REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 1 OF 2019

PHOENIX OF EAST AFRICA ASSURANCE LIMITED.....APPELLANT

-VERSUS-

LARRY OJWANG OKUMU.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.O. Mbeja (Mr.)

(Senior Resident Magistrate) delivered on 5th December, 2018

in Milimani CMCC no. 4420 of 2017)

JUDGMENT

1. The respondent who was the plaintiff in Civil Suit No. 4420 of 2017 before the Chief Magistrate's Court at Milimani Commercial Courts instituted a suit by way of the plaint dated 19th June, 2017 and amended on 7th November, 2017 and sought for declaratory orders for breach of contract; repair; reimbursement of value and compensation against the appellant in respect to the motor vehicle registration number KAU 470T ("the subject motor vehicle") plus general damages for breach of contract and costs of the suit plus interest thereon, arising out of an insurance policy agreement.

2. The respondent pleaded in his amended plaint that he was at all material times the registered owner of the subject motor vehicle and that he had taken out a comprehensive motor vehicle insurance policy with the appellant vide Policy Number COMP. 926/15 at all material times, for which the respondent would pay premiums through the agent of the appellant, namely Prime Mover Insurance Brokers Limited ("the agent").

3. The respondent further pleaded in his amended plaint that it was an express/implied term of the contract of insurance that in the event of damage to the subject motor vehicle, the appellant would ensure the necessary repairs were undertaken at its cost, in order to restore the subject motor vehicle as far as possible to its original condition.

4. The respondent pleaded that while driving on or about 9th April, 2016 he was involved in a road traffic accident along Outer Ring Road, resulting in extensive damage to the subject motor vehicle. That upon reporting the accident to the appellant, it instructed the respondent to avail the subject vehicle to Leakey's storage yard in Industrial area for repairs but that thereafter, the appellant did not avail any assessment report or repair the subject motor vehicle to its pre-accident condition.

5. It was also pleaded that the appellant did not exercise its duty of care in respect to the subject motor vehicle, resulting in additional damage to it in the process of transporting it or storing it. The said damage is attributed to negligence by the appellant with the particulars being set out in the amended plaint.

6. Upon service of summons, the appellant entered appearance and filed its statement of defence on 24th July, 2017 to deny the respondent's claim.

7. At the trial, the respondent testified and called one (1) witness, whereas the appellant relied on the testimony of one (1) witnesses.

8. Upon filing of submissions, the trial court delivered its judgment in favour of the respondent and against the appellant as prayed in the amended plaint and awarded the sum of Kshs.500,000/ on general damages for breach of contract.

9. The aforesaid decision has precipitated the appeal presently before this court. The memorandum of appeal dated 3rd January, 2019

constitutes a total of 10 grounds to challenge the findings on both liability and quantum.

10. The appeal was disposed of through the filing of written submissions. On its part, the appellant argues that the trial court entered a finding on liability without giving concise reasons for the same and yet the respondent had not proved his case to the required standard.

11. The appellant also argues that the trial court did not properly analyze the evidence on cross-examination of the respondent and his witness, and further did not consider that the delay in undertaking the repairs on the subject motor vehicle had been explained and was reasonable in the circumstances. To support its arguments here, the appellant has cited the case of **Barclays Bank of Kenya Limited v Evans Ondusa Onzere [2015] eKLR** where the court rendered itself thus:

> ***"How did the trial court evaluate the admissions by the respondent in cross-examination? We have read and analyzed the judgment of the trial court; the court did not address its mind to the evidence revealed through cross-examination, and the court did not evaluate this evidence. It is the duty of the trial court to consider and evaluate the entire evidence on record placed before it. (See Wagude -v- R (1983) KLR 569). The admission by the respondent that he owed the appellant bank various sums of money, and that his account had been credited with the sum of Kshs.2,808,999/15 are facts that go a long way in determining whether the respondent was entitled to any damages and or any of the specific sums claimed in the plaint. The trial court by failing to consider and evaluate the evidence disclosed during cross-examination erred in fact and law thereby arriving at a wrong conclusion."***

12. It is also the contention of the appellant that the trial court did not consider that a mere breach of contract does not necessarily give rise to an award of general damages and that a part ought to prove their claim for damages by way of evidence, and cites the case of **Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] eKLR** in which the Court of Appeal held that:

> ***"…Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction."***

13. In reply, the respondent on his part submits that the decision by the trial court was well-reasoned and that his evidence was corroborated by that of his witness and hence, the trial court took into consideration all the relevant material and evidence, prior to arriving at its decision.

14. The plaintiff further submits that there was inordinate delay by the appellant in undertaking the repairs on the subject motor vehicle and that the same was not done to the required standard, and hence the trial court acted correctly in finding in favour of the respondent. In this respect, the respondent relied on the following holding adopted by the court in the case of **Patrick Muturi v Kenindia Assurance Company Ltd [1993] eKLR:**

> ***"If the insurer undertakes to have the property repaired, the repair work should not take so long to complete satisfactorily that a prudent owner with a reasonable regard to his interests, business or otherwise, would not probably not think it worth waiting any longer. Thus, delay would be unreasonable where, for no fault of the assured, the insurer or a garage of his choice keeps the property for so long that a reasonable person may consider the assured to have been irretrievably deprived of the property; or where the waiting for satisfactory completion of repairs can be undertaken at an incommensurate cost in terms of time, money or inconvenience. An assured should not be required to wait at a ruinous expense, or beyond a time within the bounds of sense of a commonplace man of commonplace prudence, or if the waiting may be, attended with the perils of inflicting a death blow or considerable damage to his business interests or other lawful endeavors."***

15. On quantum, it is the view of the respondent that the award on general damages is proper in the circumstances. Consequently, the respondent pleads with this court to dismiss the appeal with costs and to uphold the decision of the trial court.

16. I have considered the rival submissions on record alongside the relevant authorities cited. As is the legal requirement for a court sitting on a first appeal, I have re-evaluated the evidence placed before the trial court and studied the judgment in question. It is clear that the appeal lies against liability and quantum. I will therefore tackle the 10 grounds of appeal under the two (2) limbs.

17. On *liability*, the respondent adopted his executed witness statement as evidence and testified that following the road traffic accident involving the subject motor vehicle on the material date, he reported the matter to a nearby police officer who visited the scene and assessed the situation, following which the respondent towed the subject motor vehicle to his residence initially.

18. The respondent testified that he also reported the matter to the appellant and delivered the subject motor vehicle to Leakey's yard under the appellant's instructions, for the purpose of undertaking repairs.

19. It was the evidence of the respondent that he made several follow-ups on the progress of the repairs but that there was a delay of about 2 years in undertaking the said repairs.

20. In cross-examination, the respondent gave evidence that it is the appellant who organized for the assessment to be done to the subject motor vehicle and later delivered the vehicle to the garage for repairs.

21. The respondent further gave evidence that upon inspecting the subject motor vehicle at a later date, he noted some parts were missing therein and some damage had occurred to the subject motor vehicle.

22. Kennedy Kavale who was PW2 stated in his evidence that he was in charge of performing the assessment on the subject motor vehicle but that he could not test the same since some vehicle parts were unavailable. Consequently, he conducted the assessment on 22nd September, 2017.

23. In cross-examination, it was the evidence of the witness that though he did not personally undertake the assessment, he authorized the same and appended his signature on the report.

24. It was also the evidence of the witness that the assessment report shows that the repairs undertaken on the subject motor vehicle were unsatisfactory and that the said vehicle could not move.

25. Lilian Simiyu who was DW1 stated in her evidence that she is the Legal Manager of the appellant and confirmed that the respondent was at all material times insured by the appellant.

26. The witness went on to state that following the accident, the appellant appointed an assessor who confirmed that the subject motor vehicle was repayable and that at the time of giving her testimony, full repairs had been done to the subject motor vehicle.

27. In cross-examination, it was the testimony of the witness that in the midst of undertaking repairs, a dispute arose concerning the car parts. The witness also stated that once the subject motor vehicle was fully repaired and ready for collection as at July, 2017 the appellant's representative sent word for the respondent to collect the said vehicle.

28. Upon hearing the parties, the learned trial magistrate was satisfied that the respondent had proved his case on a balance of probabilities.

29. Upon my re-examination of the evidence, it is not in dispute that the appellant and the respondent had at all material times entered into an insurance policy agreement vide the policy number mentioned hereinabove and that at the time of the accident, the insurance cover was still valid. It is also not in dispute that following the accident, the repairs to the subject motor vehicle were undertaken by the appellant. Further to the foregoing, the appellant's witness acknowledged that there was a delay occasioned in undertaking the repairs to the subject motor vehicle, partly due to the outsourcing of car parts.

30. In my view, I agree with the reasoning of the learned trial magistrate that upon assuming responsibility for the repairs, an implied duty rested with the appellant to ensure that such repairs were done to a reasonable standard and within a reasonable period of time, otherwise, some form of liability would arise.

31. In the present instance, I note; as the learned trial magistrate did; that the respondent brought adequate evidence to demonstrate that not only was there a prolonged delay in undertaking the necessary repairs, but that the repairs to certain parts of the subject motor vehicle were not up to standard, going by the assessment and inspection reports adduced and the testimony of PW2. The appellant did not bring any credible evidence to counter this position.

32. Further to the foregoing, the appellant did not tender any credible evidence before the trial court to show that the delays had been sufficiently communicated to the respondent or to show that upon completion of the repairs to the subject motor vehicle, the respondent was requested to collect the said vehicle but he did not do so, in order for the apportionment of blame to arise.

33. Contrary to the averments being made by the appellant and in the absence of any credible evidence to indicate otherwise, I am satisfied that the learned trial magistrate adequately analyzed the material, evidence and submissions which were placed before him and arrived at a reasonable decision in the circumstances. I am equally satisfied that the learned trial magistrate provided reasons for his decision on the subject of liability arising out of a breach of contract. Consequently, I find no reason to interfere with the same.

34. On quantum, it is apparent from the pleadings that the respondent sought for general damages for breach of contract. The respondent on the one part suggested an award in the sum of Kshs.2,000,000/ but he did not cite any authorities to support such suggestion. The appellant on the other part did not offer any proposals on this.

35. As earlier indicated hereinabove, the learned trial magistrate settled for an award of Kshs.500,000/ though he did not cite any authorities to that effect.

36. I considered the reasoning in the case of **Ronyad Enterprises Limited v Kenya Commercial Bank Limited [2019] eKLR** that as a general rule, damages are not available for breach of contract. This supports the argument being raised by the appellant on appeal.

37. All the same, I am convinced that the respondent would still be entitled to nominal damages in the absence of proof of actual loss/damage suffered. I am supported by the case of **Peter Umbuku Muyaka v Henry Sitati Mmbasu [2018] eKLR** in which the court held thus:

> ***"A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-***
>
> ***"Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal."***

38. In the absence of any guiding authorities by the parties, I considered the case of **Ronyad Enterprises Limited v Kenya Commercial**

Bank Limited [2019] eKLR where an award of Kshs.100,000/ was upheld under this head and the case of **Supinder Singh Sagoo v Kenya Commercial Bank [2020] eKLR** in which the court awarded a nominal sum of Kshs.100,000/ on general damages.

39. In view of the foregoing, I am convinced that the award of Kshs.500,000/ made by the learned trial magistrate fell on the higher side. In my opinion, a sum of Kshs.100,000/ would constitute a reasonable award for nominal damages for breach of contract.

40. Consequently, the appeal partially succeeds. The award of Kshs.500,000/ made on general damages for breach of contract is set aside and is substituted with an award of Kshs.100,000/. The respondent shall also have costs of the suit and interest on the general damages at court rates from the date of judgment until payment in full.

Parties to bear their respective costs on the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent