REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 100 OF 2016

FREDRICK NDUVA MAKUTHI.....APPELLANT

VERSUS

SAMUEL MUTISYA MUIA.....RESPONDENT

(Being an appeal from the judgement and decree of Honorable Ms. C.K. Kisiangani,

Resident Magistrate in Machakos CMCC No. 70 of 2015 delivered on 31st August, 2016)

JUDGEMENT

1. This appeal arises from the judgment and decree of Hon C.K Kisiangani Senior Resident Magistrate dated 31st August 2016 in **Machakos CMCC No. 70 of 2015**.

2. By a plaint dated 2nd February, 2015 the respondent herein claimed for special damages in the sum of Kshs 317,500.00 from the appellant being repair costs, loss of user and other expenses. The respondent had claimed that he was the registered owner of motor vehicle registration number KAK 936 X whereas the appellant owned motor vehicle registration number KBL 736 C and on or about the 29.7.2014 while the respondent was driving his vehicle along Machakos- Nairobi Road, the appellant negligently drove, managed and or controlled his motor vehicle KBL 736 C, and rammed into the rear of motor vehicle KAK 936 X thereby causing extensive damage for which the appellant was liable.

3. The trial court found that the Respondent proved his case on a balance of probabilities and found the appellant 100% liable for causing the accident. On the issue of quantum, the learned magistrate relied on the evidence of the motor vehicle assessor and awarded Kshs 119,480/- as the award for the value of repairs. She also in finding that the defendant had not controverted the evidence of receipts produced for car hire of Kshs 174,000/- and awarded the same as loss of user. She therefore concluded that the respondent proved his case on a balance of probabilities against the appellant.

4. Being dissatisfied with that finding and decision, the appellant filed this appeal on 28th September 2016 vide a Memorandum of Appeal dated 27th September 2016 that in essence faulted the trial magistrate for:

> ***a. Considering extraneous matters and going out of the ambit of the proceedings and evidence before her and hence arrived at an erroneous decision on loss of user.***
>
> ***b. Finding that the cost of repairs of Kshs 119,480/- was proved***

5. The appellant prayed that the judgement of the trial court be set aside and the court make its own findings.

6. The appeal was canvassed by way of written submissions.

7. In support of the appeal, learned counsel Mulwa, Isika & Mutia filed written submissions on 20th November 2013, and framed 3 issues for determination, *to wit*; error of fact and law in making a finding for cost of repairs of Kshs 119,480; error of fact and law on loss of user and reliance of wrong principles to arrive at the judgement.

8. On the issue of the finding for the cost of repairs, counsel submitted that the court did not address whether or not the amount of Kshs

119,480/- was proved to the required standard hence the award ought to be set aside. On the issue of loss of user, learned Counsel cited the provisions of Section 107 of the Evidence Act and submitted that the respondent did not specifically plead and did not prove the amount; counsel buttressed this argument by relying on the case of **Linus Fredrick Musaki v Lazaro Thuram Richoro (2016) eKLR.** Counsel further submitted that the respondent did not take reasonable steps to mitigate the loss and is not entitled to the amount awarded for loss of user; the case of **Samuel Kariuki Nyangoti v Johaan Distelberger (2017) eKLR** was cited. Learned counsel faulted the readiness of the trial court to accept the evidence of the assessor for the cost of repairs. On the issue of reliance of the wrong principles, learned counsel submitted that the trial court relied on evidence that was not on the record, for example that the respondent was undertaking construction in Kangundo, on page 20 of the record of appeal that is page 3 of the judgement. Learned counsel concluded that the appeal be allowed as prayed.

9. The appeal herein was opposed by the respondent vide submissions filed on 22nd October, 2018. Learned counsel submitted that the appeal is incompetent, petty and vexatious and that the trial court rightly awarded Kshs 119,480/- for the cost of repairs. Counsel submitted that the respondent satisfactorily proved the claim for loss of user vide the car hire agreements and receipts and specifically pleaded the same hence the challenge on the award ought to fail.

10. This being a first appeal, the role of the court in Section 78 of the Civil procedure Act is to re-evaluate, reassess and reanalyze the evidence afresh and draw its own conclusions though bearing in mind that it neither saw nor heard the witnesses testify. In addition, the responsibility of the appellate court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. This was observed in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212) CA.**

11. In light of the above, I shall consider the evidence on record. The respondent had 3 witnesses in support of his claim. Pw1 was Benjamin Kimaiyo working at Machakos Traffic Base who testified on the accident that occurred on the material date between the suit vehicles. He was not the investigating officer, however he tendered the police abstract as evidence of the accident. Pw1 produced the inspection report of KAK 936 X.

