REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 25 OF 2017

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY.....APPELLANT

AND

BENSON MAROKO OBIERO.....RESPONDENT

(Appeal from the original Judgment and Decree of Hon.S. K. Onjoro, SRM dated 31st March 2017 at the Magistrates Court at Kisii in Civil Case No. 276 of 2015)

JUDGMENT

1. The appellant, **KENYA NATIONAL HIGHWAYS AUTHORITY** ("KENHA"), appeals against a judgment entered against it in favour of the respondent ("the plaintiff") as follows:

> *(a) A declaration issues that the act of impounding and retaining the plaintiff's motor vehicle registration number KZF 245 Mitsubishi Lorry for a period of 40 days was not only illegal and unfair but actuated by malice.*
>
> *(b) Special damages of Kshs. 605, 500 as in paragraph 7 above.*
>
> *(c) Costs of this suit.*
>
> *(d) Interest on a, b, above (at) court rates.*

2. The plaintiff pleaded, in its plaint, that it was the owner of Lorry registration number KZF 245 Mitsubishi Fuso ("the Lorry") which was impounded at the Rongo Weighbridge on 28th June 2014 for allegedly by-passing and absconding from the weighbridge and fined USD 2000. When he filed ***Kisii Magistates Court Misc. Application No. 31 of 2014*** to challenge the impounding of the Lorry, the court issued an order directing release of the vehicle. The plaintiff claimed Kshs. 606,500/- on the ground that KENHA detained the Lorry in its yard for 40 days causing him to lose between Kshs. 10,000 – 15,000/- per day as loss of business and Kshs. 86,500/- being repair charges as the Lorry was damaged while in KENHA's custody.

3. In its defence, KENHA stated that the Lorry by-passed the weighbridge which is an offence within the meaning of the ***Kenya Roads Act, 2007*** and ***Legal Notice No. 86 of 2013*** as read together with **sections 106** and **107** of the ***Traffic Act (Chapter 403 of the Laws of Kenya)*** and as such the vehicle was detained for a lawful cause. It stated that it was a stranger to the proceedings in ***Kisii Chief Magistrates Court Misc. Application No. 31 of 2014*** and in any case the court did not have jurisdiction to issue those orders and that they were of no consequence. It also denied that the plaintiff was entitled to damages sought and demanded strict proof thereof.

4. At the hearing, the plaintiff (PW 1) testified and Jacob Maroro (DW 1) testified on KENHA's behalf. Both witnesses reiterated their positions set out in their respective pleadings. The fact that the Lorry was impounded on 28th June 2014 was not disputed. KENHA justified its action on the basis of the law. Although DW 2 denied that he was served with the order in ***Kisii Chief Magistrates Court Misc. Application No. 31 of 2014,*** he admitted in cross-examination that, *"The vehicle was released by virtue of the court order."*

5. On the basis of the evidence, the trial magistrate held that KENHA was liable for impounding of the Lorry and detaining it until it was served with the order directing its release on 1st August 2014. The court found that the plaintiff had proved that it has suffered loss and damage and awarded the amount pleaded in the plaint. KENHA appealed against the judgment.

6. In the amended memorandum of appeal dated 9th November 2018, KENHA contended that the trial magistrate disregarded its submissions and authorities filed in court and erred in law and in fact in holding that it did not have a plausible defence. It complained that the decision of the trial magistrate was not supported by law and fact. The appellant based its action on **Regulation 15(3)** and **(4)** of the ***Kenya Roads (Kenya National Highways) Regulations, 2013*** which provide:

> *15(3) Where a vehicle is found to have by passed or absconded from the weigh bridge station, whether overloaded or not, the registered owner shall be liable to pay bypassing or absconding fee of two thousand USD or its equivalent in Kenya Shillings.*
>
> *(4) Failure to adhere to the instructions of the Authority or the police shall constitute an offence, punishable by detention of the vehicle and cargo at the expense and risk of the registered owner.*

7. As regards damages, the appellant contended that the trial magistrate erred by awarding damages which were not pleaded and proved to the required standard.

8. Counsel for the respondent supported the decision of the trial court and urged the court to uphold it on the ground that the respondent proved his claim to the required standard.

9. When KENHA impounded the Lorry, the plaintiff decided to move the court to test the legality of its action. The plaintiff filed ***Kisii Chief Magistrates Court Misc. Application No. 31 of 2014.*** The court determined the matter in the plaintiff's favour on 1st August 2014 by directing KENHA to release the Lorry on following terms:

> *[2] THAT the honourable court do hereby order PC MORRIS KANGOGO and JACOB MAOTO and or the officer –in – charge Rongo Weighbridge to release motor vehicle registration NO. KZF 245 Mitsubishi Fuso to the applicant BENSON MAROKO unconditionally.*

10. The order was served on KENHA and the Lorry was released on 11th August 2014. Those proceedings, in my view, were conclusive of the issue of liability. KENHA did not appeal or apply to the court to challenge or set aside those orders. I am therefore bound to hold that the impounding of the Lorry was illegal. It follows that the plaintiff is entitled to compensation from the date the Lorry was impounded to the date the Lorry was released.

11. The trial magistrate also noted that **Regulation 15(3)** and **(4)** of the ***Kenya Road (Kenya National Highways) Regulations, 2013*** had been declared unconstitutional several cases among them, ***Margaret Miano v Kenya National Highway Authority*** **MSA Pet. 23 of 2015 [2015] eKLR**, ***Republic v Kenya National Highways Authority ex parte John Mwaniki Kiarie*** **NRB JR App. 437 of 2015 [2016] eKLR** and in ***Disaranio Limited v Kenya National Highway Authority and Attorney General*** **NRB Pet. 533 of 2017 [2017] eKLR.** The cases were decided after the act complained of and would not apply to this case. As I have stated the determination herein is grounded on the decision of the subordinate court directing the KENHA to release the vehicle.

12. I now turn to the issue of the damages. The appellant's case is that the plaintiff was not entitled to the damages awarded as he did not meet the threshold for proof. At the hearing, PW 1 testified that he was in the transport business and used to record his income in a book which he produced in evidence. He stated that his average income was about Kshs. 10,000/- – Kshs. 15,000/- a day. He produced a permit issued by Kenya Forest Service which allowed him to transport timber. He stated that he lost business after the Lorry was impounded. In cross-examination, he stated that he did not have a receipt book but his income was recorded in a book. He also stated that he paid cess for maize, sand and other products but he did not have receipts in court. The trial magistrate held that plaintiff had proved both the income and repair costs and awarded average income of Kshs. 30,000/- day.

13. It is now a cliché that the law on special damages is well settled. It is that special damages must be particularised and proved to the required standard. In ***Maritim & Another v Anjere [1990-1994] EA 312 at 316,*** the Court of Appeal emphasized that:

> *In this regard, we can only refer to this court's decision in* ***Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992 (UR)*** *where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was 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 and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.*

14. The plaintiff pleaded the claim for loss of use and repair costs in his plaint. The question then is what constitutes proof of the claim. Counsel for the appellant submitted that documents produced by the appellant were inadequate to meet the threshold of proof. He relied on the decision in ***Ryce Motors Limited and Another v Elias Muroki*** **MSA CA Civil Appeal No. 119 of 1995 [1996] eKLR** where the Court of Appeal remarked as follows in relation to the claim for special damages that had been allowed by the trial court:

> *The learned judge had before him by way of plaintiff's evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act.*
>
> *These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety.*

15. I do not understand the ***Ryce Motor Case*** **(Supra)** as deciding that in each case a plaintiff must produce books of account certified by an accountant in order to establish special damages. The evidence and therefore proof, I hold, must depend on the circumstances of the case. The Court of Appeal in ***Nkuene Dairy Farmers Cooperative Society Ltd & Another v Ngacha Ndeiya*** **NYR CA Civil Appeal No. 154 of 2005 [2010] eKLR adopted the dictum of Bowen, LJ**'s in ***Ratcliffe v Evans*** **[1892] 2QB 524** where he held that:

> ***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 pedantry.***

16. To support his claim, the appellant confirmed that he owned the Lorry which he used for transport business. He produced a book in which he recorded his daily transaction. The book was from 14th April 2019 upto 2nd September 2019. The book shows that he was transporting timber, sand, ballast, bricks, poles and maize within the region. He would earn anything from a net of Kshs. 11,000/- per day to Kshs. 31,000/- per day. He also produced a permit from the Kenya Forest Service. From the totality of the evidence, I also find that he proved that he was earning business from the lorry and his form of accounting supported his earnings. The plaintiff also produced receipts to support his claim for repair charges. I cannot fault the trial magistrate for coming to the conclusion that the claim was proved.

17. Before I conclude, I would like to point out the respondent's claim was for unlawfully impounding and holding the vehicle. Although the respondent pleaded malice and unfair treatment, the allegations were not necessary to ingredient to establish a cause of action and were gratuitous. Moreover, the particulars of malice were not pleaded and it was not necessary for the court to make the finding on that basis. Notwithstanding what I have stated and for the reasons I have set out above, it is clear that the appeal lacks merit. It is dismissed with costs to the respondents assessed at Kshs. 20,000/-.

DATED and DELIVERED at KISII this 15th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Omondi Okoyo instructed by Owiti, Otieno and Ragot Company Advocates for the appellant.

Mr Ogari instructed by B. N. Ogari and Company Advocates for respondent.