REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 153 OF 2015

MAC MASTER LIMITED……...APPELLANT

VERSUS

ONESMUS MUTUKU MUIA……RESPONDENT

(Appeal from the original judgment and decree of Hon. C.A. Ocharo (P.M.) delivered on 8th September, 2015 in Machakos CMCC No. 209 of 2012)

JUDGEMENT

1. The Appellant has filed this appeal on the following grounds:

a) The learned magistrate erred in fact and in law in finding that the respondent was entitled to general damages for loss of user of Kshs. 438,000/- without a legal basis.

b) The learned magistrate erred in fact and in law by double compensating the respondent by awarding general damages for loss of user and yet the subject matter was for total loss and amount pleaded as value of the subject matter was awarded under special damages.

c) The learned magistrate's decision on assessment of general damages was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.

d) The learned magistrate erred in fact and in law in awarding the claim for loss of user and yet the respondent did not prove the daily quantum of loss to the required degree of proof required of special damages.

e) That the learned magistrate erred in fact and in law in failing to appreciate the position in law to be where the damage to a vehicle and or motorcycle is beyond economic repair, the respondent was entitled to damages for loss of user for a reasonable time and reasonable time would be the time it would take for the respondent to procure another vehicle or motorcycle in the market.

2. This being a first appeal, this court is duty bound to re- consider and re-evaluate the evidence afresh and arrive at its own independent conclusion.

3. It is clear from the grounds cited above that the appeal is against the trial court's decision on the award of damages for loss of user. It was particularly contended that the trial court awarded the said damage yet the respondent did not specifically plead the same. Further, that the period of loss must be reasonable thus it should be limited to a period in which the respondent would normally and promptly proceed to have the motorcycle repaired and back to business and that the period of four (4) years used by the trial magistrate

was inordinately long. To support, its argument that the claim of loss of user must be specifically pleaded, the appellant relied on numerous cases among them; **Boston Wachira Kamangu v. Taifa Society Ltd & another (2016) eKLR** wherein the court cited the Court of Appeal decision in **Macharia Waiguru v. Murang'a Municipal Council and another (2014) eKLR**, **Siree v. Lake Turkana El Molo Lodges (2002) 2EA 521** and **Samson Kairu Chacha v. Isaac Kiiru King'ori (2016) eKLR**. In the case of Macharia (supra), the Court was of the view that the claim of loss of user is a special damage claim which ought to be specifically pleaded and proved. Same findings were made in the other cases.

4. The respondent on the other hand submitted that loss of use of a profit making chattel such as a motor vehicle is a claim in general damages and the standard of proof thereof is on a balance of probability. The respondent to support the argument cited the Court of Appeal in **Samuel Kariuki Nyangoti v. Johaan Distelberger (2017) eKLR** where it was so held. That the trial magistrate's assessment of damages was just and based on facts, principles of law as well as precedent. That where it is difficult to estimate the damage suffered, courts approximate the same. That the trial court computed the damages due to the respondent using four (4) years being the period between the institution of the suit and the date of the award for loss of the motor in question in accordance with the respondent's prayer.

5. The Court of Appeal in **Macharia Waiguru v. Murang'a Municipal Council & another (2014) e KLR** among other Court of Appeal decisions expressed the need to specifically plead and prove loss of user. the Court of Appeal in the recent case of Samuel Kariuki (supra) was of the view that the loss of use of a profit making chattel such as a lorry through an accident is similarly a claim in general damages just like in personal injury case. Following the latter case, it is noteworthy that the respondent proved that his motor cycle was used for transport business for which he got Kshs. 400 per day. I am further guided by the pronouncement of the Court in **Jebrock Sugarcane Growers Co. Ltd v. Jackson Chege Busi, Kisumu Civil Appeal No. 10 of 1919** (unreported) quoted with approval in Samuel Kariuki case thus:

> ***"The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages…Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess…"***

It is noted that the Respondent in his plaint had pleaded a sum for the loss occasioned to the motor cycle plus assessments fees all totaling Khs.67, 500/=. The loss of use per day was given by the trial magistrate at Kshs.300/= to be recovered for the four years the case took to be finalized. Indeed the Respondent must be believed to have been a businessman and as such he was not expected to just sit and wait for the determination of the case instead of doing what prudent people do. I find he was excepted to also try and mitigate his loss by repairing the damaged motor cycle. For him to just sit and wait for the determination of the case does not make business sense as the case could take an eternity. The Respondent did not also indicate whether he had taken out a comprehensive insurance cover for the motor cycle in which case his insurers would compensate him as they pursue the accident claim by way of subrogation. Even if the trial court felt that the Respondent was entitled to loss of user, I find the 4 years period was quite long. The Respondent was expected to have at least had his motor cycle repaired in a garage within a month at most and then be on the road to continue with his business but not just to sit and wait to reap from the alleged tort feasor. I find the daily loss of user in the sum of Kshs.300/= would be allowed for only one month thereby giving the Respondent a sum of Kshs.9,000/=. As the loss occasioned to the motor bike plus the assessment were pleaded in the sum of Kshs. 67,500/=, I find the total amount due to the Respondent should have been Kshs.76,500/= made up as follows:

(a) Special damages .....Kshs.67,500/=

(b) General damages for loss of user at

Kshs.300/= X30 days .....Kshs. 9,000/=

Total .....**Kshs.76,500/=**

The Respondent was to be awarded costs of the suit.

6. In the result the Appeal herein partly succeeds. The judgement of the trial court is hereby set aside and substituted with the following:-

(a) Special damages .....Kshs.67,500/=

(b) General damages for loss of user at

Kshs.300/= X30 days .....Kshs. 9,000/=

Total .....Kshs.76,500/=

The Respondent is award half costs in this Appeal and full costs in the lower court.

It is so ordered.

Dated and delivered at **Machakos** this **19th** day of **January, 2018**.

D. K. KEMEI

JUDGE

In the presence of:

N/A for Mwanzia - for the Appellant

N/A for Muumbi - for the Respondent

Kituva - Court Assistant