Bajaber Stores Limited v Awale Transporters Limited (Civil Appeal 230 of 2019) [2022] KEHC 17087 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 17087 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 230 OF 2019

MN MWANGI, J

JUNE 30, 2022

BETWEEN

BAJABER STORES LIMITED ..... APPELLANT

AND

AWALE TRANSPORTERS LIMITED ..... RESPONDENT

(An appeal from the judgment of Hon. F. Kyambia, Senior Principal Magistrate, delivered on 29th March, 2019 in Mombasa Principal Magistrate's Court Civil Case No. 323 of 2017)

JUDGMENT

1. The appellant herein was the defendant in the lower Court. It had been sued for an accident that took place on August 22, 2016along the Mombasa-Nairobi highway, involving the plaintiff's motor vehicle registration No. KAY 612L/ZC 8342 Axor and the defendant's motor vehicle registration No. KBS 826M/ZE 0964 Daf lorry. After hearing the case, the Trial Magistrate awarded the appellant Kshs. 2,300,000/= in damages for loss of the motor vehicle, Kshs. 53,000/= in special damages, Kshs. 512,400/= for loss of user, less Kshs. 859,620/- plus costs and interest from the date of filling suit. Parties recorded a consent on liability in the ratio of 70:30 in the lower Court

2. The respondent being aggrieved by the said decision lodged an appeal against part of the said judgment through a Memorandum of Appeal dated November 18, 2019, raising the following grounds of appeal-

    i. That the Honourable Magistrate erred in fact and law in finding that the respondent proved loss of user of Kshs. 512,400/=;

    ii. That the Honourable Magistrate erred in fact and law in failing to properly evaluate the weight of the evidence placed before him and submissions filed as regards the loss of user;

    iii. That the Honourable Magistrate erred in fact and law in finding that the appellant had proved loss of user despite the motor vehicle being a write-off;

iv. That the Honourable Magistrate erred in fact and law in finding that there was sufficient evidence to find the appellant liable for the loss of user;

v. That the Trial Magistrate erred in law and fact in finding that the respondent had proved his case on loss of user on a balance of probabilities; and

vi. That the learned Magistrate erred in law and fact in failing to find that the respondent's case on loss of user should have been dismissed for lack of evidence.

3. The appeal herein was canvassed by way of written submissions. On February 25, 2021, the law firm of V.N. Okata & Co. Advocates filed their written submissions on behalf of the appellant. The submissions by the respondent were filed on February 19, 2021 by the law firm of Kiarie Kariuki & Co. Advocate.

4. At the hearing of this Appeal, Ms. Okata submitted that that the assessors report by Auto Decade Assessors dated August 26, 2016indicated that the respondent's motor vehicle was a write-off, and as such, the respondent was not entitled to the award of loss of user. She cited the case of *Miwa Hauliers & another v Godfrey Auma* [2007] eKLR, where the court held that the claim was specific and ascertained once there was total loss of the vehicle and that the plaintiff could only get the value of the vehicle at the time of the accident. The said court also held that to award damages under loss of user would amount to double compensation.

5. Ms Okata submitted that the claim of loss of user as a special damage was not proved by the respondent. She elaborated that the document produced in evidence did not reflect the true picture of the amounts earned by the respondent during the two months prior to the accident since at pages 62-97, it shows only invoices made out to Kapa Oil Ref Ltd for various amounts and no receipts of any payments made to the respondent.

6. Ms Layoo, learned Counsel for the respondent herein submitted that PW1 in his evidence during trial testified that the respondent's motor vehicle at the time of the accident was being used for transportation purposes and that it made three trips every month. She was of the view that the Trial Magistrate was justified in awarding loss of user because the respondent's source of income was interrupted on August 22, 2016when the appellant's motor vehicle rammed into the respondent's vehicle causing it extensive damage thus rendering it immobile and unusable from the date of the accident. In support of her submissions, she cited the case of Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR, where the Court of Appeal relied on the *Halsbury's Laws of England* – Fourth Edition at page 328 paragraph 863 where the authors state the following in respect of loss of use of profit-earning chattel which is destroyed:

> "The measure is the value of the Chattel to the owner as going concern at the time and place of the loss so that he might be in a position to purchase a replacement. Loss of user profit for a period until a replacement could be obtained may also be awarded, together with costs arising from the disturbance of any current engagement, the costs of adapting, transporting and insuring any replacement and wasted wages and standing charges. Interest may be awarded on the sum.
>
> The value of prospective future earnings of the lost chattel cannot merely be added to the market value since the earning capacity of the chattel will have been taken into account in arriving at its capitalised value and mere addition would result in duplication."

ANALYSIS AND DETERMINATION.

7. I have considered the six grounds of appeal contained in the appellant's Memorandum of Appeal. Cumulatively, the said grounds only raise the singular issue of the award made for loss of user.

8. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, thiscourt has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion, while always bearing in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

Whether the Trial Court erred in awarding the respondent loss of user when the motor vehicle had been declared a write off.

9. On the issue of the burden of proof, in *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal, referred to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 the court stated that:

> " It is trite law that theplaintiff must understand that if they bring actions for damages it is for them to prove damage. 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 these damages; they have to prove it."

10. The respondent herein pleaded loss of user at Kshs. 85,400/- per trip for three months which comes to a total sum of Kshs. 768,600/=. In support of the loss of user, the respondent produced transport deliveries, invoices, delivery notes, weighbridge tickets for the months of June and July 2016.

11. On its part, the appellant argued that the documents produced by the respondent were a true reflection of the amounts earned by the respondent, since there was no receipt of any payment made to the respondent; and that once the vehicle was ascertained a write off on September 15, 2016, the loss of user could only be one month if proved.

12. The trial court gave its reasons at arriving at an award of loss of user in the following words -

> " The plaintiff pleaded for loss of user at KShs. 85,400/- for a period of three months per trip. Loss of user is in sum of special damages, which must accordingly be pleaded but strictly proved.
>
> Theplaintiff witness PW1 told thecourt that the vehicle was being used for transport and was generating KShs. 85,400/-. He produced bulk of documents, to prove that. The documents produced clearly shows (sic) that the average income from the vehicle was between a sum of KShs.82,000/- to KShs.88,000/-. The sum of KShs.85,400/- pleaded by the Plaintiff is reasonable.
>
> [9] On the number of trips the truck was doing, PW1 testified that the vehicle was doing three trips per month.

[10] The plaintiff claims loss of user for three months. Nothing (sic) that the vehicle had to undergo service, loss of user for two monthly (sic) shall be reasonably (sic). This (sic) the loss of user comes to; - 2 x 3 x 85,400/- = KShs.512,400/-"

13. From the documents furnished by the respondent, it could not be discerned that the respondent indeed used to earn a sum of Kshs. 85,400/= per trip for three months. Furthermore, PW1 in his evidence at page 154 of the Record of Appeal could not prove how he arrived at a figure of Kshs. 85,000/= per trip which he claimed that the respondent would earn from offering transport services as he did not produce any receipt and/or invoice to support the amount that had been pleaded in the respondent's claim. It is my finding that the Trial Magistrate erred in awarding the sum of Kshs. 512,400/= as loss of user which was pleaded as a special damage claim but not proved at all to the required standard.

14. In *Ryce Motors Limited and another v Elias Muroki* [1996] eKLR it was held that -

> " There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4,500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety".

15. Having found that the said claim was not proved to the required standard, does this then mean that the respondent herein was without recourse for the loss of use of his commercial vehicle?

16. In *Samwel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR, the appellant had claimed loss of user of his matatu, which had been involved in an accident. The Court of Appeal held as follows:

> " (16) The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural, 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 balance of probabilities and the principle of restitutio in integrum is applied in such cases." (emphasis added).

17. The Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in *Wambua v Patel & another* [1986] KLR 336, where the court had found that the plaintiff had not kept proper records of what he earned but stated:

> " Nevertheless, I am satisfied that he was in the 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."

18. It is evidently clear from the above authorities from the Court of Appeal to which this court is bound by the doctrine of stare decisis 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 of profit-making chattels, namely motor

vehicles, through accidents. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases.

19. The above cited decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user. An appellate court would not readily interfere with the trial court's exercise of discretion unless it is shown that the Court applied wrong principles of law; took into account irrelevant factors; failed to take into account a relevant factor or the award is inordinately high or low as to represent an erroneous estimate.

20. In the case of *Gicheru v Morton & anor* [2005] 2 KLR 333 it was held that:

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

21. For the foregoing reasons, this court finds that the trial court erred in principle in the determination of the issue of the loss of user when it held that the claim of loss of user of a profit-making chattel was a special damage.

22. I hereby allow the appeal with costs. I will however not interfere with the amount of loss of user awarded by the trial court since I find that the said amount was reasonable in the circumstances.

23. This court has suo moto noted that there was a glaring error on the face of the record since the trial court awarded interest from the date of filling suit on the damages for loss of the vehicle, yet the said amount was general damages and not special damages. I hereby set aside that part of the judgment and substitute it with an award of general damages for loss of user. The total award is outlined below -

    1. Damage for lost vehicle Kshs. 2,300,000/=
    2. Special damages Kshs. 53,000/=
    3. Loss of user (general damages) Kshs. 512,400/=

24. The special damages (No. 2 above) shall earn interest from the date of filing suit at court rates. The general damages (No. 1 and 3), less Kshs. 859,620.00 (arising from the consent on liability) shall bear interest at court rates from the date of the judgment of the lower court.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2022. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Okata for the appellant

Ms Layoo for the respondent

Mr. Oliver Musundi – Court Assistant.