Special Damages are hereby reduced to Kshs 164,000/-.
21. Costs of this appeal are assessed at Kshs 30,000/= and are awarded to the Appellant.

DATED AND DELIVERED AT KIAMBU THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform In the presence of:

.Tanui for the Appellant

....Muthomi ... for the 1st Respondent



.....N/A For 2nd Respondent

....N.A For 3rd Respondent

