



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO. 236 OF 2017**

**SINOHYDRO CORPORATION LTD.....APPELLANT**

**VERSUS**

**GEORGE KISIVO MULEI.....RESPONDENT**

**JUDGMENT**

1. By a plaint dated 10/05/2010 the respondent lodged a claim for Kshs. 717,030. The respondent averred that on or about 01/03/2009 at 3.30 a.m., the Appellant/his driver/or agent/servant carelessly managed/drove motor vehicle KBB 254A causing it to crash into respondent's building causing extensive damages to the same.

2. He pleaded that the special damages incurred were:-

- a. Costs of repairs - Kshs. 440,330/=
- b. Lost income for 2 rooms - Kshs. 276,500/=
- c. Police abstract - Kshs. 200/=
- d. Total** **Kshs. 717,030/=**

3. The defendant opposed the claim via defence dated 02/06/2010. The defendant denied the accident occurred as alleged, denied the particulars pleaded even the claimed damages as pleaded.

4. After the full trial, the trial court awarded respondent Costs of repairs.

- i. Cost of repairs** - **Kshs. 440,330/=**
- ii. Lost income for 2 rooms** - **Kshs. 276,500/=**
- iii. Police abstract** - **Kshs. 200/=**
- iv. Total** - **Kshs. 717,030/=**
- v. Costs of the suit**

5. Being aggrieved by the above decision the appellant lodged appeal setting out the following grounds;

1. **THAT** the learned Trial Magistrate erred in law and in fact in failing to appreciate and consider the evidence before him and entering judgment against the respondent.

2. **THAT** the learned Trial Magistrate erred in law and in fact in finding the defendant liable to pay Kshs. 717,030/= to the plaintiff as pleaded in the plaint despite the respondent's failure to prove his case.

3. **THAT** the learned Trial Magistrate erred in law and in fact in failing to consider the defendant's submissions which clearly demonstrated that the plaintiff had failed to prove his case on a balance of probabilities.

4. **THAT** the learned Trial Magistrate erred in law and in fact in failing to appreciate that the respondent did not adduce sufficient evidence to prove his case and the appellant was therefore under no obligation to compensate the respondent.

5. **THAT** the learned Trial Magistrate erred in law and in fact in failing to critically examine the factual issues brought out in cross examination of the respondent's witnesses which established that the respondent did not have a valid case against the appellant.

6. **THAT** the learned Trial Magistrate's judgment was erroneous for failing to find that the respondent was guilty of fraudulent misrepresentation of material facts.

6. As a first Appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

#### **DUTY OF FIRST APPELLATE COURT**

7. The duty of the court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123** in the following terms:

*“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 (Abdul Hamed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”*

8. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

*“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”*

9. The appropriate standard of review established in these cases can be stated in three complementary principles:-

a. **First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**

b. **In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**

c. **It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.**

#### **EVIDENCE BY PLAINTIFF**

10. The plaintiff told the court that the defendant's motor vehicle veered off the road and crashed onto his building on the rear part thereby smashing one wall.

11. According to the plaintiff, two lodging rooms which were each earning him Kshs. 350/= per day were damaged. The plaintiff's manager reported the accident to the police. The plaintiff produced a police abstract and a receipt of Kshs. 200/= which he paid for the police abstract.

12. The plaintiff produced a demand letter dated 23/03/2009 written by his advocates of the defendant asking for compensation for the damaged premises. The plaintiff's advocates wrote a reminder to the defendants on 29/05/2009 which yielded no response.

13. The plaintiff says he decided to repair his premises and sought the services of Nzeveni Building Contractors who gave him a quotation of Kshs. 440,330/=.

14. The plaintiff produced the quotation for the works, an invoice asking for payment and a bundle of receipts for materials which were bought for the repair works. The plaintiff told the court that he paid Kshs. 440,330/= to have premises repaired.

15. The plaintiff produced a copy of records showing that motor vehicle Reg. No. KBB 254A belongs to the defendant. The plaintiff also produced a receipt for Kshs. 500/= which he paid to obtain the copy of records.

16. The plaintiff who had taken photographs of his damaged building produced the same in evidence. The plaintiff also produced statutory

licences covering the period when his premises were damaged showing that he was authorized to conduct the business of a restaurant.

17. It is the evidence of the plaintiff that his two damaged rooms were out of use for a period of fourteen (14) months.

18. The plaintiff's business manager who happens to be his son testified as PW2. PW2 told the court that he was sleeping within the plaintiff's premises on 01/03/2009 at around 4.00 a.m. when a motor vehicle crashed onto the premises.

19. PW2 was woken up by loud bang and he went out to check. PW2 found the defendant's pickup which had breached a wall and its front part was inside the building.

20. According to PW2, there were three occupants and when he tried to talk with the driver, he found him drunk and he was murmuring inaudibly. PW2 reported the incident to the police.

21. The next day the defendant's agents visited the plaintiff's premises and promised to repair the damaged part which promise was never kept by the defendant.

22. PW2 produced a register showing that the two damaged rooms were fully booked in the month of February, 2009.

23. PW2 produced duplicate receipts showing that the rooms were paid for during the above mentioned month. PW2 identified and produced photographs showing the damaged premises and the repair works that were done.

24. According to PW2, there were two lodgers inside the damaged room at the time of the accident but they were not hurt.

25. On cross examination, PW2 told the court that the defendant's driver smelled of alcohol and he was stammering in his speech.

#### **EVIDENCE BY DEFENDANT**

26. The defendant did not adduce any evidence in support of its case. Both parties filed submissions which I have read and taken into consideration.

#### **SUBMISSIONS BY APPELLANT**

27. It is the Appellant's submissions that the trial court thus misdirected him in the application of law in making the findings and dismissing the statement of defence filed therein.

28. From the evidence of PW1, the owner of the said premises he stated that he owned the said premises.

29. When the accident occurred he was not around and was informed by his manager, who was PW2. PW1 testified that the damaged cause to his lodging was for two rooms more particularly room 6B and 7B. The said rooms had double beds and fetched him Kshs. 350 per room.

30. The repairs were commenced and he was given a quotation of Kshs. 440,000/= by Nzeveni Building Contractors (PEX 4). He further stated the work was completed yet he could not remember how long it took.

31. PW1 was invoiced and he produced the invoice as PEXH 5, however no receipt for payment was produced to the Honourable Court as evidence of payment of the amount in the invoice.

32. P Exb 6 is a bundle of receipts for the materials which were bought for the repairs required.

33. Despite the respondent not remembering how long the repair works lasted, at page 81, lines 22-23 of the Record of Appeal, he testified that the damaged rooms were not used for a period of 14 months.

34. No evidence was produced before the Trial Court to show that indeed loss was incurred at the said lodge and further that income was lost. From the evidence before the Trial Court of PW2 at pages 82-85 of the Record of Appeal, lines 14-16 AT PAGE 83, all that was produced is a register that is marked X if occupied and O when empty.

35. This is not conclusive evidence of earning as the register can be marked by anyone and will not reflect the truth. This was not corroborated with bank or Mpesa statements to show loss of earning from the said rooms. Further the register did not have the name of the lodge, Maasai Inn, and its source is wanting.

36. Further at page 84 of the Record of Appeal, PW2 clearly stated that the receipt issued upon payments for accommodation, usually have the lodge's name.

37. However what was before the Trial Court were booklets and their source could not be traced or indicate who issued them.

38. Thus this could not have been used as evidence for loss of earning. Therefore the Trial Court misdirected itself as taking the same as the evidence for loss of earning.

39. The Trial Court failed to appreciate the fact that no evidence was adduced to prove loss of earning by the respondent. Thus the award for Kshs. 276,500/= had no basis and the same should not have been awarded in the first instant.

40. Section 107 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.”***

41. The appellant relies on the case of **EQUITY BANK LTD –VS- GERALD WANG’OMBE THUNI [2015] eKLR**, Judge Ngaah Jairus in conclusion to this matter stated that;

***“It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given.”***

42. Further the judge went ahead to state that;

***“.....what this boils down to is that the learned magistrate’s award for loss of user was based on speculation and his own hypothesis of the trade customs in the motorcycle transport business. By taking this path the learned magistrate erred in law and arrived at the wrong conclusion. Special damages, as noted, must be specifically pleaded and proved; they cannot be awarded on the basis of speculation and conjecture.”***

43. Further, from the evidence before the Trial Court by PW2, he stated that there are about 15 lodges within the area. In addition, on the material date of the accident, the damaged rooms were not occupied.

44. It is submitted that the Trial Court misdirected itself in finding that the respondent’s claim that his lodge was always fully occupied. This was on speculation as no evidence was produced to corroborate the allegations.

#### **GROUND 5 AND 6 OF THE MEMORANDUM OF APPEAL**

45. It is submitted that, the respondent was guilty of fraudulent misrepresentation of material facts in that; he filed a fraudulent claim on costs of repairs, materials and labour. Further the respondent exaggerated the costs of repairs for the said rooms that were damaged. For example the respondent claims to have bought 100 iron sheet, 100 liters of paint to repair the said two rooms.

46. It is submitted that if the Trial Court had critically examined this evidence, it could have realised that the materials allegedly bought are enough to roof and paint a five bedroom mansionette house.

47. It is submitted that to prove the respondent filed a fraudulent claim, it should be noted that the accident occurred in March 2009. The receipt for materials and quotation for renovation show that they were issued in March and April, 2010. This was 1 year after the accident.

48. Its trite law that he that alleges must prove and the respondent has failed to prove its claim and opted to file a fraudulent claim.

#### **SUBMISSIONS BY RESPONDENT**

49. It is submitted that, the Defence filed by the Appellant contained mere denials and the Appellant never tendered any evidence.

50. It is contended that the awarded damages is reasonable as the trial magistrate applied all relevant principles and made no error in the award.

51. The award of damages is at the discretion of the court and there are set guidelines with regards to the award and in the present instance it is the Respondents case that the damages so awarded by the trial court was a s a result of the evidence tendered which the court took into account and the established principles for awarding damages given uncontroverted evidence given by the respondent as regards to the liability of the appellants.

52. The principles set out that guide the award of damages are such as they are meant to compensate a party for the loss suffered and should be commensurate to the injuries and the damages suffered.

53. Further, the principle on the quantum of damages is such that an appellate court will not ordinarily interfere with the findings of a trial court on an award of damages.

54. This is the general principle to be found in **Rook Vs Raiunie[1941] ALL ER 297** and adopted with approval by the Court of Appeal in **Butt Vs Khan [1981] KLR 349** that (per Law JA:

***“.....an appellate court will not disturb an award of damages unless it is as inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.....”***

55. It is urged that the court not to interfere with the findings by the trial court as the damages so awarded to the respondent were deserved in view of the fact that they were specifically pleaded and proved in the respondent's pleadings filed at the lower court and during the hearing which the appellant's had a chance to cross examine the respondents witness.

56. In the case of Dumez (Nig) Ltd Vs Ogboli [1972] 3 S.C. Page 196. Per BADA, J.C.A (P. 28, paras. C-G) the court stated that;

*i. "It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial court unless:- (a) where the trial court acted under a mistake of law; or (b) where the trial court acted in disregard of principles; or (c) where the trial court took into account irrelevant matters or failed to take into account relevant matters; or (d) where the trial Court acted under a misapprehension of facts; or (e) where injustice would result if the Appellate Court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

57. Further in the case of Kivati -vs- Coastal Bottlers Ltd Civil Appeal No. 69 of 1984 the Court of Appeal held that;

*i. "The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."*

58. In the case of Ken Odondi & two others Vs James Okoth Omburah t/a Okoth Omburah & Company Advocates Court of Appeal, Kisumu, CA No. 84 of 2009, the court stated as follows:-

*"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."*

#### ISSUES ANALYSIS AND DETERMINATION

59. After going through the pleadings, evidence on record and the parties submissions, I find the issues are;

*i. Whether the respondent proved his case on balance of probabilities on liability and on damages awarded?*

*ii. What is the order as to costs?*

60. The plaintiff told the court that the defendant's motor vehicle veered off the road and crashed onto his building on the rear part thereby smashing one wall.

61. According to the plaintiff, two lodging rooms which were each earning him Kshs. 350/= per day were damaged. The plaintiff's manager reported the accident to the police. The plaintiff produced a police abstract and a receipt of Kshs. 200/= which he paid for the police abstract.

62. The plaintiff produced a demand letter dated 23/03/2009 written by his advocates of the defendant asking for compensation for the damaged premises. The plaintiff's advocates wrote a reminder to the defendants on 29/05/2009 which yielded no response.

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65. The plaintiff produced a copy of records showing that motor vehicle Reg. No. KBB 254A belongs to the defendant. The plaintiff also produced a receipt for Kshs. 500/= which he paid to obtain the copy of records.

66. The plaintiff who had taken photographs of his damaged building produced the same in evidence. The plaintiff also produced statutory licences covering the period when his premises were damaged showing that he was authorized to conduct the business of a restaurant.

67. It is the evidence of the plaintiff that his two damaged rooms were out of use for a period of fourteen (14) months. The plaintiff's business manager who happens to be his son testified as PW2. PW2 told the court that he was sleeping within the plaintiff's premises on 01/03/2009 at around 4.00 a.m. when a motor vehicle crashed onto the premises.

68. PW2 was woken up by loud bang and he went out to check. PW2 found the defendant's pickup which had breached a wall and its front part was inside the building. According to PW2, there were three occupants and when he tried to talk with the driver, he found him drunk and he was murmuring inaudibly.

69. PW2 reported the incident to the police. The next day the defendant's agents visited the plaintiff's premises and promised to repair the damaged part which promise was never kept by the defendant.

70. PW2 produced a register showing that the two damaged rooms were fully booked in the month of February, 2009. PW2 produced

duplicate receipts showing that the rooms were paid for during the above mentioned month. PW2 identified and produced photographs showing the damaged premises and the repair works that were done.

71. According to PW2, there were two lodgers inside the damaged room at the time of the accident but they were not hurt. On cross examination, PW2 told the court that the defendant's driver smelled of alcohol and he was stammering in his speech.

72. Despite filing defence the appellant never tendered the evidence in rebuttal to the plaintiff evidence thus the court was justified in holding the appellant 100% liable for the accident.

73. On quantum, the respondent pleaded special damages for repair expenses including labour and materials plus loss of earning.

74. The court is guided by the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777**. where the Court expressed itself clearly thus:-

*'the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'*

75. On loss of earning, the evidence was that the 2 lodging rooms were being paid for Kshs. 350/= per night and the repairs took 14 months thus claim for the entire period. License to run business was produced for the entire period. Of course the appellant is right in questioning the absence of financial records, banking records or even income tax payment and returns for the business.

76. However it is not rebutted that the 2 rooms damaged were being used for lodging business and that they were repaired and thus loss of user for the period of repair. However the period of repair stated to be 14 months was not proved and even if it was proved, the respondent ought to have mitigated the losses by expediting the repairs.

77. In the case of **African Highland Produce Ltd V John Kisono CA 264/99 [2001] e KLR** the Court of Appeal held that:

*"The trial judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff was only entitled to loss of user for 21 days which period was necessary to effect in full all repairs on his BMW car. The judges of appeal allowed the appeal on the ground that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. The court further stated that the question of what a plaintiff would do in mitigation of loss or damages is not a question of law but one of fact in the circumstances of each case and the burden of proof is upon the defendant. (See also Halsbury's Laws of England VOL 11 page 289 3rd Edition 1955.)"*

78. The Court of Appeal in the above case further stated that:

*"it was 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 damages of any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by breach of contract or a tort, and he is then bound to get, as best as he may, not only in his own interest 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 payable by the wrongdoer. He need not spend money to enable him to minimize the damages, or embark on dubious litigation. The question of what is reasonable for the plaintiff to do in mitigation of his damages being one of fact and not law, and depending on the circumstances of each particular case- and the burden of proof being upon the defendant."*

79. Thus the court finds that a period of 6 months would have been more than enough and accordingly loss of earning is adjusted to 6months period.

80. As for the repair expenses, the plaintiff produced the quotation for the works, an invoice asking for payment and a bundle of receipts for materials which were bought for the repair works. The plaintiff told the court that he paid Kshs. 440,330/= to have premises repaired.

81. The Appellant failed to produce evidence to the contrary nor did he take initiative to get his own quotation. The trial court was thus justified in awarding the same claim as pleaded, and proved.

82. Thus the court makes the following orders;

**1. Appeal is allowed on award of the loss of earning which is adjusted accordingly to 6 months times 350 per day times 2 rooms - total Kshs. 126,000/=.**

**2. The appeal on repair charges Kshs. 440,330/= fails.**

**3. Global amount Kshs. 566,330/=.**

**4. The Appellant to get  $\frac{1}{3}$  of Appeal costs.**

SIGNED, DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF JUNE 2018, IN OPEN COURT.

.....

C KARIUKI

JUDGE