REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 19 OF 2019

BETWEEN

JAMES KIARIE KIBOBI.....APPELLANT

VERSUS

DANIEL ONGERI.....1ST RESPONDENT

MIARIAM ONGERA.....2ND RESPODNENT

(Appeal from the judgment of the Chief Magistrate's Court at Limuru **E. Olwande, SPM**

in the CMCC No. 396 of 2010 delivered on the 21/12/2018)

JUDGMENT

1. The appellant, ***JAMES KIARIE KIBOBI***, by his amended plaint sought judgment against the respondents **DANIEL ONGERI** and ***MIARIAM ONGERI*** for special damages which resulted to appellant's curio shop when the appellant's motor vehicle KBC 430G rammed into that curio shop. The case proceeded for hearing before the Limuru Magistrate's court and by the judgment of that court of 21st December, 2018 the Senior Principal Magistrate E. Olwande awarded the appellant total Kshs.249,592. That judgment aggrieved the appellant and consequently this appeal was filed.

2. This is the first appellate court. Accordingly, this court will in consideration of this appeal be guided by the holding in the case of ***SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123*** thus:-

> **"An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

3. The appellant's claim before the trial court was as follows:-

> **"PARTICULARS OF LOSS AND DAMAGES**
>
> **Assessors fees - - - - - - - Kshs.35,000**
>
> **Curio stock**
>
> - **Paintings various types - - - - - Kshs.78,000**
> - ***Barticks various types* - - - - - *Kshs.20,000***
> - **Necklaces various types - - - - - Kshs.23,000**
> - **Banana carvings various types - - - Kshs.180,000**
> - **Stone carvings:-**
>
> **dancers, bracelets of various types - - - Kshs.38,000**

- **Wooden bows, bows, arrows guitars - - Kshs.10,700**
- **Gemstone necklaces, armetyte necklaces,**

  Maasai sukas, maasai necklaces - - Kshs.30,000

- **Fly whisks, posts cards, sheepskins and drums- Kshs.60,000**

Loss of business for two weeks and employee wages - Kshs.250,000

Cost of repair for 2 curio shops - Kshs.184,290

TOTAL = KSHS.911,990"

4. The trial court did not award the appellant any amount for loss of curio stock totalling to Kshs.442,700/=. All the grounds of appeal fault the trial court's failure to award that claim for loss of that curio stock. The trial court in its judgment had this to say as that claim:-

> **"In respect to the curio stock, the plaintiff (now appellant) testified that when the vehicle plunged into the shop, some of the curios he was selling were damaged and he got an assessor to assess the extent of the damage. Assessor prepared a report but the same was not produced and as such, it does not form part of the evidence before me. The claim for damaged curio stock is a special damage claim which requires strict proof. The plaintiff had no assessment report and had not receipts to show the costs of acquiring the stock that was destroyed. It follows that there is no basis for the court to make a finding that the damaged curio stock was worth Kshs.442,700/-. This claim must fail."**

5. It is the above finding the appellant faults.

6. The appellant while testifying before the trial court stated thus:-

> **"The scene was photographed and I have photos showing destruction. The (sic) are contained in the assessor's report (MFI-P2)"**

7. It is that assessor's report which proved the loss of curio stock and the value of that loss. Appellant as will be noted from the above extract of his evidence did not produce the assessors report. He requested the trial court to mark that report for identification, as (MFI-P2), presumably for the same to be produced by the assessor. The assessor failed to attend court and his report ended not being part of the evidence when the appellant closed his case.

8. The trial court cannot be criticised for failing to award appellant loss for curio stock because there was no evidence before it of this loss. The Court of Appeal had occasion in the case ***KENNETH NYAGA MWIGE VS. AUSTIN KIGUTA & 2 OTHERS [2015] eKLR*** to consider whether documents marked for identification were part of the court record and the court stated in that case thus:-

> **"19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**
>
> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.**
>
> **21. In DES RAJ SHARMA -V- REGINAM (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of MICHAEL HAUSA -V- THE STATE (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.**
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> **22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.**
>
> **23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight…**
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> **24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on "MFI 2" which was a**

document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification."

9. Having in mind the above holding of the Court of Appeal, the appellant's appeal must and does fail for there was no evidence before the trial court of loss of curio stock.

DISPOSITION

10. In view of the above, this appeal is without merit and is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 25TH DAY OF NOVEMBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice/Kinyua

For the Appellant: Miss Wambua

For the Respondents: Mr. Ngechu

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE