Mombasa Maize Millers Limited v Kipkosgei (Civil Appeal 61 of 2020)
[2022] KEHC 15429 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 61 OF 2020

RN NYAKUNDI, J

NOVEMBER 18, 2022

BETWEEN

MOMBASA MAIZE MILLERS LIMITED ..... APPELLANT

AND

KIBUNEI KIPKOSGEI ..... RESPONDENT

(Being an Appeal from judgment of Hon R Odenyo Senior Principal Magistrate in Eldoret CMCC NO 148 OF 2018 delivered on the 29th day June, 2021))

JUDGMENT

1. What is before this court is an appeal arising from the judgment of Hon R Odenyo SPM in Eldoret CMCC No 148 of 2018, Kibunei Kipkosgei v Mombasa Maize Millers delivered on June 29, 2021. The respondent filed a suit in the lower court seeking special damages material loss as a result of the cause of action which arose on December 18, 2006 at Sondu Hill along the Katito - Sondu road. The respondent claimed that the plaintiff/appellant's motor vehicle registration number KAG 129P was involved in an accident with motor vehicle registration No KAW 224N owned by the 1st defendant and driven by the 2nd defendant. The parties recorded a consent on liability whereby the appellant was to bear 70% liability and the respondent 30% liability. The matter proceeded to hearing for the purpose of determining damages payable and the lower court awarded the respondent special damages amounting to a total sum of Kshs 2, 460, 529/=. The appellant being aggrieved with the award for damages filed the present appeal vide a memorandum of appeal dated August 20, 2020. The appeal was based on the following grounds;That the trial magistrate erred in law and fact in finding that the respondent was entitled to loss of goods without evidence in that regard, a claim which was not proven on a balance of probabilities.That the trial magistrate erred in law and fact in awarding the respondent the sum of Kshs 1,800,000 for loss of goods contrary to the evidence on recordThat the trial magistrate erred in law and fact in awarding the respondent loss of user whereas the motor vehicle was written off.That the trial magistrate erred in law and fact in awarding the sum of Kshs 200, 000 for loss of user without evidence

to that effect and that the trial magistrate erred in law and fact in failing to consider the appellant's submissions.

Appellant's Case

2. The appellant filed submissions on January 18, 2022. It is the appellant's case that the respondent, though PW1 as shown on page 83 of the record of appeal, testified that he had only been contracted by Kenya Seed Company Limited to transport 625 bags of maize and as such the maize belonged to Kenya Seed Company. Nothing was produced in court to confirm that Kenya Seed Company Limited surcharged or asked the respondent to refund it for the lost bags of maize seed. In view of the foregoing, the respondent did not prove that he paid Kenya Seed Company Limited for the 625 bags of maize seeds or at all so that he can claim a refund from the appellant. Therefore, the claim for damages for loss of maize seeds, if any, can only be brought by Kenya Seed Company Limited, who are the owners of the said maize seeds. Despite noting the foregoing in his judgment on page 124 of the record of appeal, the trial magistrate made an assumption that the respondent must have been surcharged by Kenya Seed Company Limited for the lost maize seeds without evidence having been led by the respondent to that effect.

3. Citing section 107 of the *Evidence Act* and the case of *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347* the appellant submitted that that the respondent failed to prove on a balance of probabilities, as required by the law, that he was entitled to damages for loss of goods and urged this honourable court to set aside the trial court's finding that the respondent was entitled to damages for loss of goods.

4. The appellant contended that the trial magistrate erred in law and fact in awarding the respondent the sum of Kshs 1,800,000 despite the trial magistrate noting in the judgment at page 124 of the record of appeal that the respondent herein failed (as clearly shown on pages 82 and 83 of the record of appeal) to produce an inventory to show a complete list of goods and receipts for the goods, a valuation report to show the market value of the said goods and also that the respondent failed to produce anything to show that the said company surcharged him for the loss of the said goods. The trial court on page 124 of the record of appeal also noted that the respondent did not either, in the filed statement or in his evidence in court, say how the maize seeds got lost. Nevertheless, the trial magistrate went on to make an assumption that the goods (625 bags of seed maize) might have been lost to looters at the scene of the accident without evidence to that effect. The appellant cited *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR* in support of this submission.

5. It is the appellants' submission that in the present case, the respondent failed to specifically plead and strictly prove special damages of Kshs 1,800,000 he claimed in respect to the alleged loss of 625 bags of maize seeds as required by law. The award of Kshs 1,800,000 to the respondent for the alleged loss of 625 bags of maize seeds is unfounded and made without basis or evidence to that effect and as such, we urge this Honourable court to set it aside.

6. The trial magistrate erred in law and fact in awarding the respondent Kshs 200,000 for loss of user whereas the motor vehicle was a write off. The damages and losses were assessed and a report was prepared by Diplomatic Accident Assessors on the March 12, 2007 whereupon me motor vehicle was written off. The Insurance Regulatory Authority Claims Guidelines 2013 defines write off as a term commonly used when the insurance industry determines a vehicle to be a total loss. In other words, the cost to repair for a vehicle after a collision is more than its value after subtracting the recycle or salvage value. In such cases, insurance companies offer settlement that is based on policy coverage. Therefore, awarding the respondent loss of user when the insurance company will indemnify him on the basis of pre-accident value amounts to unjust enrichment. The appellant cited the cases of *Abdul Gayur Yusuf Hasham v National Hospital Insurance Fund [2010] eKLR* and *Permuga Auto Spares & another*

v Margaret Korir Tagi [2015] eKLR and submitted that the claim for loss of user ought not to be awarded as it would amount to double compensation.

7. Citing the cases of *William Ndinya Omollo v Come Con Africa Ltd [2004] KLR* and Nakuru Civil appeal No 264 of 1999 - African Highlands Produce Ltd v John Kisovo the appellant contended that that there was absolutely no basis on which the learned magistrate could have awarded the sum of Kshs 200, 000 for loss of user as the respondent's motor vehicle was written off and neither was the

8. Claim for loss of user strictly proved as required by the law had the motor vehicle not been written off. The appellant asked that the judgment of the lower court be set aside.

9. The respondent opposed the appeal and submitted that the same should be disallowed with costs to the respondent.

Issues For Determination

Whether the trial court erred in its award of damages

10. In *Abok James Odera T/A AJ 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 reanalyse 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."

In *Butt v Khan [1982-88] 1 KAR*: 1 it was held -

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".

11. The appellant's contention is that the award for damages was erroneous as the award of Kshs 1,800,000/- for loss of goods was contrary to the evidence on record. Further that the award of Kshs 200,000/- for loss of user was without evidence.

Whether the award for loss of goods was erroneous

12. The loss of goods is a material loss and therefore constitutes special damages. It is trite law that special damages must be specifically pleaded and proven. The plaintiff pleaded that the damages sought for the bags of maize was Kshs 1,800,000/- being the value of 625 bags of maize. I have perused the judgment of the court and I observed that the trial court awarded the damages despite acknowledging that there was no proof that the plaintiff was in possession of goods of that value or that he was surcharged by the company he was transporting the goods for. I am perplexed that the trial court exercised discretion in awarding special damages despite the principles set out in precedent.

13. It is evident that the trial court proceeded on wring principles and therefore it would be a travesty to allow the award to stand as it is. The trial court did not express what authorities guided it to this decision or what legal provisions it relied on. I have no option but to set aside the award for damages for loss of goods in its entirety.

Whether the award for loss of user was erroneous

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

> " 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)

15. It is evident that the respondent did not have use of the vehicle from the date of the accident to the time of filing the suit which was unconscionable. Whereas the position on whether loss of user is awarded as special damages or general damages has varied, it is undisputed that the same are damages nonetheless. Further, the principle that the award of loss of user after the insurance has indemnified the respondent amounts to double compensation does not bode well with this court as despite replacing the vehicle, what then happens to the income that the respondent would have earned in the period from the date of the accident to today? I find that he is entitled to compensation for loss of user as well in the spirit of the doctrine of restitution ad integrum.

16. The Court of Appeal 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 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."

17. Therefore, the failure of the respondent to provide consistent receipts as proof of income from the vehicle does not invalidate the fact that he was generating an income from the motor vehicle. Further, to claim that the respondent was not entitled to loss of user due to the vehicle being a write-off is ironic as it is evident that the loss emanated from the very fact that the vehicle is a write off, resulting from actions that the appellant was liable for.

18. Upon considering the record of appeal, the submissions of both the respondent and the appellant, I find that the appeal succeeds partially. I hereby set aside the judgment of the trial court and enter judgment for in favour of the respondent as follows;

    Special Damages are awarded at 70% of the amounts claimed as follows;

19.

    a. Value of written off lorry: Kshs 1,022,000/-

20.

    b. Police Abstract: Kshs 210.00

21.

c. Fuel Expenses: Kshs 12,009.00

22.

d. Assessor's fees: Kshs 11,620.00

23.

e. Transport expenses: Kshs 14,000.00

24.

f. Loss of user: Kshs 140,000/-

Total: Kshs 1,199,839

25. In the circumstances the appeal partially succeeds as outlined above and for that matter each party shall bear its own costs of the appeal. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 18TH DAY OF NOVEMBER, 2022.

.....

R NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

M/S Kitiwa & CO. Adv for the appellant

M/S Gicheru & CO. Adv for the respondents