REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 61 OF 2019

(APPEALS ARISING FROM THE JUDGMENT AND

DECREE IN KAKAMEGA CMCCC NO. 117 OF 2017, BY

HON. W. LOPOKOIYIT, RESIDENT MAGISTRATE, OF 30TH MAY 2019)

MARTIN GICIMU KAMANGA.....APPELLANT

VERSUS

BOARD OF GOVERNORS,

ST ANNE'S JUNIOR SCHOOL, LUBAO.....RESPONDENT

JUDGMENT

1. The suit in the primary court was by the appellant, for a claim of Kshs. 310, 396.00 special damages, loss of user of Kshs. 140, 000.00, costs and interests. The basis of the suit was that his motor vehicle and that of the respondent were involved in a collision for which he blamed the respondent. The respondent denied liability. A trial was conducted, and judgment was entered on liability at 100% against the respondent and Kshs. 310, 396.00 as special damages. The appellant was aggrieved hence the instant appeal. He raises two grounds: that the court failed to award him damages for loss of user and interest on the special damages.

2. In the plaint at the trial court, the appellant claimed for Kshs. 140, 000.00 loss of user for the twenty-eight days his vehicle was off the road, and interests on both the special damages claimed and the loss of user. On loss of user the trial court found that the appellant had not shown how the appellant earned the amount pleaded per day, holding, relying on *Ndugu Transport Company Limited & another vs. Daniel Mwangi Waithaka Leteipa* [2018] eKLR (M Ngugi J), that loss of user was a special damage claim, that needed to be specifically pleaded and proved, and concluding that loss of user had not been proved.

3. In his written submissions, filed herein, he submits that loss of user is a claim in general damages, and that the trial court should have treated the same as such, and that he had proved his case on a balance of probability, that he was earning income form the accident vehicle at the rate of Kshs. 5000.00 per day. He has cited *Jackson Mwabili vs. Peterson Mateli* [2020] eKLR (Mwita J) and *Mac Master Limited vs. Onesmus Mutuku Muia* [2018] eKLR (DK Kemei J), to support his case.

4. There is Court of Appeal authority, which the High Court has followed, to the effect that loss of user is in the nature of general damages, proved on a balance of probabilities. That position was pronounced in *Peter Njuguna Joseph & another vs. Anna Moraa* CA No. 23 of 1991 (unreported) and *Samuel Kariuki Nyangoti vs. Johaan Distelberger* [2017] eKLR (Githinji, Karanja & Kantai JJA). The appellant submits that, based on those decisions, the trial court was in error in holding that loss of user was a claim in special damages and in failing to grant it. There is, on the other hand, other authority from the Court of Appeal to the contrary. It was said in *David Bagine vs. Martin Bundi* [1997] eKLR (Gicheru, Shah & Pall), for example, that loss of user could only be special damage, for it is a loss which the claimant suffers specifically, and which could not be equated to general damages. The High Court weighed in, in such cases as in *Summer Limited Meru vs. Moses Kithinji Nkanata* [2006] eKLR (Lenaola J), where it was said that earnings from a *matatu* business were not a matter that could be left to judicial discretion, for it was related to special damage, which had to be specifically proved.

5. It would seem, from the judicial authorities above, that the law is not settled on the matter. However, the decisions in *David Bagine vs. Martin Bundi* [1997] eKLR (Gicheru, Shah & Pall) and *Summer Limited Meru vs. Moses Kithinji Nkanata* [2006] eKLR (Lenaola J), are a little dated, and it would appear that there has been a shift in jurisprudence since then, going by the positions taken in ***Wambua vs. Patel & Another*** **[1986] KLR 336** (**Apaloo J) and *Jebrock Sugarcane Growers Co. Limited vs. Jackson Chege Busi*, Civil Appeal No. 10 of 1991 (Kisumu)** (unreported), that t*he fact that damages are difficult to estimate, and cannot be assessed with certainty or precision, does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages. That position appears to have* led to *Samuel Kariuki Nyangoti vs. Johaan Distelberger* [2017] eKLR (Githinji, Karanja & Kantai JJA), where the court treated loss of user or profits as a claim in general, rather than special, damages, in cases where the plaintiff did not keep books of

account or records, given the nature of their business. The current law, therefore, appears to be that stated in *Samuel Kariuki Nyangoti vs. Johaan Distelberger* [2017] eKLR (Githinji, Karanja & Kantai JJA), and adopted by the High Court in such decisions as *Jackson Mwabili vs. Peterson Mateli* [2020] eKLR (Mwita J) and *Mac Master Limited vs. Onesmus Mutuku Muia* [2018] eKLR (DK Kemei J).

6. Of course, under English Common Law, loss of user or profits is strictly a special claim, as stated in *David Bagine vs. Martin Bundi* [1997] eKLR (Gicheru, Shah & Pall) and *Summer Limited Meru vs. Moses Kithinji Nkanata* [2006] eKLR (Lenaola J). It would appear, however, that that English approach to loss of user works injustice in Kenya, where African communities, despite high levels of literacy, still operate in the pre-literate mode, where record keeping is not part of the African psyche and consciousness, for information is kept mentally and is transmitted orally. Operating in the pre-literate mode is part of African nature and mentality. It is just part of the African way of life, and modern education has not done much to change it. The decisions in ***Wambua vs. Patel & Another*** **[1986] KLR 336** (**Apaloo J) and** *Samuel Kariuki Nyangoti vs. Johaan Distelberger* [2017] eKLR (Githinji, Karanja & Kantai JJA) take cognizance of that. The *matatu* business culture evolved out from that environment, given that the *matatu* business is strictly an indigenous African model and not an import from elsewhere, and applying the English Common Law approach to assessment of damages for loss of user or profits in respect of that business, in the circumstances, would only work injustice. There is a whole paradigm shift in jurisprudence here, where what is strictly a special damage under English Common Law is now treated as general damage under Kenya Common Law.

7. Did the appellant adduce adequate evidence to support assessment of his loss of user for quantification by the court? He said the vehicle was a *matatu*, and, therefore, a commercial vehicle. He stated that he earned an average of Kshs. 5, 000.00 per day from it, and on a good day Kshs. 10, 000.00, and that he lost that amount of money when the vehicle stopped operating for the twenty-eight days after the accident. His driver and witness said that in a day they could make Kshs. 7, 000.00. They both confirmed that they did not keep records of how much money the vehicle brought in. The defence did not offer any evidence, and the testimonies of the appellant and his driver went uncontested and uncontroverted. In my view, the appellant tendered adequate evidence to support his contention that he lost business when his *matatu* was off-road for twenty-eight days.

8. Courts in such cases as *Jackson Mwabili vs. Peterson Mateli* [2020] eKLR (Mwita J), *Peter Njuguna Joseph & another vs. Anna Moraa* CA No. 23 of 1991 (unreported) and *Samuel Kariuki Nyangoti vs. Johaan Distelberger* [2017] eKLR (Githinji, Karanja & Kantai JJA), have awarded claims for loss of user without any supporting documentary proof by way of books of accounts on loss of income, or on what the vehicle was making prior to the accident. In most of these cases, the courts allowed the claims for a period of up to six months. The claim by the appellant herein is for twenty-eight days. Going by the authorities above, I am satisfied that the appellant proved loss of user. He put his loss at Kshs. 5, 000.00. There was evidence that the *matatu* could earn the appellant Kshs. 7, 000.00 and even Kshs. 10, 000.00 per day, but the appellant opted for a more conservative figure. The sum claimed of Kshs. 140, 000.00 should have been awarded to him.

9. With respect to interest on special damages and the loss of user, the trial court was silent in its judgment. On the matter of the interest, the appellant cites section 26(1) the Civil Procedure Act, Cap 21, Laws of Kenya, which gives discretion to a trial court to impose interest on a monetary award, either from the date of judgment or from the date of the filing of the suit. He also cites *Jane Wanjiku Wambu vs. Anthony Kigamba Hato & 3 others* [2018] eKLR (J Ngugi J), where the court held that in claims for liquidated damages, unless there is good cause, the interest should be calculated from the date of filing of the suit. In the instant case, the trial court found that the appellant was entitled to liquidated damages, and it should have gone ahead to award interest from the date of filing suit.

10. It is my finding that there is merit in the appeal herein, the same is allowed. The finding of the trial court on loss of user is quashed, and I hereby substitute it with an award of compensation for loss of user at Kshs. 140, 000.00. I also order that the respondent shall pay interest, at court rates, on the special damages and the loss of user, from the date of the filing of the primary suit. The appellant shall have the costs of the appeal. The appeal is disposed of in those terms.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE