



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 104 OF 2015

AMIRA TRANSPORTERS LIMITED.....APPELLANT

VERSUS

CENTRAL FURNITURE LIMITED.....1ST RESPONDENT

PAUL MULI.....2ND RESPONDENT

[An Appeal from the Judgment and Decree of Honourable J. N. Nyaga, Chief Magistrate,

Kisumu delivered on the 2nd December 2015 in KISUMU CMCC NO. 304 of 2013]

JUDGMENT

On 8th December 2010 the Appellant's Motor Vehicle Registration No. KBG 854A Mercedes Prime Mover pulling trailer ZD 0573 collided with the Respondent's Motor Vehicle Registration No. KBB 511Z/ZB 6414 along the Busia Kisumu Road. The Appellant then brought a material damage claim against the Respondents which he particularized as follows:-

- | | |
|--|------------------|
| (a) Repair charges | - Kshs.875,626/= |
| (b) Assessors fees for prime mover | - Kshs. 9,986/= |
| (c) Assessors fees for the trailer | - Kshs. 5,800/= |
| (d) Investigators fees | - Kshs. 37,189/= |
| (e) Police abstract | - Kshs. 200/= |
| (f) Towing charges | - Kshs. 25,000/= |
| (g) Recovery Crane hire | - Kshs. 80,000/= |
| (h) Repairs of the trailer | - Kshs.440,000/= |
| (I) Recovery expenses from Maseno
Police Station to Mombasa | - Kshs.196,901/= |
| (j) Copy of records | - Kshs. 1,000/= |

(k) Loss of user	<u>-Kshs.1,750,000/=</u>
TOTAL	<u>-Kshs.3,317,202/=</u>

The matter went for a full trial and judgment was subsequently entered for the Plaintiff against the Defendant for a sum of Kshs.1,202,226/= made up as follows:-

(a) Repair of Trailer	- Kshs. 220,000/=
(b) Repair of Motor Vehicle	- Kshs. 875,626/=
(c) Police Abstract	- Kshs. 200/=
(d) Towing charges	- Kshs. 25,000/=
(e) Recovery crane hire	- Kshs. 80,000/=
(f) Copy of records	- Kshs. 1,000/=

The appellant's claim for repair to the trailer was not fully awarded and the claims for Investigator's fees, Assessor's fees, recovery from Maseno to Mombasa and loss of user were not allowed at all. Being aggrieved the Appellant appealed based on the grounds set out in the Memorandum of Appeal. The appeal was canvassed orally with Miss Aron appearing for the Appellant and Mr. Muma for the Respondent.

I have considered the rival submissions of Learned Counsel alongside the evidence in the lower court so as to arrive at my own findings. I have of course borne in mind that I did not have the benefit of seeing the witnesses give evidence.

The claims for repairs to the Prime Mover, for the towing charges, crane hire, police abstract and copy of records were allowed in full. For the repairs to the trailer the trial magistrate awarded a sum of Kshs.220,000/= being half of what was claimed. This and the Investigator's fees, Assessor's fees, Loss of user and Recovery from Maseno to Mombasa form the basis of this appeal. I shall address them as under:-

Assessor's fees: The trial magistrate disallowed this claim on the ground that no receipts were produced. It was his finding that the invoices tendered were not proof of payment. It is however instructive to note that the Assessor (PW2) attended court and testified that she did the assessment and was paid the amounts claimed. She even produced the Assessment Reports. It is my finding that being the person to who the fees were paid her testimony was sufficient to prove the claim on a balance of probabilities than the mere production of a receipt. The assessment fees for both the Prime Mover and the trailer totaling to Kshs.15,786/= shall therefore be allowed.

Investigator's fees: Whereas PW3 the Legal Officer for Kenindia Insurance Company, who filed the suit under the doctrine of subrogation, testified that an Investigator Safety Surveyors Limited was hired no investigation report was produced in evidence and no receipt was tendered to prove that fees of Kshs.37,189/= were chargeable let alone that the same was paid. In fact neither PW1- the Appellant's Transport Manager nor PW3 himself made any mention of this sum. The sum was therefore properly disallowed.

Repair to trailer: The Assessor PW3 testified that she assessed the cost of repairing the trailer at Kshs.380,000/= plus Kshs.60,000/= VAT. She produced a report with photographs showing the damage to the trailer annexed. The trial magistrate disallowed this item on the ground that unlike that of the Prime Mover the Assessor's report did not indicate how the cost of repairs was arrived at and that it did not indicate the cost of materials and the labour charged. He wondered how the court could determine that this was not an arbitrary figure. He relied on the case of **Nkuene Dairy Farmers Co-operative**

Society Limited & Another V. Ngacha Ndeiya [2010]eKLR where the Court of Appeal held:-

“In our view special damages in material damages claim need not be shown to have been incurred. The claimant is only required to show the extent of the damage 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 was damaged. Against each item he assigned a value. We think the 3 particulars of damage and the value of the repairs were given with some degree of certainty.”

The trial magistrate nevertheless found that the trailer was damaged and that the Appellant had expended money to repair it. Mr. Muma for the Respondent submitted that the trial magistrate was very generous in so doing and that the Respondent just let it pass. However it is my finding that he fell into error in allowing only half of the repair charges. It is indeed correct that unlike the assessment report for the Prime Mover the report for the trailer did not detail the damaged parts and their cost of repair or replacement. There is however evidence that a sum of Kshs.440,000/= was paid for repairs to the trailer. The receipt was produced by PW1, the Appellant's Transport Manager. Although the receipt from Jaffrey Motors was a copy there is nothing to show its production was opposed. The receipt is dated 30th June 2011 and is marked as exhibit 5. The Appellant in this case therefore did better than the appellant in the case cited as in that case all the appellant had was an assessment report but not evidence of actual payment. The trial magistrate having found that the trailer was damaged, and indeed the photographs annexed show it was, and that it was repaired and costs expended he should have allowed the entire sum claimed of Kshs.440,000/=. I allow the claim under this head so that a sum of Kshs.220,000/= is added to what was awarded by the lower court.

Recovery expenses from Maseno Police Station to Mombasa: For this the Appellant claimed a sum of Kshs.196,901/=. However PW1 is on record as saying that they spent Kshs.175,000/= to Mombasa. There was no explanation for this contradiction and no receipt was produced to prove either the Kshs.196,901/= claimed or the Kshs.175,000/= alluded to by PW1. This being a special damage claim it ought to have been specifically proved and the trial magistrate was right to disallow it.

Loss of User: Under this head the Appellant claimed Kshs.1,750,000/= and led evidence that she lost business for the five weeks the truck and the trailer were in the garage. PW1 testified that the Appellant had a five year contract for transport services with a Ugandan (Damco Uganda) Company where the latter paid 2200 US Dollars for imports and 700 US Dollars for exports. He produced the contract as EXH.7. I have considered the evidence and rival submissions as pertains this head and have come to the conclusion that it was not proved on a balance of probabilities. Loss of User is a special damages claim which must not only be specifically pleaded but must also be proved. Whereas the Appellant produced an agreement to prove the existence of a contract between it and Damco Uganda it did not demonstrate how based on that contract the sum of Kshs.1,750,000/= was arrived at. What it did amounted to throwing figures at the court and asking it to calculate how much it lost. It did not prove that in the five weeks it claims the vehicle /trailer were in the garage it lost business worth Kshs.1,750,000/=. The claim for loss of user was therefore correctly disallowed.

Costs: I agree with Miss Aron, Counsel for the Appellant that the trial magistrate awarded costs on the one hand and took them with the other. Initially he allowed costs and interest on the sum of Kshs.1,202,226/= effective from 15th June 2011 till payment in full then proceeded to state - **“As the plaintiff has not fully succeeded in his claim each party to bear its own costs.”** The resultant Decree also indicates that “each party bear own costs.” Costs are in the discretion of the court but the guiding principle is that they follow the event. The correct position therefore was to award the appellant the costs to the extent of his success in the suit.

Conclusion

The Appellant has succeeded partially in that in addition to what was awarded in the trial court damages under the following heads have been awarded:-

(a) Assessor's fees - Kshs.15,786/=

(b) Repair to trailer Kshs.220,000/= to add to the Kshs.220,000/= awarded by the lower court.

The claims for investigator's fees, Recovery of motor vehicle from Maseno Police Station to Mombasa and the Loss of User have been disallowed. The sum of Kshs.235,786/= allowed by this court shall be added to the 1,202,226/= allowed in the lower court and the Appellant shall get the costs of the suit to the extent of her success in the court below but as for this appeal each party shall bear its own costs. Interest on the judgment sum shall be at court rates from the date of filing suit till payment in full.

It is so ordered.

Signed, dated and delivered at Kisumu this 3rd day of August 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Omondi MM for the Appellant

N/A for the Respondents

Evon – Court Assistant