12. Pw2 was the respondent who testified that on the material day he was driving from Machakos and at the funeral home whilst at the bumps he was hit from the back by the appellant's vehicle KBL 936 C and his vehicle was pushed off the road and it landed on a ditch and that the said appellant's vehicle did not stop. He testified that his vehicle was towed to Machakos police station. It had been damaged on the rear. He used to drive it to go to work daily in Nairobi. He testified that he had to hire a vehicle for 2 months pending the repair of his vehicle and he tendered a copy of records and the assessment report for his vehicle as well as receipts for spare parts and panel beating. He testified that the vehicle belonging to the appellant was over speeding when it hit him. He sought compensation.

13. Pw3 was Anthony Wanii, a valuer and assessor with AA Kenya. He testified that he assessed the suit vehicle and prepared a report that was tendered. He gave an estimate of the damaged parts and the labour costs and concluded that the vehicle could be repaired.

14. The appellant neither testified nor called any witness nor cross-examined the evidence of the respondent.

15. I have carefully considered this appeal; the evidence in the court below, the submissions by both parties' advocates in the court below and in this appeal, as well as the authorities relied on by the appellant's counsel and the only issue for determination in this appeal, in my view, is whether the respondent proved on a balance of probabilities, the special damages pleaded, as having been a direct consequence of the accident and therefore whether the trial magistrate erred in law and fact in granting the award.

16. There is no dispute that an accident did occur involving the suit vehicles at the speed bumps near the funeral home and the ownership of the vehicles is not disputed. There is also no dispute that the respondent's vehicle was hit from behind at the speed bumps. In this regard, I am satisfied on the finding on liability against the appellant by the trial court because negligence can be inferred by the act of hitting a vehicle from behind at speed bumps; and causing the respondent's vehicle to go off the road is indicative of heavy impact due to over speeding and the nature and extent of damages as per the uncontroverted evidence on record by the respondent and the police officer as well as the vehicle assessor means that I can safely rely on the doctrine of *res ipsa loquitor* to infer negligence. It is obvious that the Appellant had not kept his distance when he rammed onto that of the Respondent. A properly driven and controlled vehicle does not knock others ahead of it. The appellant was negligent and hence the court's finding on liability was sound.

17. The question is whether the respondent proved material damages that were allegedly repaired at a cost and that the damages were as a direct result of the accident and therefore whether the respondent was entitled to be compensated for the loss and damage totaling Kshs 317,500 as pleaded.

18. Starting with loss of user, of Kshs 174,000 it is important to note that the claim was a special damage which must not only be specifically pleaded, but it must be strictly proved by evidence. In this case, the respondent produced a car hire agreement to support the fact that he hired a vehicle. However, I am not satisfied that he actually spent that amount of money and find that the agreement is not sufficient proof of loss of user hence the claim could not have been awarded as pleaded basing on that alone. See **Douglas Odhiambo Apel & another v Telkom (K) Ltd CA 115/2006; Patlife v Evans [1892] 2 QB S 24; Kampala City Council V Nakaya [1972] EA 446 & Hahn v Singh [1985] KLR 716.** However, I believe the testimony of the respondent that he worked in Nairobi and lived in Machakos and I find reason to believe that he hired the vehicle thus find that the *amount* he can recover for *loss of use* is the *reasonable value* of the *substitute vehicle*. From the evidence on record, the value is Kshs 2,500 per day for 30 days and this being uncontroverted, I will allow the award of Kshs 75,000/=. Indeed the Respondent was expected to mitigate his loss by fasttracking the repairs on his vehicle. Hence the 30 days is found to be reasonable.

19. With regards to the claim for the repair cost amounting to Kshs 119,000.00 as a result of the damage caused to the Respondent's motor vehicle, the fact that the vehicle was damaged as a result of the accident was proved vide the assessment report and the inspection report that were produced in evidence. With regard to proof of repair works done there are receipts of Kshs 5,300/=, Kshs 20,500/-, Kshs 40,200/-, Kshs 77,000/- and Kshs. 6,250 all totaling to Kshs 149,250/=. However the Respondent pleaded Kshs 119,480 therefore I see no reason to disturb the award of the trial court as he was awarded what he had specifically pleaded in the plaint.

20. Therefore, on the evidence, the law and submissions, I find that the trial magistrate did not err when she awarded the Kshs 119,480. However with regard to loss of user the trial court erred in awarding the amount prayed in the absence of the evidence on record.

21. The upshot of the aforegoing is that the appeal partly succeeds. The lower court's award on costs of repairs is upheld while the award on loss of user is set aside and substituted with an award of 75,000/=. The Appellant is awarded a third of the costs of the appeal while the Respondent shall have full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 22nd day of May, 2019.

D.K. KEMEI

JUDGE