REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 16 OF 2013

THE KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

QUENTIN WAMBUA MUTISYA T/A BONDENI WHOLESELLERS...RESPONDENT

(Being an appeal from the judgement of Honourable L. Simiyu (Ms) Resident Magistrate delivered in Machakos on 9th January, 2013 in Machakos CMCC No. 504 of 2008)

BETWEEN

QUENTIN WAMBUA MUTISYA T/A BONDENI WHOLESELLERS.....PLAINTIFF

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

JUDGEMENT

Plaintiff's Case

1. By an amended plaint filed in August, 2009, the Respondent herein, **Quentin Wambua Mutisya** , **T/A Bondeni Wholesalers,** who was the Plaintiff in the Court below, sued the Appellant herein, **The Kenya Power & Lighting Company Limited,** the Defendant in the Court below, seeking a declaration that the disconnection of power supply on account No. 0122990-01 was illegal; a mandatory injunction enjoining the Appellant, its agents or servants to reconnect electricity power supply to account No. 0122990-01; Kshs 8,000.00 and General Damages plus Costs.

2. According to the Respondent, he was the account holder No. 0122990-01 (hereinafter referred to as "the Account") with the Appellant for the supply of electricity at his butchery business establishment in Machakos Town and that he faithfully and always paid all the electricity bill to the Appellant.

3. However on 10th April, 2008, the Appellant served on the Respondent an alleged bill of Kshs 71,570.61 over account No. 1145721, which was very distinct from the Respondent's Account. Upon vising the Appellant's offices for clarification, he Respondent was assured that all was well and that it was an error. However, it was pleaded that on or about 23rd April, 2008, the Appellant illegally, unlawfully and maliciously disconnected the Respondent's electricity power supply over an alleged accumulated bill on his account. The said electricity was however reconnected on or about 24th November, 2008 after these proceedings were instituted on 10th May, 2008.

4. It was the Respondent's case that as a consequence of the unlawful disconnection, the Respondent incurred loss and damages which he particularised as loss of business and costs of spoilt goods of trade.

5. In her evidence, the Respondent averred that she was a businessman running a hotel and engaged in transport business and that his business was known as Bondeni Wholesalers which was carried on Plot No. 909/663 along Machakos Kitui road in Machakos Town. According to him, in his butchery he was selling minced meat which was prepared using an electronic machine. He averred that there was electricity connection/supply to the premises by the Appellant herein being Account No. 0122990-01 in the names of Bondeni Wholesalers.

6. According to the Respondent, on 10th April, 28, he was brought a printout from the Appellant on account No. 114572-01 with the account holder indicated as **M. Kinuthia** in which it was demanded Kshs 71,570.61 being unpaid bills. According to the Respondent the said **M. Kinuthia** was his father and held a separate account. Upon visiting the Appellant's Machakos branch to inquire, the Respondent was informed that the bill was claimed by mistake as it had no relationship with his business. The said printout was produced as exhibit 1.

7. However on 23rd April, 2008 at about 4.30pm an office from the Appellant went and disconnected the Respondent's meter from his said account and this was done in his presence. The following day, the Respondent visited the Appellant's offices but the Appellant insisted that unless the account No. 114572-01 was cleared power would not be connected to his business. In the Respondent's evidence, he had in fact overpaid on his said account No. 01122990-01 and had a credit of Kshs 1,278.30 and he produced a printout in support f this contention as exhibit 2.

8. It was the Respondent's evidence that by the time of the said disconnection, he had cleared all the sums due but the Appellant declined to reconnect his power. He accordingly instructed an advocate to make a demand which was done vide a letter dated 26th April, 2008 which was produced as exhibit 3. This demand did not however elicit any action and this suit was thereby provoked. However he obtained an order from the Court for reconnection of electricity which was eventually done.

9. According to the Respondent, his business was in the premise belonging to his father and that earlier on they used to share the bill with **Mike Kinuthia**, his brother vide account No. 199408860. However on 2nd Jul, 1996 the Respondent applied for meter separation on Plot No. 969/605 which application was responded to and he was issued with Account No. 01122990-01 and meter No. 0114572-01 and the first bill issued on 11th June, 1997. Accordingly he produced the letter responding to his application and two said bills as exhibits 5-7

10. The Respondent therefore claimed loss for the business incurred during the period of disconnection when the business was closed which according to him amounted to Kshs 480,000.00 which according to him was the average for the months he worked. In his evidence he lost Kshs 123,435.00 per month and he produced his daily records as exhibit 8.

11. In cross-examination, the Respondent disclosed that the business premises belonged to his father, **Mutisya Kinuthia** but he had his account No. 01122990-01 for his business which he got in 1997 after applying for separation of the meter and paying Kshs 3,000.00 for separation and Kshs 1,500.00 for the meter deposit. According to him he signed documents at the Appellant's offices which he read and understood before doing so. He was however unaware of the provisions of the ***Energy Act*** and ***Electricity Act***.

12. The Respondent insisted that as at the time of the disconnection his account was overpaid but the Appellant insisted that he would only be supplied if the amount demanded of Kshs 71,570.00 was cleared. He was however unaware if the same was cleared. According to him he was solely running his business and was unaware if a bill on the premises could lead to his meter being disconnected since it was not a term in the form he signed. He however confirmed that he did not seek the services of an accountant in preparing his records.

Defence Case

13. In its amended defence, the Appellant apart from general denial of the averments in the amended plaint, averred that the Respondent was indebted to the Appellant for the sum claimed hence the Appellant was lawfully justified to disconnect the said power supply in accordance with its legal and contractual mandate.

14. It was its case that as the Respondent or his agent admitted liability for the bill the suit had no basis. The Appellant further denied that the Respondent suffered the damage alleged and that a demand and notice of intention to sue was issued. It further challenged the jurisdiction of the Court and prayed that the suit be dismissed with costs.

15. In support of its case, the Appellant called one **Justus Kisoi Muli**, its debt Controller based in Machakos are as its witness who testified as DW1. According to his witness the Respondent had 2 stores using an original meter to **Mutisya Kinuthya** but he was the contract holder. Later there was an application by Bondeni for meter separation which was done in 1997. Accordingly, the Respondent's account number 114572-01 ceased to exist and account no. 122990-01 became the new 2nd account. According to him the normal procedure is that the customer is visited and given a contract for to be filled in. According to him, the law is that the whole premises could be disconnected in accordance with section 61(1)(a) of the then ***Electric Act,*** now known as ***Energy Act***. It was his evidence that disconnection could be on account of a pending meter. A blank contract form was produced as DEx1.

16. According to the witness before disconnection, the Appellant had communicated to the occupants and that it had assigned a debt collector to collect the same. It was his evidence that the debt collector issued a demand which was not acted upon. As per their records, the debt was paid by a card on ATM machine on 24th August, 2009 which in his opinion was an admission that there was a debt. He produced the evidence of payment as Dex2. Upon clearance of the debt, he averred that **Michael Mutisya Kinuthya** the customer no. 2 on account No. 114572-02 was contacted. According to his evidence as at the time of his testimony, the bill was Kshs 1,444.89 for the 2nd Customer and he produced the same as Dex3 on account No. 114572-02

17. It was the witness's evidence that there was no malice on the part of the Appellant but it was only an issue of unpaid bill and fraudulent tampering with the meter, which information had already been notified to the owners who did not notify the customers. It was his case that the separation of the meter occurred during the time when the meter tampering happened. It was therefore his evidence that the Respondent and his brother were running away from a debt they knew they owed. He produced the demand letter as Dex4 and asked the Court to dismiss the case as all issues had been sorted out.

18. In cross-examination, the witness admitted that by 1997 only one meter served the whole premises. However an application for separation was made in 1997 upon which the Respondent was issued with account 114572 and 122990-01 was allocated to Bondeni Wholesalers. However he admitted that on 23rd April. 2008, the said account 122990-01 was disconnected though the debt on the said account had different entities. He reiterated that the demand letter was issued for **Kinuthya'a** account but was not cleared.

19. In re-examination the witness insisted that the disconnection of the whole premises was in accordance with the law due to the fact that there was a debt.

The Judgement

20. Upon consideration of the evidence the Learned Trial Magistrate found that upon the separation of the meters in June 1997, the two brothers parted ways and the Appellant contracted them separately hence the Respondent was only liable for account 0122990-01 which had a prepayment. Accordingly any alleged arrears had no relationship with the Respondent's business. He further found that the issue of meter tampering had nothing to do with the Respondent. It was therefore found that the Appellant had no reason to disconnect the Respondent's account hence the said action was illegal and a breach of contract between the Respondent and the Appellant.

21. As regards the provisions of the Energy Act, the Court found that the same were not operational in 1997. In any case the Respondent was not in arrears. Having found that the disconnection was illegal, the Court proceeded to hold that though in a suit for breach of contract general damages are not claimable, special damages fall under the realm of specific pleading and strict proof. On a balance of probabilities the Court found that Pex8 showed how the Respondent carried on business. The Court accordingly found that the Respondent incurred loss of Kshs 123,435.00 per month hence was entitled to Kshs 480,000.00 for the period from 23rd April, 2008 to 23rd November, 2008.

The Appeal

22. Aggrieved by the said decision, the Appellant has preferred the instant appeal in which it has raised the following grounds of appeal:

> **a. That the learned trial magistrate court erred in fact and in law in finding that there was an illegal disconnection of electric power supply.**
>
> **b. The learned magistrate erred in fact and in law in awarding special damages of Kshs. 480,000/= which amount was not properly proved at trial.**
>
> **c. That the learned magistrate grossly misdirected herself as to the principles applicable in awarding special damages and thereby arrived at an erroneous finding that the special damages of Kshs. 480,000/- had been proved.**
>
> **d. That the honourable magistrate failed to appreciate that the Plaintiff was not an expert witness to tender his own accounts.**
>
> **e. The honourable magistrate erred in law and fact by ignoring the evidence and submissions adduced by the Appellant respectively.**
>
> **f. The judgment and order of the magistrate is against evidence before her.**

23. In its submissions, the Appellant contended that the Respondent failed to prove special damages of Kshs. 480,000/- since it was not just sufficient to write down the figure and produce the records which do not show any loss as there are no proven accounts to support the record. In the Appellants submissions, proper accounts would have shown the whole business transaction for example entry of items bought, payment for services. They would be supported by primary documents such as local purchase orders and receipts. They would show the tax payable and reflect the gross profit, net profit or loss. They would be then subjected to an audit. In this respect the Appellant relied on **Shabani vs. Nairobi City Council (1982-1988)1 KAR 681** and **Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991.**

24. It was further submitted that the Plaintiff failed to prove that he had made any tax declaration for the year 2008 to prove her loss.

25. As regards declaratory orders, it was submitted that the issue of jurisdiction is two-fold. First jurisdiction to entertain the claim and if yes whether the court had jurisdiction to issue a declaratory order as sought in the plaint. According to the Appellant, pursuant to the provisions of section 61(3) of the ***Energy Act 2006***, the jurisdiction to entertain disputes on energy charges is vested in the Energy Regulation Board and in this respect the Appellant relied on **Machakos High Court Civil Case Number 100 of 2008 - Dorcas Mbathi vs. Kenya Power Lighting company Limited** where **Nyamweya, J** was faced with a similar matter declined to entertain the matter for want of jurisdiction and referred the matter to the Energy Regulation Board.

26. According to the Appellant, a subordinate court has no jurisdiction to hear declaratory suits and reliance was placed on **Stallion Insurance Company Ltd vs. David K. Nthuku [1997]** where **Etyang, J** held that a subordinate court has no jurisdiction to hear declaratory suits as well as Kisumu Appeal no. 147 of 2009 - **Secretary Kateng Association vs. Grace Ayugi & Marcella Mahulo,** where it was held that any decision made without jurisdiction would be null and void.

27. In the Appellant's submission, since the bill had accrued long before meter separation on Plot No.969/605, the Plaintiff's account was subject to disconnection since the original meter had an outstanding bill.

28. The Appellant therefore prayed that the appeal be allowed.

Respondent's Case

29. The appeal was opposed by the Respondent.

30. According to the Respondent, he gave consistent and reliable evidence before the trial court that there was a contract between him and the Appellant for supply of electricity power to the Respondent's business premises. He proved that he had been issued with his own

Electricity Meter whose Account Number is 0122990-01 after Electricity Meter Account Number 199408860 which he shared with his brother ***Michael Kinuthia*** was separated in the year 1997 and every one was given his own separate meter after contracting separately with the Appellant. It was submitted that the Respondent led consistent and reliable evidence that since the year 1997, he used to service his Electricity Meter Account Number is 0122990-01 and at the time of Electricity disconnection by the Appellant, the Meter was in good working condition and had not been tempered with. The Respondent's was therefore liable for any unpaid electricity bills in relation to Electricity Meter Account Number is 0122990-01 from the year 1997. The Respondents Account was prepaid on the date of disconnection of Electricity power by the Appellant. The Respondent therefore proved that he had no outstanding and/ or unpaid electricity bill with the Appellant.

31. According to the Respondent, the Trial Magistrate addressed herself in depth and properly on this issue in analysing the evidence on record and the exhibits produced before her in her Judgment and found that the disconnection of electricity supply to the Respondent's business which solely relied on electricity to operate by the Appellants on 23.4.2008 was illegal and/ or in total breach of the contract between the Appellant and the Respondent. It was therefore submitted that the trial Magistrate was right to find that the Appellant's disconnection of Electric Power to the Respondent's business was unlawful and illegal.

32. As to whether special damages of Kshs. 480, 000.00 was properly proved at trial and if the Trial court was right in awarding the same to the Respondent, it was submitted that it is trite law that the general principle applicable in considering an appeal on quantum is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where trial judge in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. In this respect the Respondent relied on **Oyugi Judith & Another vs. Fredrick Odhiambo Ongong & 3 others [2014] eKLR** where the Honourable Court was guided by the holding of the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5.**

33. According to the Respondent, in Special Damages, it is a well settled principle of law that they must be specifically pleaded and proved for a court of law to award them to a party. In the instant Appeal, Special damages were specifically pleaded as required by the law in the Amended Plaint annexed to the Application dated 13.3.2009 since the application was allowed as prayed by consent of the parties on 22.6.2009 and the Amended Plaint deemed as duly filed. It was therefore submitted that the trial Magistrate made no error in concluding that Special Damages were specifically pleaded.

34. According to the Respondent, the Special Damages were specifically proved as required by the law during the hearing. The Respondent led consistent and reliable evidence that his business solely depended on power supply which was illegally and unlawfully disconnected. The Respondent gave evidence that due to the power disconnection by the Appellant, he suffered loss of income of Kshs. 123, 435.00 per month. It was the Respondent's further evidence that for the period the electricity power remained disconnected between 23.4.2008 and 23.11.2008, he suffered a total loss of Kshs. 480, 000. The Respondent produced PExhibit No. 8 to prove this. The Appellant did not tender any evidence before the trial court to challenge the Respondent's evidence that he incurred loss of Kshs. 480, 000 due to electricity disconnection to his business. According to the Respondent, the Trial Magistrate analysed this issue in depth together with the evidence on record and concluded that special damages of Kshs. 480, 000 had been specifically pleaded and proved on a balance of probabilities.

35. It was submitted that since the standard of proof in civil cases in on a balance of probabilities, the Respondent proved his case on a balance of probabilities before the trial court. In this regard the Respondent relied on **Nkuene Dairy Farmers Cooperative Society Ltd & Another vs. Ngacha Ndeiya [2010] eKLR**.

36. It was therefore submitted that the Trial Magistrate was right in concluding that special damages of Kshs. 480, 000 had been specifically pleaded and proved on a balance of probabilities and awarding the same to the Respondent.

37. On the issue whether the Trial Court considered the evidence on record off both the Appellant and the Respondent and their submissions in making her findings, it was submitted that the trial Magistrate analysed and considered the evidence presented before her by both parties in determining the suit that gave rise to this Appeal. She addressed four issues in evaluating the evidence on record and in making her determination in her Judgment. Some prayers by the Respondent prayers prayed by the Respondent were denied like the prayer of General damages. To the Respondent, since she considered the evidence presented before her and the submissions of both parties in making her determination in her Judgment.

38. It was therefore submitted that as the Judgment of the Court was a fair Judgment arrived at based on the facts and evidence presented before her, this appeal is devoid of merit and the same ought to be dismissed with costs to the Respondent.

Analysis and Determinations

39. 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."**

40. 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.

41. 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 circumstances 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 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."**

42. In this case, the Respondent's undisputed case was that though initially, the Respondent shared Electricity Meter Account Number 199408860 with his brother, **Michael Kinuthia**, in 1997 he applied for the separation of the said account and as a result he was issued with his own Electricity Meter whose Account Number is 0122990-01. Accordingly, each of them was given separate meter after contracting separately with the Appellant. According to his evidence which was undisputed as at the time his power supply was disconnected his account was in credit. This was largely undisputed save that the Appellant contended that since the former account was in arrears, the Appellant was entitled to disconnect the Respondent's supply. In this respect the Appellant relied on section 61(1)(a) of the repealed ***Electric Act,*** now known as ***Energy Act***. That section however applied to bulk supply licensee. It has not been shown that the Respondent fell within the description of a bulk supply licensee in order for the section, even if relevant to apply to the Respondent. That section cannot therefore be of any assistance to the Appellant. As regards the issue whether the dispute ought to have been referred to the Energy Regulation Board, it has not been shown to me that the said Board has the powers to issue declaratory orders. Even if it does, the legal instrument relied upon for that contention, the Energy Act, was not in existence at the time the cause of action arose. Accordingly, that ground fails.

43. It was further contended that there was tampering with the electricity meter. However, there was no evidence that it was in fact the Respondent's meter that was tampered with. In any case, the reason for the disconnection was not the tampering by the failure to settle the bill. Accordingly tampering cannot be a valid ground for the disconnection of the supply.

44. For my part I have re-evaluated the evidence adduced before the Court below and I am satisfied that the Learned Trial Magistrate analysed the evidence before her and arrived at the correct decision that the Appellant had without any justifiable reason breached the contract between it and the Respondent.

45. Was the Respondent entitled to the declaratory order sought? It was contended that the Learned Trial Magistrate had no jurisdiction to issue a declaratory order based on the decision in **Stallion Insurance Company Ltd vs. David K. Nthuku [1997].** That was a decision of the High Court. However in **Corporate Insurance Company Ltd. vs. Elias Okinyi Ofire Civil Appeal No. 12 of 1998 [1999] 2 EA 61** the Court of Appeal held that:

> **"…as there is a certain amount of uncertainty in the profession as to whether or not a declaratory suit, such as was filed in the Senior Principal Magistrate's Court, could be filed in the magistrate's court we find it necessary to deal with the point. Mrs. Nyaundi for the appellant argued that it was a matter of notoriety that such cases can only be filed in the High Court. She quoted no authorities to support her proposition. It is true that there is such a general belief as urged by Mrs. Nyaundi. But that is not correct. *Section 3(1)(c) of the Judicature Act, Cap. 8 Laws of Kenya,* gives the High Court and all subordinate courts power to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897. "Court" as defined in the Civil Procedure Act means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. "Suit" as defined in the Civil Procedure Act means all civil proceedings commenced in any manner prescribed. Order II rule 7 of the *Civil Procedure Rules* reads:**
> **'7.No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right'**
>
> **As "Court" includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject-matter is within the jurisdiction of that court."**

46. Therefore the ground challenging the jurisdiction of the Learned Trial Magistrate to make a declaratory order must fail.

47. It was contended that the Respondent did not prove the loss claimed. According to the Appellant, proper accounts would have shown the whole business transaction for example entry of items bought, payment for services. They would be supported by primary documents such as local purchase orders and receipts. They would show the tax payable and reflect the gross profit, net profit or loss. They would be then subjected to an audit. It is trite that for the plaintiff to be entitled to special damages, which loss of income is, the same must be specifically pleaded and strictly proved. This was the position in **Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991,** where it was held that:

> **"Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved."**

48. However, it was held in **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269**, that:

> **"Whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done."**

49. The same Court, while relying on **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992** similarly held in **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98** that although special damages must be specifically pleaded and strictly proved the degree of certainty and particularity depends on the circumstances and the nature of the acts complained of.

50. In this case the Respondent's business was one of preparing and selling minced meat. He produced records from his said business which were admitted in evidence by consent. Based on the said evidence I am not prepared to interfere with the finding of the Learned Trial Magistrate on that issue. In this respect I agree with the decision in **Nkuene Dairy Farmers Cooperative Society Ltd & Another vs. Ngacha Ndeiya [2010] eKLR**, that:

> **"…special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty…In the result we agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim. We dismiss this appeal with costs to the respondent.''**

51. In arriving at this decision the Court relied on **Bowen, LJ**'s holding in **Ratcliffe vs. 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."**

52. In my view the mere fact that the Respondent did not call an accountant cannot be a basis for not compensating him for the loss he sustained as a result of the Appellant's wrongful action.

53. Was the loss pleaded? On 22nd June, 2009, the Learned Trial Magistrate allowed the application dated 13th March, 2009 by consent of the parties. That application sought that leave be granted to the plaintiff to amend the plaint. And that the annexed amended plaint be deemed as duly file and served upon payment of the requisite court fees. However, the only amended plaint that was paid for was filed on 14th August, 2009. In that pleading, the loss of hearing was to be computed at the hearing as well as the cost of the spoilt goods of trade. In his prayers, the Respondent specifically sought Kshs 8,000.00. and general damages. The Court however, rightly in my view, declined to award general damages. Therefore whereas the draft amended plaint annexed to the application to amend the plaint, the Respondent indicated that he was seeking Kshs 480,00o.00, in the amended plaint which was filed pursuant to the Court order, only Kshs 8,000.00 was claimed. In my view the draft amended plaint was not the amended plaint and could not be the basis for the award. In this case, the Respondent made specific pleading and that was the plea which he was entitled to. The mere fact that the Respondent indicated in his properly amended plaint that the particulars of loss would be furnished at the hearing did not entitle him to adduce evidence in support of a claim other than the one he had specifically pleaded. He could only do so by amending his pleading. In **Justine Byahurwa Alima vs. Kenya Bus Service Ltd. & Others Nairobi HCCC 346 of 1987, Githinji, J** (as he then was) held that since special damages must be pleaded with as much particularity as the circumstances permit, it is not enough to simply aver that special damages will be supplied at the hearing. On its part the Court of Appeal in **Central Bank Of Kenya vs. Martin King'ori Civil Appeal No. 334 of 2002** held while citing **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992** that:

> **"There can be no argument that the pleading particularised in the plaint was in the nature of special damages since these were damages relating to past pecuniary loss calculable at the date of the trial. The law on such pleading is now trite that the same must be pleaded with as much particularity as circumstances permit and it is not enough to simply aver in the plaint that the particulars of special damages are to be supplied at the time of trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars."**

54. As the only amount that was pleaded with particularity in the amended plaint was Kshs 8,000.00, that was the only amount the Respondent was entitled to.

55. In the premises this appeal succeeds to the extent that the award of Kshs 480,000.00 being special damages is hereby set aside and is substituted therefor an award of Kshs 8,000.00 with interests at Court rates from the date of filing of the suit till payment in full. The costs in the Court below are also awarded to the Respondent. There however will be no order as to the costs for this appeal.

56. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of July, 2018.

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey