Ndambiri v Wachira (Civil Appeal 29 of 2018)
[2023] KEHC 3604 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 29 OF 2018

FR OLEL, J

APRIL 25, 2023

BETWEEN

JOHN MWANGI NDAMBIRI ..... APPELLANT

AND

CHARITY MUTHONI WACHIRA ..... RESPONDENT

(Being an appeal from the judgement delivered on 23/3/2018 by Hon. Y.M. Baraza (R.M.) in Kerugoya Chief Magistrates' Court Civil Case No. 258 of 2014)

JUDGMENT

1. This appeal arises from the judgment of Hon. Y.M. Baraza (RM) delivered in Kerugoya Chief Magistrates' Court Civil suit No. 258 of 2014 where the Plaintiff had sued the Defendant claiming a sum of Kshs.310,000/- plus interests while the Defendant (Appellant) herein filed a counter claim for Kshs.562,700/- as special damages for cost of repairs of his lorry and loss of user.
2. After hearing all the parties and their witnesses, the court did deliver its considered judgement on 23/3/2018 where it held that:-
    a. The Defendant to pay the Plaintiff Kshs.310,000/- plus interest at court rates from 21/9/2013 to the date of judgement.
    b. The Plaintiff to pay the Defendant Kshs.110,730 plus interest at court rates from the date of filing suit to the date of judgement.
    c. Each party to bear their own cost of the suit and the counter claim.
    d. Counsels to do calculations and make a set off.

3. The Appellant who was the Defendant in the primary suit, being aggrieved and dissatisfied with the judgment of the learned Magistrate Hon. Y.M. Baraza (RM) filed this appeal and raised four (4) grounds of appeal namely:

    a. That the learned Magistrate erred in law and fact by making a decision as against the weight of evidence adduced by the Defendant.

    b. That the learned Magistrate erred in law and fact in disregarding the Defendant's evidence and witnesses thus arriving in an erroneous decision.

    c. That the learned Magistrate erred in law and fact in failing to reward the Defendant on claim of loss of user of Kshs.562,700/-

    d. That the learned trial Magistrate erred in law and fact in awarding the Plaintiff a claim of Kshs.310,000/- with interest against the weight of evidence.

4. That Appellant prayed that this appeal be allowed, judgment of the learned Magistrate be set aside and the Appellants claim of Kshs.562,700/- be allowed.

5. After judgment in the primary suit had been delivered the Plaintiff – John Mwangi Ndambira died on 12/7/2018. His wife Charity Muthoni Wachira applied for substitution vide the application dated 8th July 2019 which application was allowed, hence she is the Respondent in this appeal.

Brief Facts:

6. PW1, Justine Wachira Muriuki testified that he was a business man and that the Defendant (Appellant) was his uncle. His uncle requested him for a loan to boost his boutique business. They went to Equity Bank Mwea Branch where he withdrew Kshs.300,000/- and gave the Appellant, after which they wrote an agreement where the Appellant acknowledged receipt of the Kshs.300,000/= and agreed to refund the same with Kshs.10,000/- on top as interest. The Appellant also gave the Respondent, the log book of motor vehicle KAP 675T to keep as security and agreed to repay the loan by 29/10/2013. The written agreement was produced as Exhibit 1.

7. The Respondent further testified that, later on the Appellant approached him and requested him to release the log book of motor vehicle registration No. KAP 675T so that he could use it to take a loan from the Sacco and repay the loan earlier advanced. After waiting for one year and not receiving his money the Respondent went to Kianyaga police station and reported the matter. The Appellant was summoned and promised to pay. He gave the Respondent an undated cheque for Kshs.300,000/-. The Respondent produced a copy of the log book, bank withdraw slip from Equity Bank Headquarter, copy of cheque and demand letter as exhibit 2-6.

8. In cross-examination the Respondent admitted using the Appellant's lorry to carry logs to his shamba/plot at Kimbimbi. He stated that the lorry driver was unwell and that the Appellant instructed him to look for a driver, who turned out to be his cousin James Muchira Ndambuki. The Respondent insisted that they had expressly agreed with the Appellant to get another driver and the said driver was not his personal driver. According to the Respondent when they took the logs to Kimbimbi the lorry did not develop any mechanical problems and the problem arose later when it was being driven back. The Respondent denied being liable for the engine problem which the lorry developed and he was not to pay for the repairs as he was not responsible for the engine damage.

9. DW1 John Mwangi Ndambiri, confirm he knew the Respondent, his nephew. He confirmed that the Respondent gave him Kshs.300,000/- as a soft loan and the agreement has reduced into writing. He was to repay the said amount loaned within one month with an interest of Kshs.10,000/- and the

agreement did not have a default clause specifying what would happen in the event of default. Further, the Appellant confirmed that he deposited his log book a security for the sum advance.

10. The Appellant further testified that he later got a loan of Kshs.500,000/= from Fortune Sacco and called on the Respondent to offset the amount earlier borrowed. According to the Appellant, the Respondent told him to continue staying with the sum owed and he could offset the same by monthly payment of Kshs.10,000/= According to him he had repaid the sum of Kshs.70,000/= through monthly instalment of Kshs.10,000/=, Some payment were through Mpesa, while others were paid in cash. As for the balance of Kshs.240,000/= the Appellant admitted that he had not repaid the same because of the Respondent had borrowed his lorry and destroyed it thereby incapacitating him since he was using the said lorry for his business.

11. The Appellant further testified that on 28/7/2014, the Respondent hired his lorry to ferry poles to his building site. The lorry was registration KCG 507F Mitsubishi Canter 403, which he would hire out at a fee. The lorry driver was one Mr. Obed Mwaura and on the day he hired out the lorry to the Respondent, his driver Mr. Obed Mwaura was to drive the lorry but he did not have his driving licence, so the lorry was driven by another driver called James Muchira and it was the Plaintiff who engaged him.

12. The Respondent ferried the logs to his site, but he did not bring back the lorry the way it was. On the said date at about 5.00 p.m. he was called and told that lorry had a mechanical problem. He went and discovered that the lorry engine components namely crank shaft, pistons rods, radiator among others were spoilt. According to the Appellant, in the morning when the lorry left his premises, it did not have a problem. The motor vehicle assessor told him that the lorry was driven without water and the engine had overheated. The engine damage arose due to human error, while the Respondent's driver was in control. The Respondent was therefore liable and responsible for repairing the lorry because he insisted that he goes with his driver.

13. The Appellant engaged the services of an assessor from AA(K) who assessed the lorry and wrote a report. The motor vehicle had been inspected on 31/5/2014, approximately two (2) months before it developed a mechanical problem. At the time of assessment, it had been declared road worthy. The Appellant produced into evidence the assessment report and Mpesa statement and reiterated that it is was the responsibility of the Respondent to pay for damages suffered.

14. In cross-examination the Appellant once again admitted that the Respondent had given him a friendly loan and further he was aware of the undated cheque which he admits he issued in favour of the Respondent. Further, he also confirmed that they did not reduce into writing the agreement to repay sum owed by monthly instalments of Kshs.10,000/= and he did not have any evidence to show monthly repayment of Kshs.10,000/=.

15. As regards the suit lorry the Appellant stated that he lost Kshs.20,000/= per week when the lorry broke down but he did not have any evidence in court to show how much he would earn from the said lorry. According to the Appellant, Muchira who was driving the lorry was also his nephew, but was not his driver. He gave the lorry keys to the Respondent and it is the Respondent who give the said Muchira the lorry key. He reaffirms that the lorry did not have a mechanical problem when the Respondent took it and the list quoting the spare parts to be bought was handwritten as he had sought the costing from a local dealer.

