REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 239 OF 2017

RAPHAEL MUTUMA MWITI.....APPELLANT

-VERSUS-

FLORENCE MUKONYO MAINGI.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable M. Murage (Miss.)

(Resident Magistrate) delivered on 7th October, 2016 in CMCC NO. 5591 OF 2015)

JUDGMENT

1. The respondent herein instituted a suit by way of the plaint dated 16th September, 2015 and prayed for special damages in the aggregate sum of Kshs.464,200/= and loss of income at a daily rate of Kshs.5,000/= against the appellant for loss and damage occasioned to the motor vehicle registration number KAT 505C Matatu Bus ("the first motor vehicle") belonging to the respondent.

2. The respondent pleaded in her plaint that sometime on or about the 13th day of September, 2014 while the first motor vehicle was lawfully being driven along Magadi Road at Kamura, the motor vehicle registration number KBA 354F-Toyota Land Cruiser ("the second motor vehicle") at all material times registered in the name of the appellant and being negligently driven by the appellant and/or his agent/driver, hit the first motor vehicle on the front side, resulting in damage to it. The particulars of negligence were set out in the plaint.

3. Upon being served with summons, the appellant entered appearance and filed his statement of defence dated 5th November, 2015 to deny the respondent's claim.

4. When the matter came up for trial, the respondent gave her evidence and called an additional witness before closing her case, while the appellant closed the defence case without calling any evidence. The parties then filed and exchanged written submissions.

5. The trial court finally entered judgment in the following manner:

a) Liability	**80:20**
b) Special damages	**Kshs.464,000/=**
c) Loss of user 20% contribution	**Kshs.3,000/= per day from the date of the accident until payment in full subject to**

6. The aforesaid judgment now constitutes the subject of the appeal, with the appellant putting forward four (4) grounds in his memorandum of appeal dated 10th May, 2017 to challenge both the findings on liability and quantum.

7. This court invited the parties to file written submissions on the appeal. On liability, the appellant submits that the respondent did not bring any conclusive evidence to prove her ownership of the first motor vehicle and refers to the case of **Charles Nyambuto Mageto & Another v Peter Njuguna Njathi [2013] eKLR** where the court stated that the production of a police abstract is not in itself conclusive proof of ownership of a motor vehicle in the absence of corroborating evidence. The appellant went on to submit that the respondent did not summon the investigative officer to testify on the events pertaining to the accident and further, that the evidence of PW1 that he was the driver of the first motor vehicle on the material date was not supported by any additional evidence.

8. On quantum, the appellant faulted the trial court for awarding damages for loss of income/user and yet the respondent testified that the first

motor vehicle was written off following the accident. To support his argument, the appellant has cited *inter alia*, the case of **Raymond Muindi Simon v Takaful Insurance of Africa [2019] eKLR** where it was held that where a motor vehicle has been written off, an award for loss of user ought not to be granted since an insured is expected to be returned to the position he or she was prior to the accident and to grant such award would constitute double compensation. The appellant is equally of the view that the respondent did not demonstrate any steps taken to mitigate the loss suffered and hence the award for loss of user was unjustified.

9. In reply, the respondent submits that the appeal should be dismissed for the reasons that it was filed out of time and without leave of the court, and further that the appellant has not laid any reasonable grounds to warrant interference with the decision of the trial court. For reference purposes, the respondent quotes *inter alia*, the authority of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** in which the High Court rendered itself in the following manner:

> ***"…in Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438, it was held that:***
>
> ***"In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgment has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgments should be brought within the prescribed time and no extension of time should be granted except under very special circumstances." "***

10. The respondent similarly submits that she adduced evidence to support her claim for loss of income and hence the trial court acted correctly in awarding the same. It is also the submission of the respondent that evidence was tendered to prove entitlement to the award of damages for repairs. It was further pointed out by the respondent that throughout the trial, the appellant did not bring any evidence to rebut her evidence regarding ownership of the first motor vehicle and the circumstances surrounding the accident.

11. I have considered the rival submissions on appeal and the authorities cited. I have also re-evaluated the evidence which was tendered before the trial court for consideration.

12. Before I address the merits of the appeal, the respondent through her submissions raised an issue with the competency of the appeal on the grounds that it was filed out of time and without leave of the appeal. Upon perusal of the record, I note that the respondent had previously filed the application dated 27th May, 2017 seeking the dismissal of the appeal for want of prosecution and in the alternative, for being filed out of time. Upon hearing the parties on the said application, this court in the ruling delivered on 19th December, 2019 dismissed the same and ordered that directions be taken on the hearing of the appeal. Consequently, the above argument by the respondent fails.

13. It is clear that the appeal is challenging the trial court's finding on both liability and quantum, specifically the award made under the head of loss of user/income. I therefore deem it practical to address the four (4) grounds of appeal contemporaneously under the two (2) respective heads.

14. On liability, Mark Maingi who was PW1 adopted his witness statement as evidence and stated that he was driving the first motor vehicle on the material date and that the driver of the second motor vehicle which was speeding at the time was to blame for the accident. In cross-examination, the witness stated that he had no way of avoiding the accident as he saw the second motor vehicle approaching just a few seconds before it knocked the first motor vehicle.

15. The respondent who was PW2 equally adopted her witness statement and testified that the first motor vehicle was at all material times registered in her name and that following the accident, she reported the matter at Ongata Rongai Police Station and was issued with a police abstract which she produced together with other documents. The respondent further testified that following the accident, the first motor vehicle was written off.

