REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 159 OF 2019

DAVID WAWERU MWANGI……..……..…...APPELLANT

VERSUS

MARGARET MURIITHI…….……..…….....1ST RESPONDENT

WILLIAM MUREITHI …….……..…2ND RESPONDENT

RIFT VALLEY SPORTS CLUB……..…..……..3RD RESPONDENT

(Being an Appeal arising from the Judgment and Decree in Nakuru Chief Magistrate's Civil Case Number 146 of 2017 delivered by Hon. J. B. Kalo on 24th day of September 2019)

J U D G M E N T

1. David Waweru Mwangi the appellant herein was the plaintiff in **Nakuru Chief Magistrate's Civil Case Number 146 of 2019.**

2. I note at this early juncture that the appellant's Plaint was not drawn in the usual format, a fact that was pointed out by the respondents, but just like the subordinate court, I chose to search for the substance of the claim. In that suit the appellant lay a claim against the three (3) defendants, respondents herein, Margaret Muriithi, William Muriithi Kimaru, Rift Valley Sports Club; 1st, 2nd and 3rd respondents respectively.

3. His claim was that at all material times he was the registered owner of motor vehicle registration number KAU 040N Navy Blue Honda Civic, the 1st respondent was the driver of motor vehicle registration number KCB 034B Toyota Hilux Surf, and the 2nd respondent was the registered owner of the said motor vehicle, while the 3rd respondent, was the proprietor of the Rift Valley Sports Club.

4. On the 11th December 2016, about 1:00 p.m. the appellant, who was a life member of the 3rd respondent drove the said Honda Civic to the 3rd respondent's premises for lunch. He parked this car at the designated parking space, and went inside the club for his meal.

5. About 3.30 p.m. he was through with lunch. He proceeded to the parking lot where he had left his motor vehicle. According to his Plaint, dated 8th February 2017, he found that **"the car had been wrecked"**.

6. Upon making inquiries from the security guards at the club, he learnt that it was the 1st respondent who was responsible and she was at that time in a meeting within the club premises. According to those guards, the said 1st respondent had lost control of her motor vehicle as a result of which it collided with the appellant's stationary motor vehicle.

7. According to the Plaint, the 1st respondent was fetched from the meeting, she came to the scene and admitted to having lost control of her car and causing the collision. Later on a police officer arrived together with the 2nd respondent and a statement was recorded.

8. The appellant blamed the 1st and 2nd respondents for the accident and the 3rd respondent for ***"allowing the 1st defendant, a non-member of the club to gain access to the club, a private members club without following the laid down procedure".***

9. The particulars of negligence according to the appellant, on the part of each respondent, are well set out in the Plaint.

10. I gathered from the plaint that the appellant was seeking judgment against the respondents jointly and severally for;

"a. replacement of his motor vehicle with the same year of manufacture and mileage/use condition.

b. or alternatively for the total loss of his motor vehicle an amount of Kshs. 6,000,000/=

c. Special damages in any amount to be determined and particulars to be provided before trial of this action. This shall include but not limited to Kshs. 6,000/= per day in loss of use or storage from the date of damage of the motor vehicle.

d. Pre-judgment and post judgment interest in the above sums.

e. His costs for this action.

f. Such further and other relief this Honourable Court may deem just."

11. It is the plaintiff's case that his motor vehicle is a 1998 model 6th generation Honda Civic EK3, which was the international car of the year in 2005 which he imported from Japan ***"as an investment with an intention of registering it as an antique, collector's, item and exhibiting it at antique car shows on attainment of twenty (20) years."*** And

"That the Honda Civic EK 3 had (at 8th December 2017) 64,500 dedicated owners or fans who consider their investment priceless and hold the model (a collectable) very dear and keep their cars as a trophy."

12. That it is this investment that had been wrecked by the accident caused by the 1st plaintiff, as the impact of the collision had caused permanent damage to the car's power train rendering it useless as an investment.

13. In their various defences the respondents put the appellant to strict proof of his claims. After the full hearing the learned trial magistrate *J. B. Kalo Chief Magistrate,* in a Judgment dated 24th September 2019 found that the appellant had not proved his case and proceeded to dismiss it with costs. The trial court found the 1st and 2nd defendants liable for the accident but proceeded to dismiss the suit on the grounds that the appellant did not explain how he arrived at the figure of Kshs.6,000,000/= noting that no assessment was done on the cost of the damaged parts, neither the pre accident value nor the salvage value was established and as such the appellant failed to prove his claim for replacement of the vehicle with a similar model with the same year of manufacturer nor the alternative a total loss of Kshs.6,000,000/=.

14. The trial court was also of the view that the Appellant had not substantiated his claim for **loss of user or storage** of the vehicle to be calculated from the date of the accident until payment in full as he did not produce any evidence of payment made towards the parking or storage of the vehicle or show that he had to hire another vehicle for use.

15. The appellant not satisfied with that judgment, filed this appeal of the following grounds;

(i) That the Learned Magistrate erred in law and in fact in failing to consider the relevant procedural and substantive law applicable in the applicant's case against the defendants.

(ii) The Learned Magistrate erred in law and in fact by failing to consider filed documentary evidence that constituted the court record of the Applicant's case.

(iii) The Learned Magistrate erred in law and in fact by refusing to admit evidence which ought to have been admitted.

(iv) The Learned Magistrate erred in law and by refusing to allow the applicant the opportunity to partake in the direct examination of his witnesses.

(v) The Learned Magistrate erred in law and fact by deciding the case without taking into account issues raised in the pleadings.

(vi) The Learned Magistrate erred in law and fact by deciding the case based on issues raised by him and issues other than those before the court.

(vii) The Learned Magistrate erred in law and fact by recording proceedings that were not a true reflection of the witness testimony.

(viii) The Learned Magistrate erred in law and fact by failing to take into consideration the Applicants submissions while alluring to nonexistent pleadings by the 3rd defendant.

(ix) The Learned Magistrate erred in law and fact by failing to consider the 81 page uncontested expert valuation report consisting of original documents that were crucial to the applicants claim to quantum.

(x) The Learned Magistrate erred in law and fact by wrongful exercise of his discretion.

16. The court is empowered to by **Section 78 of the Civil Procedure Act** in the following manner;

Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

17. This being a first appeal the court is bound to re-assess, re-consider, re-examine the evidence on record always bearing in mind that the court never heard nor saw the witnesses testify, and draw to its own conclusions. The Court of Appeal said in **Selle & Another vs Associated Motor Boat Company Limited & Others (1968) CA 123**

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. In his testimony before the trial court the appellant adopted his witness statement dated 6th February 2017 and filed on 22nd February 2017. He stated in that statement;

"I concur with the statement of Ruth W. Waweru and wish to re-state that the damage to my motor vehicle would never have occurred had the management of Rift Valley Sports Club not allowed the defendant's motor vehicle on the premises as the regulations of the club require."

19. Further, he alluded to a letter of 11th December 2016, which he said had not been responded to. He went on to point out the lack of remorse on the part of the Directors and Management of Rift Valley Sports Club and went on to state that;

"It had come to light that the 2nd defendant [has] undue influence on the process of our attempts to obtain justice."

20. He state stated this was so because the said defendant had served as a Senior Police Officer in the Kenya Police Force (sic). He said this was evidence from the Police Abstract, where it appeared that the police had indicated names of this defendant different from those obtained from National Transport and Safety Authority (NTSA) in a bid to confuse issues.

21. The appellant stated further in his written statement that he had met the manager of Pacis Insurance, one Caroline W. Ndegwa who had directed him to serve the 2nd defendant with Court papers which papers it was he who would forward them. Finally, he blamed the defendants and in particular, the 1st defendant for causing the collusion and all the resultant damages.

22. In his oral testimony the defendant spoke about his career as an Engineer, here and abroad. He spoke about his car, and the collision. He produced the log book. He also spoke about the rules of the club, 3rd respondent, he produced the by-laws. He produced the receipt to confirm he had lunch there. He produced the police abstract to prove the fact that the accident had been. He sought time to produce evidence on quantum of damages, which time was granted.

23. On quantum he testified he paid cumulative towing charges of Kshs. 7,500/=; that this car was sought extensively over the internet, that he had established it was an award winning car, and a care of interest to collectors, that it had not been altered since its manufacture and that it was no longer in production .

24. He produced the importation documents, showing that car was valued as USD 3810, and he had paid Kshs. 297,496/11 as duty. He also testified that the car had been parked in location where there was insurance cover of minimal risks known, it had had regular maintenance under his supervision and had not previously been involved in any accident.

25. He relied on motor vehicle inspection report by one Jesvir Singh Rehal dated 31st December 2016, and a report by NTSA dated 27th September 2017. He personally reviewed both reports and prepared his own report, which he also produced. He relied on a ruling from the European Court of Justice, which he produced. He told the court that the car was part of his diversified investment portfolio which he produced, and stated that his claim, as value for the car was Kshs. 19,608,276/=.

26. On cross examination he told the court that the damaged parts of the motor vehicle were speedometer, engine, gear box and steering but that as per the report, they serviceable; that Jesvir Singh had indicated that the damaged parts were replaceable. He confirmed that the motor vehicle was not subjected to any assessment. That there was no Pre-Accident Value Report nor Salvage Value Report. He said the motor vehicle had moved for about 2,000 kilometres since its purchase. He said that the motor vehicle was parked at the Season's Hotel at Nakuru at the time of trial.

27. **Ruth Waweru** testified as **PW2**. She adopted her witness statement, which was about the incident, the conduct of the police and the negligence of the defendants. On cross examination she confirmed that she and the appellant were Directors of Seasons Hotel, where the motor vehicle was parked. She said she was not a member of the 3rd respondent but was a frequent visitor of the club, where she would sign in.

28. **PW3** was **Jesvir Singh Rehal**, a retired motor vehicle mechanic. He examined the motor vehicle on 31st December 2016. He said the car was an antique, with genuine parts and low mileage. He said he had seen the NTSA report as well and reached the same conclusion as NTSA. That the odometer, exhaust system, gear box transmission and gear box were serviceable, that foot and hand brakes, electrical system, front and rear lights were ok.

29. That the damaged parts were the rear bumper, rear right and left suspension, rear body panel, rear tail lights. He said that the odometer had not been tampered with, and damage on the chassis required a specialised restoration mechanic, the right and left rear suspension assemblies were damaged and required replacement.

30. He said the motor vehicle would become an antique after twenty-five (25) years from the date of manufacture. At the time of road traffic accident, the motor vehicle was eighteen (18) years old. He said the motor vehicle could have been repaired to become a transporter and not an antique. He said he was not asked to make a valuation report of the motor vehicle. He said the motor vehicle was an antique, but confirmed that he had not qualified to classify motor vehicles as antiques, but could do so from his experience working with motor vehicles.

31. The plaintiff closed his case.

32. The 1st respondent, Margaret Muriithi adopted her witness statement and testified that she had caused the accident, where her motor vehicle hit the plaintiff's on the rear bumper right side.

33. The respondents closed their case.

34. Parties agreed to dispose of the appeal by way of written submissions. The 3rd respondent did not participate.

APPELLANT'S SUBMISSIONS

35. The appellant filed detailed submissions which at times were mixed with statements of evidence, and complaints about the manner in which the trial was conducted by the subordinate court. He raised several issues in his submissions.

36. He submitted that his claim was based on the fact that the said motor vehicle was a rare and award winning motor vehicle imported from Japan as an investment of the asset class collectibles. He submitted that he had produced the reports to that effect, including his own report as an Engineer, whose expertise the respondent had not contested. He submitted that he relied on **London Tribunal Centre Case of Barnfinds Limited vs Her Majesty's Revenue & Customs** sitting in public in London on 5th July 2005, where the said tribunal made reference to and relied on **European Court of Justice Case of Erica Daiber vs Hauptzoller Rentlingen 200/84** which case defined the criteria of a collector's piece. The court observed that; *"motor vehicle as collectors' pieces of historical interest if they meet the criteria…*

i. Possess a certain scarcity value

ii. Are not normally used for their original purpose

iii. Are subject of special transactions outside the normal trade in similar utility articles

iv. Are of high value

v. Illustrates a significant step in the evolution of human achievements or period of evolution"

The Tribunal went on to state that, with respect to motor vehicles, the foregoing pre-conditions could be taken to apply with respect to;

"vehicles in their original state, without substantial changes to the chassis, steering or braking systems engine etc. at least thirty (30) years old and of a model type which is no longer in production, all vehicles manufactured before 1950, even if not in running order."

37. The appellant argued that the fact that the ECJ case had been applied by a UK court, it had become of persuasive value to our courts, our country being a member of the Commonwealth. He urged the court to be persuaded by that decision.

38. The appellant argued further that, he had established the fact that his car was an antique, a fact the trial magistrate did not consider. He also submitted that his expertise in the area of motor vehicles was not controverted by the defence. He submitted further that the learned trial

magistrate had applied a higher standard of proof than that of probability of success. That the judgment did not demonstrate with clarity to him, a person whose financial and scientific knowledge had been proved, how the trial magistrate could not find 51% confidence for him, given the preponderance of evidence that he had presented. On this he cited **Saker on Evidence page 1868** to the effect that the burden of proof lies at the ***"1st party who would be unsuccessful if no evidence at all is given on either side."*** This being the test, this burden of proof cannot remain constant but must shift as soon as he produces evidence which *prima facie* gives rise to a presumption in his favour. He argued that the defendants respondents did not give evidence once the burden had shifted to them.

39. The appellant submitted, on special damages that, that his measure of special damages was the opportunity costs of his investment funds, invested in the suit motor vehicle. It was his position that that measure in terms of *opportunity costs of his investment funds*, was objective and accurate and the only way he could prove his special damages. That he exhibited that his investment portfolio return was in excess of 30% per annum and that the motor vehicle had been demonstrated to have an annualised return at 23.5% per annum. Hence, he had proved his claim.

40. He went on to rely on the Court of Appeal case of **Nkuene Diary Farmers' Cooperative Society & Another vs Ngacha Ndenya Civil Appeal Number 154 of 2005.** That he had established his initial investment to be of Kshs. 1,401,856/= which if he had invested elsewhere, he would be having Kshs. 19,608,276/00. That the respondent did not controvert this evidence.

41. The appellant submitted further that the 3rd respondent owed him duty of care, for himself and his motor vehicle. That as a life member of the 3rd respondent there was a contractual relationship between him and the 3rd respondent. He relied on **Joseph Kiptanui Koskei vs Kenya Power & Lighting Company Limited, Civil Case Number 147 of 2009,** where the court cited **Donoghue vs Stevenson (1932) AC 580,** on the principle that every person must take reasonable care to avoid acts or omissions that can reasonably be foreseen as likely to injure a neighbour. That the 3rd respondent's act of allowing non-members into the club, yet it was set up**, *"to have limited membership based on a specific criteria and to limit its events to members to increase security of members and to inculcate a sense of fellowship."*** amounted to a breach of its contractual identity to his as its members.

42. The appellant was also of the view that the counsel for the 3rd respondent did not act in order as he was acting against its own member, when he represented all the respondents.

43. With regard to the claim for Kshs 6,000/= per day he submitted that he had established the case for loss of user and storage costs as the defence was all aware of that the motor vehicle was parked at the Season's Hotel all this time.

44. Finally, the appellant had issue with the fact that the trial court set aside the initial interlocutory judgement entered against the respondents and extended time to respondents to file their pleadings. He was not happy with the fact that the learned trial magistrate had warned him that he would lose his good case if he did not hire an advocate.

45. In addition to the Submissions, the appellant filed Submissions in response to the respondents' submissions.

1ST & 2ND RESPONDENTS' SUBMISSIONS

46. The respondents herein filed their Submissions on 10th August, 2021. The same are dated 10th August, 2021.

47. The respondent submitted on two issues, namely;

(a) Whether the Appellant proved his case on balance of probability;

(b) Whether the appellant is entitled to the remedies sought.

48. The respondents submitted that it is trite principle of the law that he who alleges must prove. They relied on **section 107-108 of the Evidence Act** and the case of **Kirugi & Another vs Kabiya & 3 Others (1987) KLR 347** for this preposition where the court held;

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

49. They submitted that it was incumbent upon the appellant to prove not only the occurrence of the accident but also the ownership and negligence on their part, in furtherance to proving the costs incurred as a result of the accident and the alleged loss of user.

50. The respondents submitted that the appellant's claim was for replacement of his motor vehicle with a similar model with the same year of manufacturer or in the alternative a total loss of Kshs. 6,000,000/=.

51. The respondents argued that the Appellant's contention that he bought his vehicle as an investment and he intended to register it as a collector's item and exhibiting it as antique at attainment of twenty-five (25) years was unsubstantiated. That further the contention that his car was an award winning car and that the same was no longer in production was equally unsubstantiated.

52. The respondents argued that it was illogical for the appellant to seek the replacement of the motor vehicle with another one or the payment of Kshs. 6,000,000/= as the full value of the said motor vehicle yet according to PW3 the motor vehicle was serviceable, the broken parts replaceable and capable of restoration and the motor vehicle was not a write off.

53. On the alternative prayer for Kshs.6 million as damages, the respondents argued that the appellant did not lead any evidence on how he arrived at that figure noting that there was no assessment done on the costs of the damaged parts. That neither pre accident value nor the salvage value was ever established to warrant and sustain a claim for replacement of the vehicle with a similar model with the same year of manufacturer nor the alternative loss of Kshs. 6 million.

54. The respondents further submitted that an assessment report by an expert ascertaining the actual damage and the extent of damage suffered on the appellant's motor vehicle was crucial in this case. They stated that all the documents produced before the trial court had no evidential value to sustain the claim and as such the grounds of appeal as enumerated at page 26 of the record of appeal had no bearing to the finding of the lower court. The respondent relied on the case of **Douglas Odhiambo Apel & Another vs Telkom Kenya Limited**, where the Court of Appeal held that;

> ***"…a plaintiff is under a duty to present evidence to prove the claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court…. unless consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed****…."*

55. The respondent argued that parties are bound by their pleadings and the appellant herein pleaded and sufficiently adduced documents he purported as evidence however, the pleadings and the documents adduced in the trial court were never in harmony and consonance to otherwise present a water tight claim to enable the court diligently adjudicate the same.

56. They submitted that the appellant did not specifically plead and prove his claim which was in the nature of special damages. Reliance was placed on the case of **Linus Fredrick Msaky vs Lazaro Thuram Richoro & Highlands Mineral Water Company Limited** where the court upheld the decision by the trial court which dismissed the plaintiff's case for want of proof of special damages.

57. On the second issue the respondent submitted that the appellant having failed to prove his case on a balance of probabilities his case warranted a dismissal. The respondents urged this court to uphold the trial court's decision and to strike out the Appellant's appeal with costs to them.

58. The third respondent did not participate in this appeal.

ISSUES FOR DETERMINATION

59. From the foregoing it is evident that the appellant did not argue the grounds of the appeal in the order set out in the memorandum of appeal neither did he set out the specific issues for determination. Having considered the evidence and submissions three key issues which are interconnected arise for determination.

> ***(i) Whether the three respondents are liable for the appellant's claim***
>
> ***(ii) Whether the Appellant proved his claims against the respondents on a balance of probabilities;***
>
> ***(iii) What is the order as to costs?***

ANALYSIS & DETERMINATION

60. This being a first appeal, the court is obligated to reassess, reconsider and reexamine the evidence and extracts on record and arrive at its own independent conclusion, bearing in mind and giving due allowance to the fact that it neither heard nor saw the witnesses as they testified It is trite law that he who alleges must prove. **Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya** are clear that:

> ***"S. 107 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those acts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***S. 108 The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given an either side.***
>
> ***S. 109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

61. In **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that: -

> ***"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."***

62. On liability: It is not in dispute that there was an accident on the 11th December 2016 at the parking lot of the Rift Valley Sports Club. The record also shows that the 1st respondent in her testimony admitted that she had caused a slight accident to the appellant's motor vehicle whereby it was damaged in its rear. It is timewasting for the counsel for the 1st respondent to go to lengths to submit that the appellant was put to strict proof thereof yet the record speaks for itself on this. In fact, the 1st respondent states that they tried to agree with the appellant but he refused. The first and second respondents were liable for the accident, one being the driver and the other the registered owner of the motor vehicle. What is in dispute is the compensation that the appellant is claiming as a result of that accident.

63. With respect to the 3rd respondent the appellant raised a claim based on contract. That the 3rd respondent owed him a contractual, duty of care which was breached by the allowing of the 1st respondent, a non-member on its premises. The appellant did not plead this in his plaint. This is because in his Plaint, there is no claim based on contract neither are there set out any particulars of the contract or the breaches thereof. The submissions were not supported by the evidence tendered or the pleadings. He accused the 3rd respondent of negligence and laid out particulars of negligence, viz: failing to register the 1st respondent's car at the gate, allowing a meeting of non-members without following procedure, and failing to register the cash collected from such activities, allowing the defendants' car to leave without taking their statements, moving his car from the accident scene without his authority, turning the private members club into a commercial enterprise without members' consent. The fact of the presence of the 1st defendant within the premises of the 3rd respondent was not in issue. The issue was whether the accident caused by the 1st respondent could be connected to the 3rd respondent any way to make the 3rd Respondent liable. Can it be said that if the 1st respondent was a member of the club this accident would not have happened, or that the circumstances of the accident would have been different, by dint of that fact alone? Or if it had happened, the motor vehicle would not have been damaged because the other motor vehicle would have been driven by a member of the club? It does not appear to me that the accident was as a result of any act or omission of the 3rd respondent. The issues raised by the appellant in the Plaint appear to be issues related to the running of the club and which issues are not issues to be determined in this suit.

64. In fact, it appears to me that the appellant took a great risk, taking his valued asset, motor vehicle out of its safe haven where on his own word it would always remain parked and insured for the minimal risk. Taking the motor vehicle out on a drive was a risk that he took and as a mathematician, and the kind of investment he had placed in that vehicle, the probability of any accident, from and to the motor vehicle's safe space ought to have been somewhere on his mind. It was his evidence that this motor vehicle had not been bought as a transporter, but to be exhibited in car shows for antiques, but on this particular day it had been used as a transporter to bring him to the club for lunch. So even if the court were to find for him, he would have had to bear part of the liability.

65. The issue is whether he established that his motor vehicle was **a rare, collectible, antique**. I have looked at the testimony given by the appellant, including his own witness statement. The same is devoid of evidential proof to this end. The appellant testified about his acquisition of the Honda Civic motor vehicle was with the intention of registering it as an antique. The appellant relied on two foreign judgments that gave the criteria of what qualifies to be an antique motor vehicle. His own expert witness PW3 testified and said he was not qualified to classify antique motor vehicles but could do so from experience, and that all the other factors being constant, the motor vehicle would need to be twenty five (25) years old to be classified as an antique. The two judgments the appellant relied on also indicate that the motor vehicle would have to be thirty (30) years old, on top of the other requirements. This motor vehicle was eighteen (18) years old. Hence though it had all its original parts intact, it did not qualify to be an antique. As it to whether it was a rare, award winning motor vehicle, the appellant had not laid evidence before the trial court to establish that.

66. Did the appellant establish the special damages sought? These were either Kshs. 6,000,000/= or the replacement of his vehicle with a similar model of vehicle with the same year of manufacture and mileage or use condition i.e a sixth (6th) generation Honda Civic EK3 1998 model from Japan which was international car of the year 2005.

67. The plaintiff was duty bound to substantiate how he arrived at this figure. In fact, in his plaint he did not set out the specific material damage to his car and what it might cost to repair. There was no evidence adduced in support of this prayer. There was no pre accident valuation of the motor vehicle or post-accident valuation of the motor vehicle. The appellant did not lay before the court nay evidence to show that this Honda Civic EK3 was valued at Kshs. 6,000,000/= or that the damage it sustained out of the accident was to that extent to warrant the court to issue the order. Court of Appeal in **Nkuene Dairy Farmers Co-op Society Ltd & Anor Vs Ngacha Ndeiya (2010) eKLR** is instructive. In that case, the court delivered itself thus: -

> ***"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."***

68. The appellant produced NTSA inspection report, Inspection report prepared by Jesvir Singh Rehal, a review of vehicle examination report that he prepared and pro forma invoice issued by Trust Company Limited. None of these documents stated the cost to restore the damaged items. The best evidence herein would have been supplied by the motor vehicle assessor. It was therefore not possible for the court to establish the costs of repairs on the damaged items of the Appellant's motor vehicle**.** Only a specialist and qualified motor vehicle assessor would have examined the vehicle and set out the exact damages plus the requisite restitution costs of the motor vehicle. In fact, the said Jesvir Singh Rehal stated so in his testimony, that a specialized restorative mechanic could work on the damaged parts. However, the appellant chose not to pursue that line but to pursue the total replacement of his motor vehicle or the sum of Kshs. 6,000,000/=. Neither of this was supported by the evidence he gave in court. It is such a specialized restoration mechanic who would have told this court what was needed. This PW3 actually testified that he was not asked to carry out a valuation assessment. Without evidence to support the claimed figure of Kshs, 6,000,000/= and justify the replacement of the whole motor vehicle with another one, I find no error in the trial magistrate's finding.

69. Did the appellant establish the claim for Kshs.19, 608,276/= as shown in his supplementary list of documents? The appellant's claim is that the purchase of this motor vehicle was with a specific aim, to register it as a collectible antique as part of his investment portfolio. In his submissions he did go to lengths to demonstrate how that would work out. However, submissions can never take the place of evidence. In his

testimony, both in the witness statement he adopted, his oral testimony, the appellant did not demonstrate by way of evidence how that accident on 11th December 2016 where his stationary motor vehicle was hit by that of the 2nd respondent driven by the 1st respondent was related to his investment portfolio. No expert evidence was called to demonstrate this. Merely producing an enormous amount of private documents could not have been sufficient to establish that the connection so as to move the court to grant the prayer.

70. In any event it is trite law that special damages must be specifically pleaded and strictly proved In **Sande Vs Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)** the Court of Appeal held that:-

> ***"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law."***

71. The appellant herein neither pleaded these special damages in his plaint nor did he adduce the actual evidence to support the claim.

72. The appellant also prayed for loss of user or storage to be assessed at Kshs. 6,000/= per day. In his evidence he said the motor vehicle was parked at Season's Hotel where it was drawing storage charges. In **David Bagine vs Martin Bundi Nairobi Court of Appeal No. 283 of 1996,** the Court of Appeal said; -

> ***"We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages.The loss is what the claimant suffers specifically. It can in no circumstance be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved…"***

73. The appellant's position was that the respondents had not bothered about making any assessments for themselves the said motor vehicle despite knowing its whereabouts. Clearly the appellant was mistaken. The respondents had no duty to prove the alleged value of the alleged damage. The appellant had made a claim. The duty remained his always to prove the facts that were disputed by each of the other parties. This duty was not discharged.

74. In the upshot I do find that the appellant failed to prove his case on the balance of probabilities. I find no reason to disturb the findings of the learned trial magistrate. The appeal has no merit. The same is dismissed.

75. Regarding costs, they follow the event. The one who loses bears the cost of the loss.

76. The respondents will half the costs of the appeal.

Signed, Dated and Delivered virtually this 20th day of December, 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Lepikas

Appellant present

For the Respondent: N/A