



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 190 OF 2018

AHMED MBARAK.....APPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. J. Kasam (SRM))

on the 7th September, 2018 in SRMCC No.1670 of 2013 at Mombasa)

JUDGMENT

1. The Appellant, **AHMED MBARAK** was the Plaintiff in **Mombasa CMCC No.1670 of 2013**, having sued the Respondent, **KENYA POWER COMPANY LIMITED** vide a Plaint dated **13th August, 2013** for compensation of **Kshs.2,000,000/=** for loss and damage of about 400 second-hand tyres belonging to him. He claimed that on **1st July, 2013** at around 11.00pm the Respondent's transformer located along Mwangeka Road, Makupa area exploded causing sparks of fire to fly and lit up a fire which destroyed the said 400 second-hand tyres. He contended that the Respondent was strictly liable and at paragraph 5 of his **Plaint** estimated his loss and damage at **Kshs.2,000,000/=**.

2. On **25th September, 2013**, the Defendant/Respondent filed a Statement of Defence dated **21st September, 2013** in which it denied the claim in *toto*. It stated that if the accident did occur as alleged, the same was due to the negligence, carelessness and recklessness of the Plaintiff/Appellant. The particulars of the negligence as attributed to the Plaintiff/Appellant were pleaded at paragraph 5 of the Statement of Defence.

3. At the hearing, the Appellant called 3 witness while the Respondent filed witness statements but did not call any witness to testify.

4. The Plaintiff/Appellant testified as PW1 and stated that on the material day at 11.00pm he was at Links Road when he received a call from his assistant informing him that the yard where he stores his tyres had gone up in flames and the transformer was to blame. He told his assistant to call one of his staff members to try and put off the fire as he tried to get a hold of the Mombasa Fire Brigade. He stated that he also called the Respondent's to assist and put out the fire, and at 3.00am, the fire had been managed. He stated that the transformer was one and half meters from his yard.

5. It was PW1's testimony that the yard was fenced, gated and the transformer was near the road. The transformer was defective and had been showing sparks and the fuse sparks came into contact with the tyres hence causing the huge loss. He stated that the tyres were 400 in number and he was not able to salvage any. He assessed that the tyres were worth **Kshs.5,000/=** per tyre and thus estimated his loss at **Kshs.2,000,000/=**. He further told the court that the Mombasa Municipal Fire Brigade did a report that confirmed that the loss and damage was connected to the electrical transformer. He then reported the matter to the Police and he produced a Police Abstract before the trial Court.

6. PW2 was **HAMISI RAMADHAN ALI**, a fire fighter with the County Government of Mombasa. He stated that on **1st July, 2013** he was at work, on night shift duty when he received a signal that there was a fire at Mwangeka area at Mvita Sub-County. He testified that he, together with his colleagues left for the area and when they arrived they saw electrical sparks emanating from the transformer and the sparks were falling down over to the fence next to it and the tyres were burning.

7. PW2 stated that he immediately sought assistance from Kenya Power and Lighting to switch off the line so that they could be able to extinguish the fire with ease, but the people from Kenya Power and Lighting did not show up until 2316 hours when they joined them before they could leave and they managed to extinguish the fire. It was his testimony that after the fire was extinguished, he came back and did his investigations. He established that the cause of the fire was a short circuit. He also stated that every tyre rim at the scene was counted and established that they were over 400 and going by the owner's word, each tyre was valued at **Kshs.5,000/=**, bringing the value of destroyed

tyres to be Kshs.2,000,000/=. He prepared a report of the fire dated 1st July, 2013, which was produced as **Exhibit P2**

8. PW3 was **No.234513, PC NAFTAL ONTINA** who was attached to Makupa Police Station. It was his evidence that there was no report made on the fire and the Police were responding to an alarm raised by members of the public that there was an explosion from an electric transformer which had led to an eruption of fire that burnt 400 second hand tyres. PW3 told the court that an abstract and O/B extract was prepared and handed over to the owner of the tyres on **9th July, 2013**. He stated that he joined the station in **2014**, and Investigating Officer then was **No.64253 - PC GABRIEL NYONGESA** who was transferred to Nandi, hence was only legally before court to produce the abstract and a copy of the O/B.

9. The Defendant did not call any witnesses and neither did it inform the court to adopt its witness statements as part of the trial court's records. The suit was thus, undefended.

10. As per the Trial Court's record on **10th July, 2018**, the parties were directed to file written submissions and the Defendant/Respondent filed its submissions on **14th August, 2018** while the Plaintiff/Appellant requested for 7 days more days to put in submissions. The **Judgment** was delivered on **7th September, 2018**.

11. In her Judgment, the trial Magistrate found that the Plaintiff/Appellant had proved his case to the required standard on a balance of probabilities and found the Defendant/Respondent to be liable of the negligence and consequential damages. On quantum of damages, the trial Magistrate found that the Plaintiff/Appellant pleaded **Kshs.2,000,000/=** which she assessed to be special damages and found the same to have been pleaded but not specifically proved. The trial court proceeded to dismiss the **Plaint** dated **27th August, 2013** despite having found the Defendant/Respondent 100% liable.

THE APPEAL

12. Aggrieved by the Judgment, the Appellant filed this Appeal and raised the following grounds in its memorandum of appeal;-

1) That the trial learned Magistrate erred in law and fact by failing to properly evaluate the evidence on record thereby arrived at wrong conclusion.

2) That the trial learned Magistrate erred in principle by failing to consider the filed written submission of the Plaintiff and thereby occasion miscarriage of justice.

3) That the learned Magistrate erred in law and fact by finding that the amount sought in the plaint is special damages.

4) That the trial Magistrate erred in law and fact by holding that the Plaintiff has not proved any damages to be awarded to him thereby occasioning miscarriage of justice.

13. The Appellant prayed that his Appeal be allowed, the Judgment and Decree in **Mombasa SRMCC No.1670 of 2013** be set aside and or vacated, Judgment be entered as against the Respondent as prayed for in the Plaint and costs of this Appeal as well as costs in **Mombasa SRMCC No.1670 of 2013**, I awarded to him.

14. Directions were then given on **9th December, 2019** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions.

15. Parties opted to rely on their written submissions as presented in their entirety.

ANALYSIS AND DETERMINATION

16. This being the first Appeal this Court has the duty to re-evaluate and analyze the evidence that was tendered before the lower court in detail and come up with its own conclusions bearing in mind that it neither saw the witnesses nor heard the evidence when parties were testifying to assess their demeanour. See the case of **Peters..Vs..Sunday Post Ltd [1958]EA 424**, where the Court of Appeal held that: -

“...Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide...”

17. I have carefully considered the pleadings and submissions filed herein. The Court has noted that the Appellant has only raised the issue on the award of damages. Thus, this Court finds that the only issue for determination is whether the trial Magistrate erred in law and fact by finding that the Appellant was not entitled to an award of damages.

18. It is not in dispute that in evaluating the evidence that was presented before her, the trial Magistrate found the Respondents to be negligent and therefore liable. The trial Magistrate considered that the Appellant had proved its case on a balance of probabilities and found that the Respondent was negligent. The Appellant avers that he ought to have been awarded for the alleged loss and damage an amount of **Kshs.2,000,000/=** which was the net worth of his second hand tyres.

19. in her Judgment, the Trial Magistrate quantified the claim for **Kshs.2,000,000/=** to be in the nature of special damages and as such found

that the Appellant had not proved his case to the required standard to warrant an award of special damages. The trial court indicated that special damages must not only be pleaded, but they must also be specifically proved.

20. In his submissions, the Appellant agrees that **Kshs.2,000,000/=** special damages must be specifically pleaded and proved but states that the proof of such damages is not only by production of evidence through documents. He stated that PW2 and PW3 corroborated his evidence that the tyres were 400 and were valued at **Kshs.2,000,000/=** while the Defendant failed to call any witness or tender any evidence in rebuttal.

