REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E005 OF 2021

SILAS MUTUA MBERIA...APPELLANT

VERSUS

MUTHONI NJUE VERONICA..RESPONDENT

(Being an appeal from the Judgment of the Hon. M.C Nyigei (SRM) delivered on 15/12/2020 in Maua CMCC No. 139 of 2018)

JUDGMENT

1. The appellant sued the respondent in the trial court by an amended Plaint dated 25/10/2018 in which, he sought general damages for pains, suffering and loss of amenities; special damages of Kshs 34,205 special damages and a sum of Kshs 325,960 being the amount of money required to repair Motor Vehicle Reg. No. KAH 801J and return it to its pre-accident condition; costs of the suit plus interest.

2. The appellant's case in summary was that, the respondent negligently controlled her motor vehicle Registration number KBJ 097H on the 11/03/2018 that it collided with the plaintiff's motor vehicle thereby occasioning the plaintiff serious bodily injuries and to his motor vehicle extensive damage. The personal injury was disclosed in the medical report and evidence of **PW5, James Kivumba**, while the damage to the motor vehicle was disclosed in the assessment report was duly prepared and produced by **PW4, Vincent Muriuki Muthiga**.

3. Although the respondent denied the claim by her amended statement of defence dated 11/2/2019 and prayed for the appellant's suit to be dismissed, parties recorded a consent on liability at 90:10% in favour of the appellant.

4. After the conclusion of the trial where the appellant, as plaintiff called a total of five (5) witnesses while the respondent as defendant called three witnesses, the trial court found that the appellant had proved his case and awarded him general damages of Kshs 500,000, special damages of Kshs 34,205, future medical expenses of Kshs100,000 plus costs and interest. The court however dismissed the claim for costs of repairs in the sum of Kshs 325,960 and gave the reason to be: -

> **"I have looked at the assessment report and the assessor recommended that repairing the vehicle is uneconomical so the claim to the insurance was to be settled on a total loss basis and placed the pre-accident value at Ksh350,000 and the salvage to attract offers from Kshs 100,000. <u>It can then be concluded that the vehicle was never repaired as it was uneconomical to do so.</u> The plaintiff's claim for a sum of Kshs 325,960 fails."** (emphasis provided)

5. Aggrieved by the trial court's refusal to award Kshs 325,960 for cost of repairs of his motor vehicle, the appellant filed this and later amended the Memorandum of Appeal on 12/1/2021 setting out six (6) intertwined grounds of appeal. All the ground fault the trial court for its decision for being erroneous for failure to appreciate that the damage had been proved to the requisite standards. The sole issue is whether the trial court was right s disallowing the claim.

Submissions

6. Upon the directions by the court given on 5/5/2021, the parties filed their submissions in respect to the appeal on 14/6/2021 and 8/7/2021 respectively. The appellant contends in the submissions that the trial court fell into error when it dismissed his claim for cost of repairs, since the same had been pleaded and proved. He relied on **Miwa Hauliers & anor v Godfrey Auma (2007) eKLR, Kenya Wildlife Service v Joseph Musyoki Kilonzo (2017) eKLR and Solomon Mwangi Karara v Rift Valley Bottlers Ltd & anor (2017) eKLR** in support of what amounts to prove on a balance of probabilities.

7. The respondent disagreed with the appellant's position and supported the trial court's decision to dismiss the claim for cost of repairs and contended that no expenditure had been incurred by the appellant. The cases of **Christopher Ndaru Kagina v Esther Mbandi Kagina & anor (2016) eKLR and Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) eKLR** were cited in support of the submissions on when a court would reject the evidence of an expert and that evidence at variance with the pleading is due for rejection by the court.

Analysis and determination

8. The duty of every first appellate court is to revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. That duty is said to give a first appellate court the jurisdiction to proceed by way of a retrial and not be bound by the findings by the trial court.

9. The grievance herein being solely on the trial court's dismissal of the appellant's claim of Kshs 325,960 being cost of repairs, the task of the court is to establish if the reasons advance by the court were in consonance with the evidence and the applicable law. The court can only interfere with such findings by the trier of facts if it be demonstrated that the same is at variance or disagreement with the evidence or just inimical to reason, the applicable principles and thus contrary to notions of justice.

10. It is not in dispute the appellant suffered damage to his car due to the wrongful acts of the respondent agreed between the parties and apportioned at 90:10% Had the respondent exercised due care and caution on the road, the appellant's motor vehicle would still be in a road worthy state. The recommendations made by PW3, the assessor in his report were that the claim be settled on a total loss basis and placed a pre-accident value of Kshs 350,000 and salvage to attract offers from Ksh100,000, as it would be uneconomical to repair the vehicle. In the judgment the trial court took the view that the vehicle was repaired hence the dismissal. That was wrong for sending a person with prove injury on which liability had been assigned without a remedy. That isn't fair nor just.

11. **In *Nkuene Dairy Farmers Co-operative Society & Anor v Ngacha Ndeiya (2010) eKLR,*** the Court of Appeal held-:

> ***"In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."***

12. The same court of Appeal likewise in ***David Bagine v Martin Bundi (1996) eKLR***, in asserting the probative value of an assessor's report reiterated that:

> ***"The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim"***

13. It is thus clear that the appellant only needed to prove the extent of the damage to his motor vehicle and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. It must always be remembered that the balance of proof on the appellant was at all times on a balance of probabilities and not higher. The claim by the appellant was not for an expense already incurred but a claim to restore his damaged motor vehicle to its pre-accident state. The value of the damage was assessed and a report produced in evidence. It was therefore not necessary to demonstrate that indeed the costs of repairs were incurred, because the report was sufficient proof on a balance of probabilities. The appellant was not legally required or obligated to specifically prove the claim by production of receipts like in the case of special damages.

14. I find that the trial court erred in dismissing the appellant's claim for special damages on account of damage to the motor vehicle when there was tendered uncontroverted evidence in the assessment report produced by the assessor. I do find the assessors evidence to have been beyond reproach and fully persuaded by it that to effect repairs would have been uneconomical. This was a case that the court was availed the evidence of loss and quantum thereof. To dismiss it as the trial court did is to this court unjust for being too technical on the rule that parties are bound by their pleadings. Indeed, there was no departure from the pleadings on record. The evidence simply showed what had been lost and how to effect a recompense. I find that the needs for repair would be uneconomical but the appellant was entitled to be compensated for the loss occasioned to him by the respondent. That loss is the pre-accident value of the car less salvage value. I find that loss to calculate as follows; - Kshs 350,000 - 100,000 = **Kshs 250,000.**

15. In conclusion, the appeal is allowed, the decision of the trial court disallowing the special damages claim is set aside and in its place substituted a judgment in the sum of Kshs 250,000 being the loss occasioned to the appellant by the respondent's tortious conduct.

16. Having succeeded, I award to the appellant the costs of this appeal. I award to the appellant interest on the damages as well as on costs. The interests on the sum of special damages will be at court rates from the date of the suit while interests on costs will be calculated from the date of this judgment.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 9TH AUGUST 2021.

PATRICK J.O OTIENO

JUDGE

IN PRESENCE OF NO APPEARANCE FOR PARTIES.

PATRICK J.O OTIENO

JUDGE