



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 98 OF 2010

HOME GROWN(K) LTD CO LTD & ANOTHER.....APPELLANT

VS

IBRAHIM GITONGA MURAGURI.....RESPONDENT

JUDGMENT

HomeGrown(K) Ltd and Geoffrey Mutwiri were sued by Abraham Gitonga Muraguri in Meru Chief Magistrates court C.C. No. 432 of 2009 for special and general damages together with costs and interest.

The claim arose out of a Road Traffic Accident where the plaintiff Motor vehicle Registration KAC 595 U Mitsubishi Canter was hit by Motor vehicle Registration KAT 976 U Scania lorry which according to plaintiff belonged to the 1st defendant and was negligently, carelessly, recklessly and/or dangerously driven, managed and/or controlled by the 2nd defendant thus causing the accident. Particulars of negligence and damages were stated in plaint dated 1st September 2009.

From the judgement of the lower court in C.C No. 432 of 2009 it is indicated that consent on liability was entered at 85% to 15% against defendant and in favour of plaintiff and therefore the only issue for determination in the suit has special damages. The trial Magistrate found that the plaintiff had proved he had bought spares, repaired the vehicle at Kshs 175, 900/=. The trial Magistrate also found the plaintiff had established loss of user of Kshs 4500 for 36 days which totalled to Kshs 162,000/=. It was also established that the plaintiff had paid Kshs 40,000/= to Standard Assurance Co Ltd in respect to excess; transport charges of Kshs 640/= were also awarded.

Judgement of Kshs 378,540 less contributory negligence of 15% came to 321,759 together with costs of the suit and interest on the judgment sum.

The defendant/Appellant herein successfully applied for stay of execution as the judgement in C.C. No. 432 of 2009 pending hearing and determination of appeal on condition that decretal sums of Kshs 448,876/= is deposited in joint interest earning account in the names of the advocates for the parties within 21 days.

The appellants in their grounds of appeal in the Memorandum of Appeal dated 7th September 2010 said the damages awarded were not specifically pleaded and strictly proved.

THAT award of Kshs 175,900/= for cost of repairs and Kshs 162,800/= for loss of user were not specifically pleaded and strictly proved;

THAT the learned Magistrate erred in law in awarding Kshs 40,000/= as excess paid to Standard Assurance while the same was not strictly proved.

THAT the Learned Magistrate erred in law and fact by entering judgement against the appellant against the weight of evidence. It was appellants prayer that appeal be allowed; the judgment delivered in favour of the plaintiff /Respondent on 27th August 2010 and the resultant decree be vacated and replaced with an order dismissing the plaintiff/Respondent's claim;

THAT the Respondent do pay appellants cost of the appeal and costs in the subordinate court. The appellants counsel in submission argued that special damages were not specifically pleaded and strictly proved and the appeal should be allowed.

He relied on several legal authorities to restate this principle and in particular **C.A Case No. 283 of 1996 – David Bagine vs Martin Bundi** where it was held inter alia that loss of user is what the claimant suffers specifically and it can't be equated to general damages to be assessed in the general phrase "doing the best I can". Those damages must be strictly proved.

It was submitted there were no record expenditure produced and the Respondent didn't show he used to bank income from the vehicle in question. Referring to the case of **Eliud Mumaju Sabuni vs KCB (H.C.C. No. 37 of 2000 at Bungoma – unreported)** and **Herbert Hanks Amrith Singh C.A No. 42 of (1983), KAR 738** lack of proof of daily income and daily loss was not allowed as the Respondents also had a duty to mitigate loss by repairing motor vehicle within reasonable time to mitigate damages. It was argued that award for loss of user made by the trial magistrate was a product of speculation. It was argued that there was no legal basis the learned trial magistrate used to adopt an average sum of Kshs 4,500/= as there was no evidence the plaintiff/Respondent used to earn Kshs. 6000/= or Kshs 4500/=.

In the case of **Mathew Mutua vs Car & General Ltd (2000) eKLR**, while quoting with approval the case of **Charles Thande vs Sisto & Murunga Danyi & 3 others C.A No. 192 of 1992** where Shah Judge of the Court of Appeal went to the extent of saying that in the absence of specific pleading of special damages such a claim cannot be allowed even if not objected to by the other side.

Appellants counsel argued that for transport charges Kshs 650/= was awarded instead of 640/= which was proved. it was also submitted that evidence of Excess paid to Standard Assurance was Exp5 which was actually written "with compliments and not receipt usually issued by Standard Assurance Co. Ltd. It was therefore prayed that award of Kshs 40,000/= be set aside. The respondents counsel on the other hand filed written submissions in which it was argued that claim for cost of repairs and labour were pleaded to the tune of Kshs 611,005. It was argued that an assessors Report was sufficient proof of damages, repairs, spare parts and labour. That claim report was exaggerated can't stand considering liability was already agreed upon. The case of **Nkuene Farmers Co-operative Society Ltd & Another vs Ngecha Ndejia** to support this averment. It was also argued that appellants didn't rebut evidence that was adduced by Assessors Report and it was therefore conclusive and Kshs 368,000 pleaded, proved and awarded was proper.

Respondent argued in the submission that damages for loss of use was properly founded being that the trial magistrate took notice of the fact that the respondents motor vehicle Mitsubishi canter lorry could only have been used for business and not personal use. The case of **Joseph Mwangi Gitundu vs Gateway Insurance Co Ltd [2015]eKLR** was referred to where in absence of vouchers evidencing daily income of a motor vehicle, the judge adopted Kshs 1500/- as reasonable multiplier for a matatu and therefore adopting Kshs 4500/- for a commercial lorry Mitsubishi canter was reasonable. It was argued that there was no rebuttal that Standard Assurance Co Ltd received Kshs 40,000/- as excess fee which was made as a direct consequence of the accident from negligence of the defendants.

The respondents counsel submitted that appellant didn't adduce any evidence to contradict plaintiffs evidences: The appellants could not claim the judgement was against weight of evidence when they never called any testimony to controvert plaintiff version of events. I have looked at the evidence on record a fresh and to start with I do find that the appellant's arguments concerning the finding on

transport charges is not true. The judgment is very clear that Respondent produced receipts for Kshs 640/= as transport charges and not Ksh 650/- award and therefore the appeal succeeds in that regard.

Secondly, as much as Exp5 is not a receipt from a receipt book per se, it is an acknowledgment of receipt of Kshs 40,000/- from the respondent and therefore the claim it is merely a complimentary chit can't stand.

Concerning loss of user, the Respondent claimed Kshs 192,000/= being loss of user for 4 days a week for 2 months. The Respondent produced a bank A/C statement Ex P7 and visa card which the trial magistrate rightly stated didn't reflect that the plaintiff used to deposit Kshs. 6000/- on any 4 days a week prior to the accident. The trial magistrate noted that private business is never consistent to bring in consistent income. He took judicial notice that the vehicle was meant for business and must have been bringing in something. He decided to adopt an average of Kshs 4500/- per day as loss of user and awarded Kshs 162,000/= in total for loss of user,.

Going back to evidence of the plaintiff/Respondent in regard to loss of user he said

"I lost earnings from the motor vehicle for those 2 months. The vehicle used to work 4 days in a week and fetch Ksh 6000/= per day as profit, per the 2 months I lost Kshs 192, 000/= (on the lower side). I had an account No. 8021335 at Barclays Bank Nanyuki. I have my bank statement showing the savings in respect of motor vehicle earnings. I have my visa card". In cross examination he said he used to fetch an average of Kshs 16,000/= 4 times a week. He admitted one had no vouchers to that effect. He had no record of how he used to earn out of the motor vehicle. The question that would arise from the plaintiff examination in chief and cross examination for me would be what business was he carrying out using the Mitsubishi canter lorry that he said used to bring in either 6000/= per day as in examination in chief or Kshs 16,000/= per day as in cross examination? Where is the evidence he conducted any business using the vehicle if he didn't keep records, was there a turnboy or someone else who knew the type of business he was doing? What evidence did the trial court rely on to arrive at a multiplier of Ksh 4500/- instead of 6000/=or 16000/= or even 1500 per day as was held in the case of **Joseph Mwangi Gitundu vs Gateway Insurance Ltd [2015]eKLR** cited by the respondent counsel in their submission?

The plaintiff/Respondent produce bank statement but didn't highlight the specific credit to that account that related to earnings from the lorry prior to the accident and I would agree with appellant as was held in the case of **Bonham-Carter vs Hyde Park Hotel Ltd (1984) 64 TLR at 178 by Lord Goddard CJ** judgement that

"plaintiffs must understand that if they bring actions for damages it is for them to prove their damage. It is not enough to write down particulars and so to speak throw them at the head of the court saying "This is what I have lost, I ask you to give me these damages".

They have to prove it.

I do agree with the appellant counsel, that the assessment of loss of user and award thereof is baseless and can't therefore stand in the circumstances. The award was erroneous and is set aside in its entirety.

For the cost of repairs, purchase of spares and labour, the trial magistrate found that although Kshs 368,000/-receipts that were produced in proof were only for Kshs 175,970/- as per EX p4. The plaintiff Pw2 and Motor vehicle Assessor testified in this regard and I do find the appellants submissions misplace. I do find the trial magistrates findings sound and well reasoned and can't be unsettled.

The appeal is partly allowed in that general damages for loss of user awarded to appellant in the trial court is set aside and judgment entered for the respondent for Ksh 175,900 + 40,000/ + 640 less 15% contributory negligence.

The appellant will get half costs for this appeal.

Ruling Signed, Delivered and Dated this 31st Day of August 2017.

HON. A.ONG'INJO

JUDGE

In the presence of:

C/A:

Appellant:-N/A

Respondent:- N/A

DR issue Notice to parties and Counsels

HON. A.ONG'INJO JUDGE

31.8.2017