REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL 93 OF 2019

MOSES NDOLO NDAMBUKI.....APPELLANT

-VERSUS-

ANDREW LINGE MUTUA..... RESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate Hon. M E Analo (RM) dated 3rd July, 2019 in Machakos CMCC No. 604 of 2019)

BETWEEN

MOSES NDOLO NDAMBUKI.....PLAINTIFF

-VERSUS-

ANDREW LINGE MUTUA.....DEFENDANT

JUDGEMENT

1. According to the Appellant herein, he was at all material times the registered and/or beneficial owner of motor vehicle registration number KAU 120P while the Respondent was the registered and/or beneficial owner of motor vehicle registration number KAZ 571T.

2. It was pleaded that on or about 25th December, 2017, the Appellant was driving his said vehicle along Red Cross Area, along Nairobi-Machakos Road when the Respondent's said vehicle was so negligently and/or carelessly driven, managed and/or controlled by the Respondent's servant and/or agent that it hit the Appellant's said vehicle as a result of which the Appellant's vehicle was damaged. The particulars of negligence and damage to the vehicle were particularised in the plaint and it was pleaded that the Appellant's loss amounted to Kshs 383,698/= which amount the Appellant claimed from the Respondent.

3. In his defence the Respondent denied that the Appellant was the registered owner of motor vehicle reg no. KAU 120P but at the same time admitted the paragraph that dealt with the ownership of the said vehicle in the plaint. He further denied that the allegations of negligence made by the Appellant and averred that the accident was as a result of an attempt by a pedestrian to cross the road whereupon reaching the middle of the road the said pedestrian decided to turn back. As a result, the Respondent's agent swerved to avoid hitting the pedestrian resulting into the said accident. The Respondent however denied the particulars of the alleged damage caused to the Appellant's vehicle and prayed that the suit be dismissed with costs.

4. PW1, **PC Tom Robert** a police officer stationed at Machakos Police Station testified that on 25th December, 2017 their office received a report of an accident at Machakos Boys High School involving motor vehicle reg. No. 2 Our office received a report of accident at Machakos Boys High School involving motor vehicle registration numbers KAZ 571T Toyota Saloon and KAU 120P Suzuki Maruti Taxi which was booked vide OB NO.4/25/2017. According to him, one **Joshua Munyoki** was driving KAZ 571T from Nairobi direction heading to Machakos when he overtook another motor vehicle and as a result collided with motor vehicle KAU 120P Suzuki Maruti which was coming from the opposite direction being Machakos heading to Nairobi. As a result, several passengers were seriously injured and were taken to Machakos Level 5 Hospital while the vehicles were towed to Machakos Police Station. According to him, the officers who visited the scene were **PC Amina** and **PC Kemboi** who had since been transferred. After the investigation it was established that the said **Joshua Munywoki** was to be blamed and he was charged with the offence of driving a motor vehicle without due care in Machakos Traffic Case No. 43 of 2018. The witness produced an abstract which was issued on 22nd May, 2018 as an exhibit and stated that his attendance fee was Kshs.5, 000/-. According to him, in the police report there was no mention of the involvement of a pedestrian and that the accident happened on the

extreme end of the road on the left side as you face Nairobi from Machakos as the driver of KAU tried to avoid the head on collision.

5. PW2, **Martin Ndolo Mathuru**, an assessor with Regent Automobile Valuers produced an accident assessors report dated 23rd March, 2018 for motor vehicle KAU 120P Suzuki Maruti which was assessed under instructions from **Moses Ndolo** while at Machakos Police Station. The report detailed the nature of the damage of the said motor vehicle which was as a result of a head on collision accident. According to the report, the collision caused extreme damage to various body parts of the front suspension system.

6. In cross-examination, he clarified that the person who did the assessment was **Daniel Kinyua** who was transferred to Kisumu Branch. Per the report it was recommended that the motor vehicle KAU 120P be treated as a total loss since the total estimated repairs was Kshs.383, 448/= yet its value was Kshs.250, 000/- making it uneconomical to repair. The witness claimed attendance fee of Kshs 5,000/- and exhibited both the report and the receipt for his attendance.

7. PW3, **Moses Ndolo Ndambuki**, the Appellant herein relied on his statement in which he stated that on 25th December, 2017 at 8.30am he was driving along the said road in a white Suzuki Maruti Van Motor Vehicle Registration No. KAU 12 0P and after passing Red Cross. a Toyota Corolla Motor Vehicle Reg. No. KAZ 571T which was over speeding encroached onto his lane and hit him head on and as a result he lost control of his vehicle which was extensively damaged. He lost consciousness and was admitted to Machakos Level 5 Hospital and later transferred to Bishop Kioko Hospital. He later reported the accisent to Machakos Police Station.

8. It was his evidence that the damage caused to the said vehicle was assessed by Regent Automobile Valuers & Assessors Limited and he was informed that it would cost Kshs 383,148/- to repair the vehicle and he decided to seek compensation from the owner of motor vehicle reg. no. KAZ 571T after his insurance company declined to pay on the ground that he had taken out a Third Party Cover. He therefore blamed the driver of motor vehicle reg. no. KAZ 571T for the accident.

9. In his evidence he stated that he was the owner of motor vehicle KAU 120P which he bought on 16th March, 2015 from **Daniel Kihara** and produced the said agreement for sale dated 16th March, 2016. He also stated that he was issued with logbook upon payment of the purchase price but never transferred the same though transfer forms had been executed in his favour since he was not well versed with the process. He exhibited the said log book together with the transfer for KAU 120P, the Demand letter dated 2nd July, 2018, certificate of postage, third party notice, search for Motor vehicle for KAZ 571T, receipt for the search, motor vehicle insurance certificate, a copy of the motor vehicle accident report form and a bundles of photos of motor vehicle KAU 120P. He also displayed his driving licence. According to him, he repaired the motor vehicle and Assessment was done.

10. In cross-examination, he stated that he had not repaired the vehicle and that his claim was based on what the assessors reported. He however confirmed that he was still interested in repairing the motor vehicle and he wanted the money to enable him do so.

11. At the close of the Plaintiff's case the defence opted not to adduce any evidence.

12. In his judgement, the learned trial magistrate found that from the plaint the Respondent was seeking special damages which were required to not only be specifically pleaded but also strictly proved. He further found that though in the plaint the Respondent sought Kshs 330,000/- for replacement and repair of damaged parts and a total of Kshs 383,698/= no receipt was produced to prove the special damages pleaded. The Court therefore found that the claim had not yet accrued by the time the suit was filed. He therefore did not deal with the issue of negligence.

Determination

13. I have considered the foregoing as well as the submissions on record. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."**

14. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

15. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration.**

Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

16. Nevertheless, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. The learned trial magistrate only dealt with the issue whether or not the Appellant had proved its loss as required by law. He did not deal with the issue of negligence. With due respect the issue of negligence was one of the issues for determination before the learned trial magistrate and he ought to have dealt with the same. The East African Court of Appeal in **Haj Ibrahim Mohamed Saeed vs. Al-Haj Othman Kaid Sallam [1962] EA 149** restated the importance of framing of issues by the trial court when it stated that:

"The need to frame issues has been repeatedly stressed by the Court. Here the failure to do so, or to refer to the terms of the Rent Restriction Ordinance, appears to some extent to have misled the learned Judge in his consideration of the case."

18. The importance of framing issues for determination was appreciated by the Supreme Court of Uganda (per **Oder, JSC**) in **Rukidi vs. Iguru and Another [1995-1998] 2 EA 318 where** expressed itself as hereunder:

"The discretion of framing issues at trials lies on the court and Order 13 rule 3 of the Civil Procedure Rules does not say that the Court may only frame issues from all the items listed therein since the discretion is left to the Court and since it may frame issues from any or all of the items listed in the rule means that the Court may frame issues at any time from the commencement of trials up to the writing of the judgement by the trial court…Whereas Order 13, rule 3 of the Civil Procedure Rules clearly indicates that issues must be framed before the production of evidence in a case and it is in rare cases that framing of issues is postponed till after hearing evidence of one or two witnesses, this ground of appeal must fail since no failure of justice occurred by framing of one issue."

19. On his part, **Odoki, JSC** (as he then was) had this to say:

"Whereas the framing of issues is a prerogative of the Court, it is a misdirection to state that issues should always be framed at the close of submissions of parties or their counsel; issues should always be framed at the commencement of the hearing of the suit unless for special reason it is not possible to do so…Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus-oriented and saves the time of the Court and there is nothing wrong with the parties or their counsel agreeing on the issues or otherwise participating in their framing…The fact that issues were framed at the commencement of the hearing does not mean that they cannot be amended by addition or deletion since rule 5 Order 13 allows the Court, any time before passing the judgement, to amend the matters in controversy between the parties, or to strike out any issues that appear to have been wrongly framed…A trial Judge therefore always has a discretion to amend the issues framed any time before passing judgement but the point to be emphasised is the need to frame the issues at the commencement of the hearing of any suit to guide the parties and the Court in addressing the basic issues in controversy."