21. It is trite law that special damages must not only be pleaded but must also be specifically proved. In the instant case, the trial Magistrate noted that neither the Appellant nor their witnesses produced any probative evidence that showed his tyres were valued at **Kshs.2,000,000/=**. And in dismissing the Appellant's claim, the trial Magistrate noted that "no evidence of actual business documents were produced and the name of the business was unknown. The amount of **Kshs.2,000,000/=** was an estimated.....". What was produced was only a report of fire and police abstract bearing the said estimate.

22. In the case of **Douglas Odhiambo Apel & Another...Vs..Telkom Kenya Limited [2014] eKLR**, the Court of Appeal found that: -

"...So as things stand, there is no evidence on record upon which I, as a court of law, can undertake an assessment of damages. There are averments in the plaint that the plaintiffs suffered loss and damage. The plaintiffs must place before the court evidence to sustain those averments. Pleadings and written submissions are not evidence..."

23. This Court agrees with the finding of the trial Court that the Appellant cannot throw around figures without proof of actual costs and expect compensation. The claim before the trial court was monetary in nature for the loss and damage of property and needed not only to be pleaded but specifically proved. The Court of Appeal in the case of **Capital Fish Kenya Limited..Vs..The Kenya Power & Lighting Company Limited [2016]eKLR**, found that: -

"...No evidence whatsoever was led by the appellant on this aspect. This, as we already stated elsewhere, was an abstract figure which was thrown to the court with a mere statement that "this is the loss the appellant has suffered. Please award it to the appellant." In the case of Ryce Motors Ltd & Another vs Muchoki (1995-98) 2 E. A 363 (CAK) commenting on statements of accounts presented without more as in this case stated, this Court observed;

"... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages."

For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages. The trial court's finding on that score can thus not be faulted..."

24. It is trite that this Court is only allowed to interfere with the decision of a trial court in an award of damages when it is only satisfied that the trial court acted on wrong principles or misapprehended the facts. In the Court of Appeal case of **Loice Wanjiku Kagunda...Vs...Julius Gachau Mwangi CA 142/2003**, it was held that: -

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles

25. The trial Magistrate considered all facts and found the Respondent 100% negligent but was unable to award damages to the Appellant for lack of proof as is required by law.

26. The lower court record clearly shows that the Appellant told the court that the tyres costs **Kshs.5,000/=** each on estimate depending on what he would agree with a client, and therefore in total having pleaded that the tyres were 400, it brought his loss to **Kshs.2,000,000/=**. This evidence was not controverted or challenged by the Respondents. The law is that what is not disputed is deemed to be admitted.

27. In the premises, I find that the trial court erred in failing to not accept the uncontroverted evidence of the Appellant, with regard to the value of tyres having found that indeed the Respondent was liable for the destruction of the same. In the case of **Nelson Rintari...Vs...CMC Group Ltd (2015)eKLR**, the Court held: -

"...I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the constitution of Kenya 2010 which obliges courts to do justice without procedural technicalities..."

28. I therefore agree with the Appellant's contention that his yard had 400 tyres and his estimation that one tyre costs **Kshs.5,000/=**. I proceed to award the Appellant **Kshs.2,000,000/=** for the loss and damage that was occasioned to him by the Respondent's negligence.

29. In view of the foregoing, the Appeal succeeds only to the extent that the Judgment and Decree in **Mombasa SRMCC No.1670 of 2013** has been set aside and substituted with an award of **Kshs.2,000,000/=** with interest from the date the suit in the lower court was filed till payment in full.

30. On costs, the Appellant is awarded costs of this Appeal as well as costs of the suit at the Lower Court

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF MARCH, 2021.

D. O. CHEPKWONY

JUDGE

16/3/2021

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY