REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NUMBER 32B OF 2017

ABDI YUSUF ABDILLEH.......APPELLANT

VERSUS

P. N MASHRU........................RESPONDENT

He testified that Plaintiff returned on 9th March, 2012 and bought 13 pieces of rims of KAU 196D a trailer and produced receipt of Ksh.169,000/- as P exhibit 7.

The defence did not call any witness to offer evidence in his defence.

After close of hearing the parties filed their respective written submissions on quantum and after consideration the trial magistrate entered judgment for the plaintiff against the defendant for general damages at Ksh.255,000/-.

The Appellant being dissatisfied then filed this appeal on the following grounds: -

> **1. That the learned trial magistrate erred in law and fact in disallowing the appellants claim on quantum when the said claim had been proved.**
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> **2. That the learned trial magistrate erred in law and in fact by disregarding the weight of the appellant's evidence on quantum.**
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> **3. The learned trial magistrate erred in law and fact in holding that the appellant had not proved on a balance of probabilities the cost of repairs amounting to Ksh.2,980,782.40.**
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> **4. The learned trial magistrate erred in law and fact in holding that the appellant had not proved on a balance of probabilities the value of the spilt oil amounting to Ksh.2,100,000/- and tax paid thereof Kshs.317,226/-.**
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> **5. The learned trial magistrate erred in law and fact in failing to grant the appellant's claim for loss of user of Ksh.2,000,000/-.**
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> **6. The learned trial magistrate erred in law and fact in holding that the appellant had partly succeeded in him claim.**
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> **7. The learned trial magistrate erred in law and fact in failing to make a finding that appellant had overwhelming evidence on quantum.**
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> **8. The learned trial magistrate erred in law and fact in failing to hold that the respondents had not tendered any evidence on quantum to challenge appellant's evidence.**

By consent of the parties, this appeal was canvassed by way of written submission. Mr. Chepkong'a for the appellant submitted that the trial magistrate disregarded the weight of appellant's evidence and relied on what respondent had submitted that the appellant has proved charges of Ksh.100,000/- as towing charges, Ksh.140,000/- repair charges and assessors fees of Ksh.15,000/-.

He submitted that the trial magistrate did not go a step further to explain what the repair costs of Ksh.140,000/- were for. He submitted that under the Civil Procedure Rules, 2020 Order 21 Rule 4 on provision of judgment it is stipulated that defended suit shall contain concise statement of the case, point of determination, the decision and reasons. He relied on the case law authority in **Jacinta Nduku Masi Vs Leonida Mueni Mutua & 4 others (2018) eKLR.** He further submitted that the trial court dismissed the assessors report while at the same time accepted that appellant's motor vehicle was damaged.

He further submitted that trial magistrate did not give reasons in his judgment why he disagreed with evidence of other witnesses. That the trial magistrate ignored the evidence of appellant on cost of repairs amount to Ksh.2,980,782, he submitted that evidence of PW 2 was not rebutted. He further submitted that evidence of the appellant on repairs was overwhelming and the respondent never tendered evidence to rebut the evidence by the appellant and his witnesses. While relying on case law authority in **Nkuene Diary Farmers' co-operative Society and Another Vs Ngacha Ndeiya (2010) eKLR** which requires to prove that he actually spent money and the assessment report was sufficient. He submitted on the value of spilt oil amount to Ksh.2,100,000/- and tax paid of Ksh.317,226/- that the same was pleaded and supported by evidence. He further submitted that trial magistrate erred in failing to award Ksh.200,000/- which was not disputed as he had done with other awards of towing of Ksh.100,000/-. That the urged this court to set aside the trial magistrate's findings and allow appellants appeal as prayed.

The respondent submitted through advocate on record Mr. Owinyi. He submitted on general damages that nowhere in the Appellant's pleadings at the trial court or evidence is there justification on account upon which general damages lie and the clam should be dismissed. He submitted on costs for vehicles repairs that the appellant did not prove the amount of Ksh.2,980,782.40 as claimed. He submitted that the assessors report was dated 12th June, 2012 and by that time the spares for the claimed amount had already been purchased. That the appellant tried to give evidence that his vehicle was extensively damaged to the engine, front axle, all tyres, rims and gear box. That the police inspection report in accident claimed did not support the allegations by the appellant. He submitted that the assessor's report was not genuine and the trial court was right in disregarding it. That the evidence the appellant adduced does not meet the standard set for proof of special damages set in the authority in **Ryce Motors Ltd & another Vs Elias Muroki (1996) eKLR.**

He submitted on cost of split fuel and KRA tax that the appellant did not produce evidence to show that the sum represented the value of spilled fuel. That the trial court was right in its observation. With regard to the claim of Ksh.317,226 for KRA tax that no evidence was produced to show that the plaintiff paid the sum and therefore trial court's finding be upheld. That on loss of user the appellant did not provide any evidence of these earnings from owners of the fuel he transported and that this honourable court should uphold the same.

He further submitted that the appellant did not prove his case on a balance of probabilities at the trial court and the trial court was right in assessment of damages.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to re-evaluate and re-examine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle Vs Associated Motor Boat Company Ltd (1968) EA 12** where Sir Clement De le Stang stated that: -

> **"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.**
>
> **However, this court is not bound necessarily to flow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif Vs Ali Mohammed Solan (1955) 22 EACA 270).**

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this curt by the appellant and the respondent taking into account all the decisions relied on.

The Appellant herein complaints that he proved on balance of probability the above costs but trial court disregarded his evidence on special damages. The respondent contention on the other hand is that the appellant did not prove by evidence the costs of vehicle repairs, cost of split fuel and KRA Tax on balance of probability and therefore the trial court was right in assessment of damages.

The Appellant main ground is that the trial magistrate erred in not awarded the special damages pleaded. The law on special damages is clear. Special damages must be pleaded and proved. In **Haha Vs Sighn (1985) KLR** the Court to Appeal Kneller Nyarangi JJA and Chesoni Ag JA stated: -

> **"Special damages must not only be claimed but must also be strictly proved for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particular of proof required depends on the circumstances and nature of the act themselves."**

Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR), Cockar JA on the issue of special damages stated: -

> **"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In <u>Ouma v Nairobi City Council [1976]</u> KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in <u>Ratcliffe v Evans [1892] QB 524</u>, an English leading case of pleading and proof of damage.**
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> **"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**

The appellant then having claimed special damages was under obligation to not only plead them but also prove them. In paragraph 5 of the plaint, the appellant pleased the special damages. He further gave particulars of 34 items which were damaged in the plaintiff's motor vehicle.

The plaintiff gave evidence testifying had his motor vehicle was damaged as a result of the collision. He invited assessment valuers who gave the estimates for repair. PW 3 John Kiplang Chesang who works for Wereng Motor Assessors and Valuers testified that he carried out the assessment and assessed the cost of report to be Ksh.2,980,782.40. He presented his report as P. Exhibit 4. He confirmed that his firm did not report the motor vehicle, but is aware that the parts damaged were supplied by Terrain Equipment.

PW 3 Elamin Musyoka a sales man with Terrain Equipment ltd gave evidence. He testified that they supplied the parts for repair and generated delivered notes and invoice which he produced as plaintiff Exhibit 5a, b). The invoices had, however, not been paid. PW 4 James Sikuku Wabeto Joel an employee of Sakwa tyres and accessories testified that the plaintiff bought tyres, control arm brushes sprays, oil and diesel filter at ksh.730,400/- and was issued with receipt Exhibit 6 and later bought 13 pieces of rims and paid Ksh.160,000/- and was issued with receipt exhibit 7. On 6th June, 2017, Mr. Owiny for the respondent/defendant informed court that he had no evidence to offer and closed the defence case.

The trial court in analyzing the above evidence in his judgment stated:-

> (**The defendant has submitted that the plaintiff has proved the towing charges of Ksh.100,000/- and Ksh.140,000/- repair charges which claims are receipted and proved. The defendant has submitted that Ksh.2,980,782.40 being the cost of repairs has not been proved for reason that there was no assessment done to determine what needed to be repaired. I quite agree with the defendant. The assessors report is dated 12th June, 2012. By this time, spares for the claimed amount had already been purchased/what informed the purchases? The evidence by the plaintiff can only be absurd as urged by the defendant. The plaintiff could only make purchases after a professional assessment of what was required to be replaced. The plaintiff put the cat before the house and has raised serious doubts in the court's mind that these spares were necessary and were for the particular vehicle and not any other in the plaintiff's fleet. The plaintiff has in my considered view failed to prove specifically that he expended Ksh.2,980,782.40 in purchases for the repair of the subject motor vehicle.**

Respecting Ksh.2,100,000/- for the value of spilt and lost oil, and Ksh.317,226/- Tax paid to KRA on the unaccounted for fuel, this claim is not proved on a balance of probabilities. The plaintiff testified that a portion of the oil being 16,500 litres was spilt and lost to thieves whose value he put at Ksh.1,200,000/-. In support he adduced a tax claim from KRA in excise tax for the quantity and adduced a receipt of Ksh.317,226/- in payment vide P exhibit 8a and 8b but these are not in his name but in the name of Diverse Cargo Marine and Air C & F Services. There is no evidence that he is the one who bore this loss and that claim must fail"

With due respect to the trial court, that was not the proper position in law. The appellant in a case where he sought special damages had first to plead it, which he did in paragraph 5 of the plaint. He went further and gave particulars of the parts that were damaged and needed repair. By this he pleaded his claim with certainty and particularity. He called evidence of the motor vehicle assessor who gave the estimates of repair. There is no requirement that the assessors report must be made at any particular stage. It was, however, presented. There was evidence that the damaged parts were bought from Terrain Equipment and invoices produced. An invoice is a proof of an amount due to the supplier for goods supplied. It is prove of a debit owed by one it is made to. In my view he need not have to prove special damages.

If that were the case what would be the positon of a plaintiff whose vehicle has been repaired but unable to pay and was relied on the payment by the defendant to pay the repairs to have his motor vehicle released.

In **Nkuene Dairy Farmers Co-operative Society & another Vs Ngacha Ndeiya (2010) eKLR**, the Court of appeal, Bosire, Onyango Otieno and Nyamu JAA stated: -

> **"Motor vehicle parts are sold in shops. An assessor we think would be in a position to know their case. The prices may vary form one shop to another but the price are nonetheless ascertainable even without purchasing the item and fixing it in the damaged vehicle. Motor vehicle parts are common items and any price wherein the assessor might have given would be counter-checked and either accepted or disapproved. The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the assessors report.**
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> **The experience of the assessor was not challenged and we think Onyancha, was right in descripting him as an expert and his report as being opinion evidence. The court had the right to accept or reject the opinion if circumstances so dictated. The Respondent to our mind particularized the claim in the plant and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellant court in the decision they came to. …..**
>
> **In the result we agree with Mr. Charles Kariuki that the Assessors report was sufficient proof and his failure to produce receipts for any repairs done was not fatal to the Respondents claim."**

In the present appeal, the appellant called both the assessor and the supplier of the parts which were used in the repair of the motor vehicle. Neither the assessors report or supplier's delivery and invoice or prices were challenged by the Respondent who did not call any evidence for defence. I am satisfied that the appellant did plead and prove the special damages for motor vehicle repair of Ksh.2,980,782.40 and motor vehicle assessors expense of Ksh.15,000 and totaling Ksh.2,995,782.40.

The other head of special damages claimed to the loss of user of the motor vehicle the appellant claimed in paragraph 8 of the plaint that as a result of the collision the lost income for two months when the motor vehicle was undergoing repairs; what then is this claim under loss of user? In **David Bagine Vs Martin Bundi (1997) KLR** the Court of Appeal held: -

> **"We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in not circumstances 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. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs"**

The appellant then having pleaded a claim for loss of user, he should lead evidence to prove the same. The evidence of the plaintiff in this respect was thus: -

> **"The vehicle was in the garage for three (3) months. Every month the vehicle would go twice to south Sudan. A trip would make Kshs.500,000/- for 3 months I lost 3 million. My vehicle was inspected after accident. This is the report. I am praying for justice in this matter. I want the court (sic) to refund the amount I spent in repairing the vehicle business money lost and costs of the suits."**

This is the only evidence adduced by the appellant in respect to the claim of loss of user. This as has been pointed out in **David Bagine Vs Martin Bundi** (supra) is a claim for special damages, which must not only be pleaded but also be proved. In paragraph 58 the plaintiff gave particulars of loss of income as Ksh.4,000,000/-. In his testimony he stated that the loss was Kshs.3,000,000/-. Though he said he had documents to prove first that he was losing Ksh.500,000/- per trip, and that he was making 2 trips per month, he did not tender any.

The appellant did not tender any evidence to show that he would normally make 2 trips to South Sudan. This he would have easily done by producing contract for the transport or even previous payment of same trip to show he was being paid the said Ksh.500,000/- per trip. It was not enough to say he had documents and not produce them.

Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR, the Court of Appeal held that:

> **"Considering the above holding in the light of the now crystalized principle of law that special damages must not only be specifically pleaded but also proved, we agree with the trial Judge's holding that it was not sufficient for the appellant to merely state the loss that he had allegedly suffered, and throw the resulting figure to the Court, and then ask the Court to allow it."**

This is what he appellant did in respect of the claim for loss of user. I, therefore, find that the same was not proved, and the trial magistrate rightly in my view rejected it.

In the result, I set aside the judgment of the trial magistrate and substitute thereof the following judgment: -

1. Vehicle Repairs	Kshs.2,980,782.40
2. Towing Charges	100,000.00
3. Assessor Fee	15,000.00
TOTAL	Kshs.3,095,782.40
Less 10%	Kshs. 309,578.00
Total	**Kshs.2,786,203.40**

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The appellant will have the costs of this appeal.

Dated, signed and delivered at Bungoma this 29th day of May, 2020.

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S N RIECHI

JUDGE