20. It was noted by **Sergon, J** in **Ngugi Peter Ngumi Gichoho Alias Peter Ngumi Gichoho Ngugi vs. Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri HCCA No. 138 of 2003** that:

"A perusal of the record shows that the learned Principal Magistrate did not frame up the issues for determination which he was enjoined to do under Order 22 rule 5 of the Civil Procedure Rules. But the deficiency in failing to evaluate the evidence can be corrected by the first appellate court. Though the learned Principal Magistrate did not frame up the issues, he nevertheless ably analysed the evidence presented before him."

21. However, the failure to frame issues is not necessarily fatal as was held by the East African Court of Appeal in **Norman vs. Overseas Motor Transport (Tanganyika) Limited Civil Appeal No. 88 of 1958 1959] EA 131** where it stated that:

"If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed…In the instant case it would seem that the failure of the court to frame issues was to some extent the fault of counsel on both sides. Nevertheless, the failure to frame the issues is an irregularity and the question is whether, notwithstanding the failure to frame the issues, the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and the court duly considered it."

22. It was accordingly held by the same Court in **S N Shah vs. C M Patel and Others [1961] EA 397** that:

"Whereas there would have been considerable advantage in framing the issues before the evidence was called, issues had been joined upon the pleadings and it was not, therefore, obligatory upon the learned Judge to frame issues. The fact that he did not do so would be no justification for upsetting his decision."

23. In this case the only evidence on record regarding the manner in which the accident occurred was the Appellant's evidence. In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002**, **Lesiit, J** citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** appreciated that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

24. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

25. Being a first appeal, I have no hesitation that the Appellant proved that the accident did occur and it was caused by the negligence of the Respondent's agent.

26. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269**, **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98**, **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

27. It was therefore held by the Court of Appeal in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** that:

"The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

28. Similarly, in **Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716**, the Court of Appeal held as follows;

"Special damages must not only be specifically claimed (pleaded) but also strictly proved…for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

29. That was the position in **Woodruff vs. Dupont [1964] EA 404** where it was held by the East African Court of Appeal that:

"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them…The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

30. In my view to hold that a person whose property has been damaged but due to lack of resources to repair the same cannot be compensated even when the damage can be ascertained would be unjust and unfair to those who are financially disadvantaged particularly where the damaged property was his source of income. My position is grounded on the holding in **Nkuene Dairy Farmers Co-Op Society Ltd & Another vs. Ngacha Ndeiya [2010] eKLR** where the Court of Appeal held that:

"The appellants did not call any evidence in support of their case. As stated earlier they filed a written statement of defence

denying liability and blamed the respondent's driver for the accident. However, since they did not call any evidence either to prove their averments or to rebut the evidence the respondent adduced to establish his claim, a bare assertion that the respondent did not adduce sufficient evidence to prove his case will not do…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…The character of the acts themselves which produce the damage, and the circumstances under which these 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 pendantry…Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counter checked and either accepted or disproved. 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 Assessor's report. The experience of the Assessor was not challenged and we think Onyancha J. was right in describing him as an expert, and his report as being opinion evidence. The court had the right to accept or reject his opinion if the circumstances so dictated. The respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to…In the result we agree…that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim. We dismiss this appeal with costs to the respondent."

31. It is therefore my view and I hold that the Appellant sufficiently proved to the prescribed standards that his vehicle was damaged and what that damage was. However, from the assessors' report, it was clear that the amount required to repair the said vehicle was more than the value of the vehicle itself. In those circumstances, to direct that the Appellant the paid the cost of repair would amount to unjust enrichment. As held above, the Appellant is not entitled to be compensated to such an extent as to place him in a better position than that in which he was before the accident took place. In this case the Appellant's vehicle was as good as one that had been written off. The Court of Appeal in **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998** held that where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value.

32. In the premises the Appellant was entitled to the value of his vehicle being Kshs 250,000/= less the salvage value of Kshs 50,000/= which was Kshs 200,000/=

33. Consequently, I allow the appeal, set aside the judgement of the lower court dismissing the Appellant's suit and substitute therefor judgement in favour of the Appellant against the Respondent in the sum of Kshs 200,000/-. That sum will accrue interest at court rates from the date of filing suit till payment in full. I also award the Appellant costs both of this appeal and in the lower court.

34. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 18th June, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Njongoro for the Respondent

CA Geoffrey