



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 91 OF 2015

RAPID KATE SERVICES-----1ST APPELLANT

PETER NGOTHO MUNGUTI-----2ND APPELLANT

VERSUS

FREDRICK RINGERA-----RESPONDENT

(Being an appeal from the judgment and decree of the Resident Magistrate C.K Kisiangani made on 22/4/2015 in Machakos CMCC No. 571 of 2007)

BETWEEN

FREDRICK RINGERA-----PLAINTIFF

-VERSUS-

RAPID KATE SERVICES-----1ST DEFENDANT

PETER NGOTHO MUNGUTI-----2ND DEFENDANT

JUDGEMENT

1. The Respondent herein in his amended plaint dated 14th August, 2012 sued the Appellants claiming Special Damages in the sum of Kshs 13,700/=, General Damages for loss of user of his vehicle at the rate of Kshs 3,800/= per day for 2 months and Kshs 130,000/- being the pre-accident value of his vehicle.
2. According to the plaint, the 1st Appellant was the registered owner of motor vehicle Reg. No. KYX 119 driven by the 2nd Appellant, the 1st Appellant's authorised driver, agent and/or servant. On or about 20th May, 2006 whilst the Respondent's m/v reg. no. KVQ 946 was being driven along Machakos-Wote road, the 2nd appellant negligently drove, managed and or controlled m/v reg. no. KYX 119 that he caused the same to collide with the respondent's motor vehicle causing extensive damage to the motor vehicle reg. no. KVQ 946 and it became a complete write-off.
3. The Respondent set out the particulars of negligence and also relied on the doctrines of *res ipsa loquitor*, and vicarious liability. According to the plaint, the 2nd Appellant was charged with the offence of careless driving vide Machakos Traffic Case No. 2687 of 2006 and was convicted of the said offence and fined Kshs 5,000/- in default 3 months imprisonment.
4. It was pleaded that as a result, the Respondent's said vehicle became a complete write-off and he suffered loss and damage for which he held the Appellants wholly liable.
5. In support of his case the Respondent testified that he was a police officer attached to JKIA Police Station and that the subject accident involved his vehicle reg. no. KVQ 946 Toyota Corolla and motor vehicle reg. no. KYX 119 Isuzu Lorry. According to him, on that day he had given his vehicle to another driver whose name he could not remember on 20th May,2006. It was his case that as a result of the said accident his vehicle was damaged and was written-off and he exhibited photographs proving the same as well as the police abstract. It was

his evidence that the driver of the lorry was **Pete Munguti** who according to him, based on the police abstract was to blame for the accident since he was charged and convicted of the offence of careless driving in Traffic Case No. 2687 of 2006 and was fined Kshs 5,000/- and in default 3 months imprisonment. He exhibited the said proceedings. The Respondent's evidence was that the owner of the lorry was Rapid Kate Services which he confirmed vide a search, a certificate of which he exhibited and for which he paid Kshs 500/= and was duly issued with a receipt which he exhibited as well.

6. Although the Respondent was not the one driving his vehicle, he testified that based on the said conviction, the 2nd Appellant was liable.

7. As a result of the vehicle being written-off, it was the Respondent's case that he had to look for other means to serve him since the vehicle was meant for his private purposes. He therefore hired a vehicle from Bitalix Tax Cab reg. no. KAE 450U which he was driving himself and was paying Kshs 3,800/= per day for two months. According to him, he spent a total sum of Kshs 228,000/= and produced three receipts for the same. Since the accident was at Katoloni, he engaged the services of a breakdown known as Lenga Lenga at Kshs 10,000/= to tow the vehicle to Machakos Police Station and produced a receipt for the same. He also contracted the services of Njoro Automobiles Assessors who came up with a recommendation that the vehicle was a write-off and who charged the Respondent Kshs 3,500/= whose receipt the Respondent produced. It was submitted that from the said report, the pre-accident value of the vehicle was Kshs 130,000/= while the salvage value was Kshs 30,000/=.

8. In cross-examination, the Respondent confirmed that he was not at the scene of the evidence but later visited the place as the owner of the vehicle during which time the vehicles were still at the scene and both drivers were there and the driver of the lorry identified himself. According to the Respondent, his place of work was 25 km away and he was not residing in police quarters.

9. The Respondent called one **Joseph Karanja Muregi**, a motor vehicle valuer with Nyoro Automobiles whose company director was **Nyoro Wanyoike**, his employer. According to the witness he was conversant with the signature of his said employer who was away in Nairobi but with whose authority he was in court. The witness identified the signature on the report and proceeded to testify that the said report was made on 5th June, 2006 for the plaintiff whose vehicle reg. no. KVQ 946 Toyota Corolla was involved in an accident. According to the report, the pre-accident value of the vehicle was placed at Kshs 130,000/- and the vehicle could not be repaired due the extensive damages which exceeded half of the value of the motor vehicle was the salvage value was Kshs 30,000/-. As a result, the vehicle was written-off. He proceeded to produce the report as an exhibit.

10. At the end of the evidence of the said witness, the Respondent's case was closed and the Appellants opted not to adduce any evidence.

11. In his judgement the learned trial magistrate found that since the Appellants closed their case without adducing evidence and the Respondent's driver was under a duty to be on the lookout for any eventualities that may arise on the road, without calling the person who was driving the vehicle to explain the circumstances that led to the accident and as the 2nd appellant was charged and convicted of a traffic offence, the liability would be apportioned at 90% against the Appellant and 10% against the Respondent. Based on the evidence of PW2, the learned trial magistrate found that the value stated in the plaint had been properly proved by the Respondent. She also found that in the absence of any objection to the car hire receipts the Respondent proved the loss of user at the rate of Kshs 228,000/= as el as the towing charges and the assessment charges. Accordingly, she awarded a total sum of Kshs 371,500 less 10% liability hence the total awarded was Kshs 334,350/=. She also awarded the Respondent costs and interests.

12. In this appeal, it was submitted that since there was no evidence tendered before the trial court as to the liability, there was no justification for apportioning liability in the manner the trial court did. It was further submitted that the assessment report which was produced did not justify the conclusion why the vehicle was written-off. It was further submitted that the learned trial magistrate failed in not deducting the salvage value when making the award for total loss hence the award of Kshs 130,000/= ought to be set aside and be dismissed. As regards the loss of user, it was submitted that where the vehicle is a total loss the claim for loss of user does not arise. However, even where such an award is sought it ought to have been awarded reasonably to avoid unjustifiable enrichment by the Respondent. In this case, it was submitted that loss of user for 60 days was unjustifiable in light of the principle of mitigation of loss.

13. In opposing the appeal, it was submitted by the Respondent that the trial court did not err at all and hence the appeal should be dismissed. The trial court decision on liability and quantum was not wrong and it was based on the evidence that was produced and the law and the court did not consider extreme matters. It was submitted that the police abstract was produced by consent of the parties that is, the appellants did not object to its production and insist on police officer to testify. The inference here is that if the police testified it would have been detrimental to the appellants. According to the Respondent, his evidence was clear that the 2nd appellant, **Peter Munguti**, was to blame for the accident and that the 2nd appellant was charged with the offence of careless driving and fined Kshs. 5,000/= after the said driver pleaded guilty of the charge. The respondent explained that from the police file he had in court, the recommendation made by the investigating officer was that the driver of m/v reg. no. KYX 119 the 2nd appellant herein was to blame for the accident and the respondent produced the proceedings of Tr. 2687 of 2006 as PExb3.

14. It was noted that the appellants did not call any evidence to the contrary before the trial court and the Learned Magistrate found it fair to split the liability at 10%:90% since the 2nd appellant was found to blame and pleaded guilty and the plaintiff's driver ought to have been on the lookout for any eventualities that may arise on the road. The appellants seem to belabour that they were held 100% liable while in fact it was only 90%.

15. On assessment of damages, it was submitted that it is not in doubt from PW2's evidence that the Respondent's vehicle was extensively damaged. PW2 in his evidence indicated that the following parts were damaged, steering front windscreen which was smashed, both head lamps, front off side bumper ripped off, doors and windows broken, front bumper torn, cooling radiator torn and smashed, dash board broken and rear windscreen broken. The assessment report and photographs produced as exhibits confirm the damages that the assessor termed as total loss and not economical to repair as the cost of repairs exceeds half of the value of vehicle.

16. It was noted that PW2 indicated clearly that it is not a must that the price of each item should be included in a report reasons being that

spare parts do not come from the same shops and costs keep changing. Every assessor has his own method of writing his assessment report where you can include costs or not include. The assessor placed a pre-accident value at Kshs.130,000/= and declared it a write off. The salvage value was at Kshs.30,000/=. The evidence of PW1 and PW2 was very clear on the same. There was enough documentary and oral evidence and therefore the assessment of damages is within the discretion of the trial court and the same should not be interfered with.

17. On the claim of loss of user, it was submitted that the same was pleaded and proved. The respondent testified that he is a police officer attached to JKIA police station. He used his vehicle for private purposes that is, driving to and from his place of work which is 25km away and also taking his children to school but he was rendered immobile from the date of accident and had to seek car-hire services for a period of 2months at the rate of Kshs. 3,800/= per day hence Kshs. 228,000/=. To prove this special loss and claim, the respondent produced payment receipts –PExbt6. The expenses of hiring an alternative vehicle for 2months is therefore compensable and the trial court's finding should not be disturbed.

18. The respondent pleaded a sum of Kshs. 10,000/=. In his testimony, he testified that he engaged breakdown services (Lenga Lenga) who towed his motor vehicle from the scene of accident to Machakos Police station at a cost of Kshs. 10,000/=. He proved the same by producing the receipt as exhibit. He also paid the assessors Kshs. 3,500/= and receipt for the same was produced as PExb8. Police abstract was obtained at a cost of Kshs.200/=. The claim being under special damages, trial court did not err in awarding the same since it was pleaded and proved.

19. The upshot of the above, it was submitted, is that the appeal lacks merit and should be dismissed with costs to the respondent.

Determination

20. I have considered the foregoing. 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.”

21. 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.

22. 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 circumstance 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 to 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.”

23. 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.”

24. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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 facts exist.

25. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

26. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which 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.”

27. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

28. In this case, it is clear that the Respondent was not an eye witness to the accident. His driver was not called to testify before the trial court. The Respondent seems to have relied substantially in support of his case on the fact of the conviction of the 2nd appellant in the traffic case. As regards the relevancy of a conviction of a traffic offence to a civil claim in respect of negligence, it was held by the Court of Appeal in Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74 in which Platt, JA opined that:

“It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case...It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party’s conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages.”

29. According to Apaloo, JA (as he then was) in the same case:

“It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court’s assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence.”

30. Accordingly, in Ochieng vs. Ayieko [1985] KLR 494, O’kubasu, J (as he then was) held that:

“Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate’s Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.”

31. Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 was of the opinion that:

“Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it...Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the

subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent...The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him.”

32. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in Calistus Ochien’g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

33. However, in Robinson vs. Oluoch [1971] EA 376, it was held that:

“Section 47A of the *Evidence Act* was introduced into the Evidence Act by an amendment in the schedule to the *Statute Law (Miscellaneous Amendments) Act 1969* and it states that a final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged. The respondent in this case was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the Judge was right in not striking out the defence as a whole.”

34. While citing Robinson vs. Oluoch (supra), Trevelyan, J in Queens Cleaners and Dryers Ltd vs. East African Community and Others, [1972] EA 229, expressed himself as hereunder:

“Careless driving necessarily connotes some degree of negligence, and in those circumstances it may not be open to the respondent to deny that his driving in relation to the accident, was negligent...The expression “conclusive evidence” in section 47A of the *Evidence Act* means evidence which cannot be the subject matter of dispute, qualification or challenge. The word ‘conclusive’ has a number of meanings such as final, that closes the question, and decisive, and, in the context of the section “conclusive evidence” is evidence of such a nature. It would therefore be wrong to admit evidence to explain why a plea of guilty was tendered for it would at least go to qualify if not to nullify what the Legislature has decreed shall be conclusive. There is nothing in section 47A that supports the view that the section has no applicability except to criminal proceedings. That section simply lays down that a final judgement of the court (or an appellate court in appeal thereon) cannot be impugned. It must relate to both criminal and civil proceedings. Generally speaking, traffic offenders are not criminals in the narrow sense of the word, but I fail to see that because in certain places such cases are dealt with in courts trying no other kind of case, and because they are referred to as ‘traffic cases’ rather than as “criminal cases”, they are not cases within the criminal jurisdiction of the courts. The offence to which the third appellant pleaded guilty (careless driving), as its definition makes clear, is that there was lack of care in the manner of his driving and care, or rather in the legal duty to take care, is at the root of the tort of negligence...The “degree of negligence” cannot be resolved by referring back to what happened in the other court; that has never been possible. It must be done by evidence in the instant proceedings. To establish a claim in negligence simpliciter the degree thereof is immaterial for if you are negligent in the smallest degree it is enough to fix you with liability and there is no problem: applying section 47A the conviction spells out negligence and that concludes the matter. But where contributory negligence is concerned, it is different for the court must investigate whether one or the other or both of the parties were at fault so as to apportion the damage according to the relative importance of their acts in causing the damage and their relative blameworthiness. What section 47 does is to make it impossible to hold that the person convicted was not negligent at all for the conviction is conclusive evidence that he was, i.e. the court can find that his blameworthiness was small enough; it cannot find that he had none.”

35. What the court was saying in that matter is that pursuant to section 47 of the *Evidence Act*, the fact of conviction is a conclusive proof that such a person was convicted and that fact cannot be challenged. In accident cases, it also connotes some negligence on the part of the person convicted hence the person cannot contend in a civil suit that he was completely blameless. What he can contend is that there was another person who was, to an extent, similarly to be blamed. As to the extent of their blameworthiness, it is for the trial court to determine. It follows that the Appellants cannot successfully claim that they ought not to have been found liable at all.

36. As to whether the apportionment of liability was proper, in Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment

should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

37. That seems to have been the position in Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

38. In this case, the only evidence on record emanated from the Respondent and it was to the effect that following the accident, the 2nd appellant was charged and convicted of the offence of reckless driving. That connoted that the 2nd appellant was negligent. There was no other evidence on the basis of which liability could be apportioned. However, the learned trial magistrate in the exercise of her discretion apportioned the liability at 90:10 in favour of the Respondent. She was entitled to do so based on the evidence before her. There is no basis upon which the court could find that liability ought to be apportioned 50:50 since there was no evidence or legal presumption that would justify a finding that the Respondent's driver was negligent and to what extent. In the premises, this cannot be said to be an exceptional case in which an error in principle was committed or the apportionment manifestly erroneous in order to justify this court in interfering with the exercise of discretion by the trial court. In those circumstances I cannot substitute my own apportionment for that made by the trial magistrate even if, had I been sitting as the trial court.

39. As regards the special damages for total loss, PW2 produced the valuation report in which the assessor found that the pre-accident value of the vehicle was Kshs 130,000.00 while the salvage value was found to be Kshs 30,000.00. There was no objection to the production of that report. Accordingly, there can be no valid objection to the contents of the said report. In Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 the Court of Appeal expressed itself as follows

“The onus was on the appellant to prove the special damages strictly. The payments made by the appellant for the various purchases are certainly consistent with the damage noted by the police in the certificate of inspection issued to the appellant and produced as an exhibit without objection. The purchases were supported by proper documents and there was no reason why the appellant could not produce them in court as he sought to do. The documents were admissible and ought to have been admitted and considered by the trial court. The omission to do so invites the court’s intervention and the appeal is allowed. The appellant pleaded the cost of repairs at Shs. 700,000/= although he stated the amount was more than that. That, however, was not specific pleading and there was no leave sought to amend the pleading to insert the correct figure. In the result, although the appellant proved a higher figure for repair charges, he can only be awarded the amount pleaded at Shs 700,000/=.”

40. It is therefore my view that the said report was properly admitted and its contents relied on. It was however submitted that the salvage value ought to have been subtracted from the pre-accident value. The Court of Appeal in Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998 was of the view that:

“Where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value.”

41. In those circumstances I agree with the appellants that to award the plaintiff the pre-accident value of the vehicle without mentioning the salvage value may well amount to unjust enrichment. It follows that the salvage value ought to be subtracted from the pre-accident value.

42. It was submitted that having been awarded loss of the vehicle, the Respondent ought not to have been awarded loss of user of the said vehicle. However, the Court of Appeal in Peter Njuguna Joseph & East African Road Services vs. Anna Moraa Civil Appeal No. 23 of 1991 held that:

“Claim for loss of user should not be based on the age of the vehicle since the court is not dealing with a claim for loss of expectation of life or for dependency to consider the proper multiplier for a deceased person either under the Law Reform Act or the Fatal Accidents Act. Here the court is concerned with the actual loss of user of the vehicle, which has been immobilised by the accident. The owner must take all reasonable steps to ensure that the vehicle is back on the road within a reasonable period. The owner must mitigate his damages by having the vehicle repaired if it was not written-off. If the vehicle is found to be a write-off, then the owner is entitled to pre-accident value of the damaged vehicle. He would then be paid a reasonable figure for loss of user until the time he receives the pre-accident value of the written-off vehicle.”

43. This position is contradistinguished from that in John Kipkoech & Another vs. Suleiman Karuga Njoroge Civil Appeal No. 159 of 1992 in which the Court of Appeal expressed itself as hereunder:

“Once a Judge awards the sum representing the pre-accident value less the salvage value there is no justification in law and logic for awarding an additional amount for loss of user since the vehicle was not a write-off and remained un-repaired purely on account of deliberate inaction on the part of the Respondent. There is a duty to mitigate damages and if any amount is to be given for loss of user, it should be limited to the period it would have taken him to get his vehicle back on the road acting with reasonable diligence.”

44. In the above case, the vehicle was not written off and the only reason it remained unrepaired was due to deliberate inaction on the part of the Respondent.

45. On the issue of mitigation, the Court of Appeal in Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 expressed itself as follows:

“We are conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of. In this case it was possible for the appellant to tender clear evidence on the claim but did not. At any rate, the appellant was under a duty to mitigate his loss and there is nothing on record to show what attempts were made in that regard. The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or tort, and he is then bound to act, as best as he may, not only in his interests, but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being on the defendant.”

46. In the present case, the vehicle was written off and until the Respondent got the pre-accident value of the vehicle, he was entitled to loss of user of the vehicle and I cannot say that three months was an inordinately long period to claim loss of user.

47. As regards the other special damages, I am unable to find any justification to interfere therewith. I therefore set aside the award of Kshs 130,000.00 as loss of the vehicle and substitute therefor a sum of Kshs 100,000.00 which represents the pre-accident value of the vehicle less the salvage value. Save for that the appeal otherwise fails.

48. There will be no order as to the costs of this appeal.

49. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 23rd October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muema for Mr Wambua Kilonzo for the Respondent

CA Geoffrey