



Hussein v Hakika Transport Services Limited & another (Civil Appeal 42 of 2022) [2023] KEHC 24903 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 42 OF 2022
JM CHIGITI, J
OCTOBER 27, 2023**

BETWEEN

ABDIKARIM MOHUMED HUSSEIN APPELLANT

AND

HAKIKA TRANSPORT SERVICES LIMITED 1ST RESPONDENT

NGUMU MUSYOKA 2ND RESPONDENT

(Being an appeal from part of the judgment of Principal Magistrate's Court at Mariakani Law Courts delivered on 23rd March, 2022 in PMCC No. 249 of 2018 by Prinicpal Magistrate Hon. Stephen K. Ngii)

JUDGMENT

The Appellant's Case

1. The Appellant moved the subordinate court for a material damage claim against the Respondents, for special damages, for loss of his vehicle, police abstract, assessment report and copy of records at a total sum of Kshs. 3,303,150/=, loss of business earnings, general damages, costs of the suit and interest.
2. After hearing the case, judgment was delivered on 23rd March, 2022 wherein he was awarded Kshs. 2,530,000 as loss of the motor vehicle plus costs and interest from the date of judgment. All the other claims were disallowed.
3. Being dissatisfied with the judgment, he lodged an appeal wherein he wants this court to determine:
 1. Whether he is entitled to damages for loss of user / loss of earnings and general damages.



2. Whether he is entitled to interest on special damages from the date of filing suit.
4. The Appellant argues that interest on special damages as a rule runs from the date of filing suit to the date of payment.
5. The Appellant argued that he was deprived of his motor vehicle truck, immediately after the accident. The loss of vehicle was specifically prayed for, he paid Court filing fees of slightly more than Kshs. 70,000, and he continued incurring the said loss even after institution of the suit. The trial court did not assign a reason for denying the Appellant interest on special damages from the date of filing suit.
6. He wants the court to allow this ground of appeal and award him interest on the awarded sum of 2,5530,000/= from the date of filing suit. He places reliance in the cases of Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] eKLR.

On the issue whether the Plaintiff is entitled to damages for loss of user / loss of earnings and general damages:

7. The Appellant argues that in his testimony stated that he used the vehicle for business purposes. Thus the accident cut short his source of income. This was corroborated by his driver in his witness statement who was PW1. His vehicle was in the transportation business.
8. In Civil Appeal No. 59 of 2010, Samuel Kariuki Nyangoti -Vs- Johaan Distelberger the appellant had claimed for loss of user of his matatu which was involved in an accident, and the Court of Appeal stated inter alia;

“...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 or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually 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 in general damages. The standard of proof in such claims is on a balance of probabilities and the principle of restitutio in intergrum is applied in such cases..”

9. The Court of Appeal went further to set out in extension, the case of Wambua -vs- Patel & another (1986) KLR 336, where the plaintiff had not kept proper records of what he earned, it was inter-alia held;

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

10. The Court of Appeal further made reference to the case - Chinese Technical Team for Kenya National Sports Complex and 2 others -Vs- Chabari M'ingaruni (Civil Appeal No. 293 of 1998), where a claim for loss of use of a vehicle matatu was allowed although no supporting documentary proof by way of books of accounts had been produced, upon the court being satisfied that the vehicle was used as a means of earning income from the deceased plaintiff and also Peter Niuguna & another - Vs- Anna



Mora (Civil Appeal 23 of 1991) the court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.

11. He also places reliance on Civil Appeal No 29 of 2019 - Jackson Mwabili - Vs- Peterson Matei (2020) eKLR, where Justice Mwita made reference to several Court of Appeal decisions in interrogating damages for loss of user and he stated inter alia;

“The above decisions are clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user.”

12. The decisions made a finding that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user.
13. The Appellant argues that in his witness statement he stated that he was making about Kshs. 480,000 per month at Kshs. 60,000 profit per trip x 8 trips per month. As per the plaint, he claimed Kshs. $480,000 \times 12$ months thus bringing a total of Kshs. 5,760,000/=.
14. Although this was not controverted the Honourable Magistrate in his judgment did not interrogate the same and stated that loss of user is in the realm of Special damages without interrogating the same adequately.

The respondents case

15. The Plaintiff testified as Pw3 testified that; “I used to transport goods for Subukia Holding among other companies. I have a bank account. Subukia had accounts for their transporters. The statements are from Subukia Holdings Kenya Limited. Statement dated 18th April, 2018 - PMF 1-4a. The statement of account in respect to motor vehicle KBX 832W. Refer to receipts numbers 2153, 2151, 2152 from Subukia Holding. These receipts were issued to me by Subukia upon payment”
16. The Appellant went on to state that he also had a statement from the sister company Jidle East Africa Shipping and Cargo receipts from Hamid International Limited. The two are sister companies. Statement from Jidle and receipts from Hamid were also marked PM51-5 (a)-(b). All documents pertaining to loss of income were marked for identification and not exhibits.
17. The respondent places reliance in the Court of Appeal judgement at Nairobi in Civil Appeal No. 140 of 2008 between (Kenneth Nyaga Mwige -vs Austin Kiguta and (2) Others)

“...If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account”.
18. In the Nigerian case of Michael Hausa -vs- The state (1944) 7-8 SCNJ 144, the Court went onto state that a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. The Court held that failure or omission by the party to formally produce the documents marked for identification being MFI, MFI 2 and MFI 3 is fatal to the Respondents case. The documents did not become exhibits, before the trial Court, they had simply been marked for identification and they have no evidential weight. The Appellant closed his case without calling any further witness. Thus no makers were called to testify to the “marked” documents.
19. There was no explanation given in the Appellant's evidence as to how he arrived at this figure of KShs.5,760,000/- especially in the light of the statements being marked for identification.



20. In cross examination, the Appellant told the court,

“I can't prove my earnings through the bank statements because I used to be paid in cash. I have not produced receipts evidencing all the payments. I don't have records of income for those years. I have no audited accounts for my business. I have no tax records to prove that I was running transportation business with the motor vehicle” He stated further that even the documents to prove he purchased the vehicle was not in his list of documents.”

21. In the case of Bonham Carter -vs- Hyde Park Hotel Ltd. (948) 64 TRL 177 Lord Gudderd Chief Justice stated and I quote:

“The Plaintiff must understand that they cannot just write particulars and “throw” them at the Court asking for damages to be granted on such particulars only, they must strictly prove the same.”

22. On the issue of interest, the Respondent relies on Civil Appeal No. 34 of 2019 (John C. Omollo -vs- South Nyanza Sugar Co. Ltd.) where the court held “The forgoing provision is articulate on the wide nature of the trial court's discretion in awarding interest. That discretion must however be exercised judiciously. An appellate Court will not interfere with the trial court's discretion unless the trial court proceeded on an erroneous principle or was plainly and obviously wrong.”

Analysis and Determination

23. This being a first appeal the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.

24. In the case of Selle & another vs Associated Motor Boat Co. Ltd [1968] EA the court held as follows: -

“...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...”

Issues for determination:

1. Whether he is entitled to damages for loss of user / loss of earnings and general damages.
2. Whether he is entitled to interest on special damages from the date of filing suit.

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25. Cecilia W. Mwangi & Ano. vs Ruth W.Mwangi NY CA Civil Appeal No.251 of 1996 (1997) eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”

26. In the Plaintiff's claim the Appellant claimed loss of business and loss of profits/earning and goes on to claim loss of business/earning. The word “capacity” does not appear anywhere in his claims. The Plaintiff's claim for loss of earnings should have been pleaded as a special damage and not a general damage as has



been done. The claim should have been pleaded in particulars of special damage in paragraph 7 of the Plaintiff/pleadings which is not the case. He stated he was aware of his loss right from the onset of his claim which he then should have included as a special damage. He states on cross examination on page 5 of the Record of Appeal and I quote: "On 11th July, 2018 I sued the Defendants. By that date I had known the damages and losses arising from the accident".

27. The Court of Appeal in *S J v Fransisco Di Nello & another* (2015) eKLR put the issue in this way:

"Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved."

28. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 wherein Lord Denning M. R. said as follows:

"It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

29. From the principles set out in the above authorities, loss of future earnings must be pleaded and proved as they are in the nature of special damages. The Appellant did not pleaded specifically loss of earning as under special damages but as general damages.

30. During cross examination, the Appellant testified that,

"I can't prove my earnings through the bank statements because I used to be paid in cash. I have not produced receipts evidencing all the payments. I don't have records of income for those years. I have no audited accounts for my business. I have no tax records to prove that I was running transportation business with the motor vehicle" He stated further that even the documents to prove he purchased the vehicle was not in his list of documents."

31. This is the amount stated in the Plaintiff for lost earnings or income. This according to the Plaintiff's evidence was a figure known to him as at the time of filing of the Plaintiff, yet it is not included in paragraph 7 of the Plaintiff as a special damage. It is claimed as general damages.

32. From the following excerpts from the proceedings, it is clear that the Appellant made an attempt to prove the special damages: Pw3 led the court through what would have otherwise helped him prove his claim. Unfortunately, all documents pertaining to loss of income were marked for identification, but not produced as exhibits. The upshot of this lapse is that the said documents did not assist the Appellant meet the requirements of Section 107,108 and 109 of The *Evidence Act*.

33. In the case of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party



the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

34. This court finds that in order to succeed, special damages must first be pleaded with specificity before discharging the burden of proving them through evidence. It is this court’s finding that the Appellant was not able to prove the same.

35. In so finding, I am guided by the judgment in the High Court case in Nairobi Civil Suit No. 1620 of 1995 (Gilbert Mwirigi -vs- Elijah Muthuri) where the Court held:

“Although the plaintiff intimated that he had lost the income which the vehicle used to earn him in his matatu business, this he treated as general damage. In my humble opinion, loss of user being a claim that can be quantified is a specific claim, which should fall under claims for special damages, and not general damages. I shall therefore disregard that aspect of his claim because, it being a claim in special damage, it was not specially pleaded in the plaint. The general rule is that special damage must not only be specially pleaded, but they must be specifically proven. Not having been so pleaded I regret, lack the jurisdiction to make any award for loss of user.”

36. The Court of Appeal in the case of David Bagaine -vs- Martin Bundi (1997) eKLR, considered the issue of loss of user and held that:

“We must and ought to make it clear that damages claimed under the title, “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can.”

37. The Appellant fails on this issue.

The second issue for determination is whether the Appellant is entitled to interest on special damages from the date of filing suit.

38. Section 26(1) of the *Civil Procedure Act* gave the Trial Magistrate a wide measure of discretion on the question of interest. The award of interest is therefore a matter that is left to the discretion of the trial court, and generally, an appellate court is enjoined to treat the decision of a trial court with respect, and refrain from interfering with the decision unless it is convinced that the trial court based the award on some erroneous principal or was plainly wrong.

39. In African Economic Research Consortium V Murji Shamji Nathan [2011] eKLR, the Court the court found that; “A claim for special damages is of court for payment of money. It is the loss which the plaintiff claims he has already incurred at the date of the suit. Thus when the superior court said “the plaintiff was entitled to interest, it meant that interest on special damages shall be from the date of the suit.”

40. The court finds that in exercising its discretion the trial court embraced the wrong principal or was plainly wrong. The Appellant is entitled to interest on special damages shall be from the date of the suit.

41. This limb of the appeal succeeds.

Orders;

1. The Appeal is partly successful.



2. The judgment dated 23rd March 2022 is set aside to the extent of the interest only.
3. The Appellant is entitled to interest on special damages from the date of filing suit until payment in full.
4. The rest of the judgment remains as issued.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2023.

J. CHIGITI (SC)

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