16. DW 2 Obed Mwaura Muchiri testified that he was a lorry driver employed by the Appellant and had driven the suit motor vehicle for six years. They would normally ferry goods from Nairobi and sell at the shop. In a month they would do two trips .On 28/7/2014 he was at the shop when the Respondent came with the Appellant in his personal motor vehicle. The Appellant told him that the

Respondent wanted to ferry poles using the said lorry. Unfortunately, he had forgotten his driving licence and decided to go pick it at his house. While away the Appellant called him and told him that the Respondent had gotten a driver who would drive the suit lorry. When he came back he did not find the lorry. Later he was called and told that the lorry had broken down, it had an engine knock.

17. According to the witness the lorry did not have any mechanical problem and he had even driven it up to Kapsabet and came back safely. The motor vehicle engine developed a mechanical problem due to carelessness and must have overheated. He blamed the Respondent as the person at fault. In cross-examination, he stated that it is the Appellant who told him that the Respondent had found another driver and the said driver and the Respondent were cousins.

18. DW3 John Munene Mbogo testified that he is an electrician in Kianyaga and knew both the Appellant and the Respondent, he knew them as relatives. The Appellant was an uncle to the Respondent, while DW2 was employed by the Appellant as a driver. On 28/7/2014 DW2 told him he was going to ferry posts and need to go pick his driving licence which he had forgotten in his house. He accompanied DW2 to his house to pick the driving licence. Later DW2 was called and told not to bother because the Respondent had gotten somebody else who would drive the lorry. When they went back they did not find the lorry. It had left. It was the Appellant who had called DW2. Later he was told the lorry had developed mechanical problem. In cross-examination, he confirmed that he did not know who drove the suit lorry on the said date and if it was the Respondent who authorized the other driver. According to him, it is the Appellant who said that the Respondent would take responsibility.

19. DW4 Samson Mwetha stated that he had worked with AA(K) as a motor vehicle assessor and had 5 years' experience as an assessor and one year experience as a mechanic. On 21/11/2014 he did assessment on motor vehicle registration No. KBG 507 F Class No. FESE CBD 560567 Engine No. 4033H68164, year of manufacture was 2001 model FESI CBT type Mitsubishi Canter colour white/ blue.

20. The assessment was carried out on instruction of the owner, the Appellant herein and he found the following engine parts were damaged; Crankshaft main bearing, crank shaft seal worn out, piston, piston load, piston rings, piston thrust bearing, radiation holder, cylinder head casket, clutch and pestle plate, crunch shaft main bearing and crunch shaft seal.

21. According to the assessment the damage was caused by human negligence. The engine would cost Kshs.115,000/= to replace engine. He prepared the report dated 28/9/2014 and produced it into evidence together with receipt of Kshs11,400/= and photographs. In cross examination he confirmed that when the assessed the motor vehicle it was not serviceable.

22. The Defendant closed his case after his witnesses had testified and upon considering the evidence adduced by the parties and their written submissions, the trial court entered judgement on 23rd March, 2018 which is subject of this appeal.

Appellant Submissions

23. The Appellant filed his submissions on 17/8/ 2012. He stated that the trial magistrate erred in law and fact in disregarding his evidence and those of his witnesses thus arrived at a wrong decision. That the standard of proof in civil cases is as the balance of probability and not beyond reasonable doubt. He had produced documents and called witnesses to achieve this standard yet the Magistrate failed to award him the claim of loss of use as pleaded in the counter claim. The decision was wrong given that the Respondent did not disapprove the same. The Appellant relied on the case of *Pil Kenya Limited v Oppong* (209) KLR 422.

24. The Appellant reiterated that the suit lorry did not have any known prior mechanical problems and when it broke down it was under custody of the Respondent and the break down was attributed to human negligence as confirmed by the motor vehicle Assessor (DW4). Further, as a result of the breakdown the engine was not serviceable and required replacement. Based on Section 109 of the *Evidence Act*, the Appellant proved that he was a business man running a gas selling shop at Kianyaga town and used this lorry to ferry gas cylinders to and from the shop and therefore was liable to be compensated for loss of user. The Appellant relied on *Hahn v Singh* (1985) KLR 716, *Total Kenya Limited v Janerams Limited* (2005) KLR and *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Ltd* (2016) eKLR. Where it was held that special damages must be strictly pleaded and proved with as much particularity as circumstances permit.

25. In this particular claim the Respondent acknowledged the fact that he hired the motor vehicle for transport and thus the claim for loss of user of Kshs.562,700/- was entirely sustainable from the day the lorry broke down bearing in mind that the Appellant has been deprived a total of Kshs.400,000/= (20 weeks at the rate of Kshs.20,000/- per week), Kshs.50,000/-incurred for labour and Kshs.2,000 spent on issuing the demand letter.

26. As regards the loan advanced to him by the Respondents, the Appellant stated that he had repaid Kshs.70,000/- as evidence by the Mpesa statement. Finally, it was his submission that the Kshs.10,000/= interest charged was illegal and not within the parameters of lending rates as controlled by Central Bank of Kenya. He prayed that the appeal be allowed.

Respondents Submissions:

27. The Respondent submitted that the Appeal has no merit and ought to be dismissed as it was sufficiently proved that the Appellant borrowed the sum of Kshs.300,000/= from the Respondent and agreed to refund the sum with interest of Kshs.10,000/=.This was clearly captured vide a written agreement dated 27/10/2023, signed by the parties. There was no evidence that the Appellant attempted to refund the sum owed and in particular failed spectacularly in proving that he repaid Kshs.70,000/= to the Respondent.

28. On the counter claim, it is alleged that the counter–claim of Kshs.562,700/- ought to have been specifically pleaded and proved sufficiently as required by law. The Respondent submitted that the Appellant did not prove their case to the required standard, as he admitted giving the lorry to a driver of his choice and at the time the lorry broke down the same was not in the hands of the Respondent in this Appeal. Further, no particular of negligence and/or carelessness was pleaded in the counter-claim nor was the same proved by evidence.

29. The Respondent further submitted that on the issue of the loss of user, the Appellant failed to produce book of accounts, duly verified by Auditors or KRA returns to authenticate his allegation that his lorry was to earn him Kshs.20,000/= per week. In absence of any proof the trial court was right to dismiss the entire claim for loss of user. Similarly, the labour cost of Kshs.50,000/= and Kshs.2,000/= for issuing a demand letter was equally not proven as required by Section 107 of the *Evidence Act* Cap 80.

30. The Respondent reiterated that parties were bound by their pleadings and since no particular of negligence was pleaded no liability could be attributed to the Respondent more particularly when no such proof was tendered.

31. The Respondent prayed that the Appeal be dismissed with costs.

Analysis and Determination:

32. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

33. As held in *Selle & Another Vs Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion 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. (*Abduk Hammed aif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270.

34. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala-Vrs-R* (1975) EA 57. Where it was stated that:-

> " It is not the function of the first Appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the Magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses."

35. Though the Appellant raised four grounds of appeal, two main issues arise, namely whether the trial Magistrate erred in awarding the Respondent a sum of Kshs.310,000/= and if the Appellant was entitled to the award of Kshs.562,700/= as prayed for in the counter claim.

A. That the learned trial Magistrate erred in law and fact in awarding the Plaintiff a claim of Kshs.310,000/- with interest against the weight of evidence.

36. This ground of appeal cannot succeed for the simple reason that there was overwhelming undisputed evidence that the Appellant was given Kshs.300,000/= and he was to return the same with interest of Kshs.10,000/=. The Respondent produced into evidence bank money withdrawal slip from Equity Bank Mwea account 0100194696707 showing he withdrew Kshs.300,000/= and more importantly also produced a written agreement signed by both parties where the Appellant agreed to refund the sum advanced with interest of Kshs.10,000/= by 29.10.2013.

37. The Appellant when he testified did not deny being advanced money by the Respondent. In his evidence in chief he testified that "he gave me Kshs.300,000/=. It was a soft loan. We did put it in writing through this agreement." This is an express admission by the Appellant. While in his evidence he averred that after the initial agreement, the parties agreed that he would repay the sums owed by monthly instalment of Kshs.10,000/= . This allegation was not proved. Further the Appellants evidence that he paid the Respondent Kshs.70,000/= through monthly cash remittance and through

Mpesa too remained unproved as it was not shown anywhere in the Mpesa statement where he did refund any of the sums owned nor where the payments dated highlighted and computed.

38. The court of appeal in *Mbuthia Macharia V Annah Mutua & Ano* {2017} eKLR discussed the issue of burden of proof and stated that;

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore while both the legal and evidential burden initially rests upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case the incident of both the legal and evidential burden was with the Appellant."

39. I also refer to *The halsbury's laws of England, 4th Edition, Volume 17* at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties' case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> {16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutions evidential burden. Therefore, while both legal and evidential burden initially rests upon the Appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

40. As regards the legal burden , the Respondent discharged the burden of proof by the cogent evidence he adduced while the Appellant failed to discharge the evidentiary burden that shifted upon him to show that either he did not receive Kshs.300,000/= from the Respondent or that he received the said amount and repaid it in full or partially. This ground of Appeal therefor fails.

(B) The learned Magistrate erred in law and fact in failing to reward the Defendant on claim of loss of user of Kshs.562,700/-

41. The Appellant did file his statement of defence and counter claim dated 10th December 2014, where he claimed a sum of Kshs.562,700/= as special damages. The Appellant claimed a sum of Kshs.110,700/= as costs of buying engine spare parts, Kshs.400,000/= for loss of user, Kshs.50,000/= for labour and Kshs.2,000/= being advocates fee for writing a demand letter. Further the Appellant averred that the Respondent was liable to pay this sum due to the fact that his driver was negligent in the way he handled the suit lorry leading to the engine damage.

42. The law on vicarious liability is well settled. Vicariously liability is a legal doctrine which assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. It is also referred to as "imputed negligence" or "imputed liability."

43. The common law position as regards the issue of vicarious liability has been settled by many decisions. The House of Lords in *Morgans Vs Launchbury and others* (1971) 2 All ER 606. It was held that:

> " In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant, or that at the material time the driver was acting on the owners behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owners request express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."

44. The Court of Appeal sitting in Mombasa in Civil Appeal No. 119 of 1986 *Khayigila Vs Gigi & Co limited & Another* (1987) KLR 1976 also held that:

    a. In order to fix liability on the owner of a car for the negligence of its driver it was necessary to show either that the driver was the owner's servant, or that at the material time the driver was acting on the owners behalf as his agent.

    b. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at owners request, express or implied, or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.

45. The Respondent in cross examination averred that it was the Appellant who told him to look for a driver as his usual driver was unwell. The driver he procured was their cousin and it was the Appellant who gave him the keys for the suit lorry. He also admitted that the lorry developed mechanical problems when it was on its way back in the evening.

46. The Appellant on the other hand averred that the Appellant borrowed his lorry and agreed to fuel it and used it to take poles to his plot in Kimbimbi. According to the Appellant on the said date, his driver was available but did not have a driving licence. The Respondent was impatient and called another driver one James Muchira (who turned out to be their cousin) to drive the lorry and ferry poles to the Respondents parcel of land at Kimbimbi. At about 5pm on the same day as the said driver was enroute back from Kimbimbi he called the Appellant and informed him that the lorry had developed a mechanical problem, which latter turned out to a major engine breakdown.

47. The Appellant blamed the Respondent as it was him who engaged the lorry driver, further the assessor DW4 had informed him that the lorry was driven without water in the Engine thereby causing the engine to overheat. Further it was his evidence that his lorry had been inspected two months earlier on 31.5.2014 at Embu and found to be roadworthy. He also testified that he use the lorry for his business and also hired it out and made Kshs.20,000/= per week.

48. From the evidence adduced, it is common ground that it is the Respondent who sourced for a driver, and the suit lorry was being used at his request and for his benefit with his express instruction. Further it was performing a task or duty delegated by him and for his benefit and thus became vicariously liable for the engine damage which occurred while his appointed driver had control of the said motor vehicle.

49. The Appellant specifically pleaded at paragraph 13 of the counter claim the particulars of damages suffer with respect the damaged Engine and quantified the cost of buying new spare parts. DW4 Samson Mweturia produced the assessment report dated 21.11.2014 where he quantified the engine damage. His report and photograph's were produced as Defence Exhibit 4(a), (b) and 5.

50. The Appellant further claimed for loss of user for 20 weeks (Five months) at Kshs.20,000/= per week. This is due to lost business opportunity when the lorry was not working. He also sort Kshs.50,000/= as labour charges and Kshs.2,000/=.

Special Damages:

51. The Appellant sought Kshs.110,700/= as cost of buying spare parts for the lorry Engine, Kshs.50,000/= for mechanic labour charges and Kshs.2,000/= for advocates legal fee for written a demand letter to the Respondent.

52. In *Capital fish Kenya Limited vs The kenya power & lighting company limited* (2016) eklr, the Court of Appeal reiterated that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.

53. In the case before the trial court, the Appellant testified that his motor vehicle was damaged and he pleaded for compensation for damages and lost earnings. In cross examination he did not testify about repair of the suit lorry but only asked for loss of user. DW4 Samwuel Mwetha motor vehicle assessor with AA(K) who did assessment of the engine and in his report dated 21.11.2014 outlined what was spoilt as testified that it would require approximately Kshs.115,000/=. He further testified that the engine was not serviceable but required replacement.

54. As held in In Capital fish Kenya Limited vs The Kenya Power & Lighting Company limited (2016) eklr (Supra) apart from listing the alleged loss of damages, no evidence was led in support of the alleged loss. As it were, the Appellant merely threw figures at the trial court without credible evidence in support thereof .There was no credible documentary evidence in support of the alleged special damages.

55. In *David Begina Vs Martin Bundi* (283 of 1996)(1997) eklr the Court of Appeal referred to the judgment of Lord Goddard CJ , In *Bonhan carter Vs Hyde Park Hotel Ltd* (1948) 64 TLR 177, where he observed that;

> " It is trite law that the Plaintiff must understand that if they bring an action of damages it is for them to prove damages. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying "this is what I have lost", I ask you to give me the damages. They have to prove it."

56. From the evidence on record, I am persuade to hold that the trial court fell into error when it allowed the claim of repairs to the tune of Kshs.110,700/=, when the same had not been proved to the required standard. Similarly the claim for labour costs and legal fee where not proved. But since there was no cross appeal the award will stand.

Loss of User:

57. The Appellant did plead for loss of user at Kshs.20,000/= per week for twenty weeks.(5 months) and sought loss of user at Kshs.400,000/=.

58. In *Samuel Kariuki Nyangoti Vs Johaan Distelberger*(Supra), where the Appellant therein claimed loss of user for his matatu which was involved in an accident. The court of appeal stated that;

> " (16)The damages claimed by the Appellant were in the nature of pecuniary loss which the law does not presume to be direct, natural or probable consequence of the accident since the subject of ascertainment by court through evidence and the application of the law relating to measure of damages, in personal injury cases, the loss of business profits and loss of

future earning capacity are equally in the nature of General damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim of General damages. The standard of proof in such claim is on a balance of probabilities and the principle of restitution is intergram is applied in such cases.")emphasis.

59. In *Wambua Vs Patel & Another* (1986)KLR , Apoloo J(as he was then) held in a case where there were no proper records that ;

> " Nevertheless, I am satisfied that he was in the cattle trade and earned a livelihood from that business. A wrong doer must take his victim as he finds him. The Defendant ought not to be heard to say the Plaintiff should be denied his earning because he did not develop more sophisticated business method"..... But a victim does not lose his remedy in damages because the quantification is difficult."

60. Finally in *Peter Njuguna Joseph & Another Vs Anne Moraa* (Civil Appeal No 23 of 1991) the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and the period under which it should have been repaired even though not a single document was produced (see also *Jerock Sugarcane Growers Ltd Vs Jackson Chege Busi* (Civil Appeal No 10 of 1991)

61. From the above decisions it is clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decision also relate to commercial vehicles which were damaged and as a result, the owner's claim loss of user. The decision's further agree that the owner of the damaged vehicles is entitled to compensation and courts have been liberal when quantifying damages for loss of user.

62. The Appellants submitted that the trial Magistrate erred in not awarding them loss of user, yet it had been specifically pleaded and proved. The trial Magistrate thus wrongly elevated the standard of proof in civil cases above the required, "on a balance of probability". The Appellants are right as the trial Magistrate fell in error not to award the Appellant damages for loss of user where specifically the Respondent had been found vicariously liable for the engine damage which occurred on the suit lorry. The next question which then arises is what amount of damages for loss of user the Appellant was entitled to.

63. The Appellant testified that he used the lorry for his business and hires it out. In evidence he testified that, "The lorry is mine. I used for my business and I also hire it to people." When DW2 Mr Obed Mwaura Wachira (the usual lorry diver) testified, that he had been driving the lorry for six (6) years since 2012. He specifically stated that, "We normally ferry Gas from Nairobi to sell in the shop. In a month we make about two (2) trips." He did not talk of them using the lorry for commercial hire. The evidence as to what the lorry was used for is contradiction. Be that as it may the amount claimed of Kshs.20,000/= a week is reasonable as a net figure after removing operational costs.

64. The law also requires the Appellant to mitigate his loss. He did not testify as to how he mitigated his loss, when his lorry was grounded.

65. The principal of mitigation of loss imposes a duty on the party injured by a breach of contract or tort to mitigate his loss by taking reasonable measures to minimize his loss arising from the breach or tort. See *Farah Awad Gullet Vs CMC Motors Group Limited* (2018) eklr where it was held that:

> " On mitigation of loss, we agree with the judge's finding that it is now well settled principle of law that a party seeking redress in damages either for breach of contract or in tort has a duty to mitigate his loss;{ cited with approval the case of *British Westinghouse Electricity*

and Manufacturing co ltd Vs Underground Electric Railways Co of London Ltd (1912) AC 673 as per lord Halden LC."

66. In the above cited *British westington Electricity* case (supra) Lord Viscount Haldane LC 688-9, set out the principles of determining the measures of damages.

> " The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract has been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle has to be qualified by a second which imposes on a Plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damages which is due to his neglect to take such steps.

67. The Appellant claimed damages at Kshs.20,000/= for a period of five months. He needed to have mitigated his loss and probably did after a reasonable period of time as repairing the lorry could not have taken the said five months, nor did he lead evidence to that effect. Exercising my discretion and considering what it would have costed him to repair the suit lorry I do award damages for loss of user for a period eight (8) weeks at Kshs.20,000/= per week.

Disposition

68. This appeal partially succeeds I do partially set-aside and vary the Judgment of Hon Y.M Baraza (Resident Magistrate) issued in Kerugoya CMCC No 258 of 2014) dated 23/3/2018 and order that the Respondent herein/Plaintiff in the trial court will pay the Appellant herein a sum of Kshs.160,000/= as loss of user plus interest at court rates from the date of filing the suit to the date of Judgment.

69. All the other awards will remain as passed in the said judgment.

70. Since the parties herein are close relatives, each party will bear their own costs

71. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25TH DAY OF APRIL, 2023.

In the presence of;

..... for the Appellant.

..... for Respondent.

.... Court Assistant.