16. Upon hearing the parties, the learned trial magistrate found that the respondent had produced evidence to show that an accident occurred involving the first and second motor vehicles, and that though the appellant was found liable for the accident, PW1 did not bring any evidence to show that he took any steps to avoid the accident. Consequently, the learned trial magistrate apportioned liability at 80%:20% in favour of the respondent.

17. On the subject of ownership of the first motor vehicle, upon re-examination of the material and evidence which was tendered at the trial, there is nothing to indicate that a copy of records was produced by the respondent. Suffice it to say that the respondent produced the police abstract relating to the accident as P. Exh 1 to show that the first and second motor vehicles were at the time of the accident owned by herself and the appellant respectively.

18. Going by the record, the appellant did not challenge the contents of the police abstract by way of contrary evidence or at all during the trial. In the absence of any such contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the position taken by the Court of Appeal in the case of **Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another (2010) eKLR** as referenced in the case of **Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki [2016] eKLR** that:

> ***"Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"***

19. From the foregoing, I am satisfied that the respondent proved on a balance of probabilities the ownership of the respective motor vehicles.

20. In respect to the question of negligence, I observed that whereas the respondent did not summon the investigating officer mentioned in the police abstract to testify or to produce the sketch maps, the police abstract indicated that the matter went before the criminal court and that the respondent, upon being charged with the offence of careless driving, was found to blame for the accident. This evidence was not at all rebutted by the appellant at the trial. Further to the foregoing, the appellant did not call any contrary evidence to challenge the testimony of PW1 that he was the driver of the first motor vehicle.

21. I am convinced that the learned trial magistrate correctly analyzed the material and evidence which was placed before her and arrived at a proper finding on liability. In any event, it is clear the learned trial magistrate apportioned liability between the parties. I am therefore not inclined to interfere with the finding on liability.

22. This brings me to the issue of quantum. This being an appeal in the first instance, it is worth bearing in mind that this court can only interfere with the trial court's award of damages if it can either be shown that an irrelevant factor was taken into account, or that a relevant factor was disregarded, or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were laid out in the of case **Butt v Khan (1977) 1 KAR** and echoed by the court in the case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** .

23. As earlier noted, the appellant is essentially challenging the award on loss of user/income. In her evidence, the respondent testified that prior to the accident, she would receive a daily income of Kshs.5,000/= and presented a daily income sheet as P. Exh 4. In cross-examination, the respondent stated that the first motor vehicle was used to carry passengers. In her submissions, the respondent urged the learned trial magistrate to award the sum of Kshs.5,000/= from the date of the accident until payment in full. In contrast, the appellant submitted that the abovementioned sum sought is an exaggeration and should therefore not be granted. In the end, the learned trial magistrate found that the sum of Kshs.5,000=/ sought fell on the higher side and therefore opted for an award of Kshs.3,000/= on average per day from the date of the accident until payment in full. I find this sum to be reasonable in the circumstances.

24. From re-evaluation of the material and evidence tendered at the trial, I observed that the learned trial magistrate equally awarded the sum of Kshs.450,000/= being a pre-accident value of the first motor vehicle. The accident assessment report which was produced as P. Exh 3(a) indicated that the first motor vehicle was a 14-seater Matatu mini-bus which supports the evidence of the respondent that it was being used to transport fare-paying passengers and was therefore an income-generating vehicle.

25. In respect to the argument by the appellant that to award the pre-accident value as well as damages for loss of user would amount to double compensation, I observed that the authorities cited in his submissions in support thereof are merely persuasive in nature. On my part, I am guided by the analysis of the Court of Appeal in the case of **Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR** where it awarded damages for both loss of the motor vehicle in terms of value and for loss of user. Similarly, in the recent case of **David Maina v Mary Wanjiku Wanjie & another [2020] eKLR** the High Court awarded damages under the two (2) heads of pre-accident value and loss of user. I am therefore satisfied that the learned trial magistrate was correct in awarding damages under both heads.

26. That notwithstanding, the Court of Appeal in the above-cited case of **Samuel Kariuki Nyangoti v Johaan Distelberger** (supra) acknowledged the position taken by the appellant that mitigation of loss ought to be demonstrated. In the present instance, the respondent did not bring any credible evidence to show steps taken to mitigate the loss since the time of the accident. It was therefore unreasonable to order the appellant to pay damages for loss of user from the date of the accident. In my view, it would have been improbable for the first motor vehicle to have been in continuous operation without any hitches. These are some of the factors that the learned trial magistrate ought to have taken into account.

27. Being supported by the above-quoted case of **David Maina v Mary Wanjiku Wanjie & another** (supra) also involving a written off vehicle, I instead compute the period of loss at 2 years with a usage of 6 days every week, as follows:

3,000/= x 6 days x 52 weeks x 2 years = Kshs.1,872,000/=

28. In the end, the appeal succeeds in respect to the award made on loss of user.

29. Consequently, the trial court's award of under that head is hereby set aside and is substituted with an award of Kshs.1,872,000/=. The judgment on appeal shall now read as follows:

a) Loss of user Kshs.1,872,000/=

b) Special damages

(i)	**Police abstract**	**NIL**
(ii)	**Towing charges**	**Kshs.8,500/=**
(iii)	**Assessment report**	**Kshs.5,500/=**
(iv)	**Pre-accident value**	**Kshs.450,000/=**
Total		**Kshs.2,336,000/=**

Less 20% contribution **Kshs.467,200/=**

Award **Kshs.1,868,800/=**

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on the damages for loss of user/income at court rates from the date of judgment of the lower court until payment in full. Parties shall bear their respective costs of the appeal.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Ms. Kiplagat for the Appellant

Ms. Muema holding brief for Mr. Ngala for Respondent