



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 14 OF 2014

JOSEPH KIMANI.....1ST APPELLANT

LAWRENCE MURIITHI MANA.....2ND APPELLANT

-VERSUS-

JAMES KANGARA KAHANYA.....RESPONDENT

(Being an Appeal from the Judgment/decree delivered by the Honourable Aganyo (Ms.), (Senior Resident Magistrate) on 9th December, 2013 in Nakuru CMCC No.1273 of 2010)

JUDGMENT

1. The Appellant's motor vehicle Registration Number KBH 543S, a Toyota Hiace was on the 12th September 2010 involved in an accident with the 1st Respondent's vehicle Registration Number KBK 427L a Nissan Sunny Saloon. It was extensively damaged. The appellant sued the Respondents for recovery of the repair and other related costs blaming the Respondents for the accident in his Further Amended plaint dated 25th March 2011.

The Respondents denied liability and the damages. However, on the 29th August 2013 parties recorded a consent judgment holding the Respondents 90% liable, and matter proceeded for assessment of damages before the trial court.

2. The trial Magistrate upon evidence presented before him assessed damages as follows:

•Special damages	- Kshs.278,250/=
•Loss of business for 34 days	
at Kshs.6,000/= per day	- Kshs.204,000/=
Total	- <u>Kshs.482,250/=</u>
Less contributory negligence of 10% thus plus costs	- <u>Kshs.434,025/=</u>

3. The appellants were dissatisfied with the award of damages as being too high and based on no evidence. In their summarised grounds of appeal, the appellants faulted the trial magistrate:

- a) for making an award for loss of business in the absence of proper records, bank statements and/or income tax returns.*
- b) Failure to consider the appellants submissions on the assessment of damages*
- c) Awarding special damages in the absence of strict proof and proper receipts -*

The court has been urged to set aside the said awards. Parties filed written submissions on the Appeal.

4. In the Further Amended plaint filed in the trial court on the 21st December 2015, the Respondent pleaded particulars of special damages as follows:

- **Cost of repairs of motor vehicle** - **Kshs.239,250/=**
- **Cost of towing to Lari police station** - **Kshs. 10,500/=**
- **Cost of towing from Lari police station-** **Kshs. 8,500/=**
- **Towing from Lari Police station to**
Kilgoris Garage Nakuru - **Kshs. 20,000/=**
- Total** **Kshs.278,250/=**

Further, a claim for loss of business at the rate of Kshs.6,000/= for the 34 days period of the vehicle was under repairs was stated.

5. This court being the first appellate court, I am obligated to revisit, reevaluate and reconsider the evidence tendered before the trial court and come up with my own findings and conclusions. (**Selle -vs- Associated Motor Boat Co. Ltd (1968) E.A 123**).

The subject motor vehicle Registration Number KBH 643S was a business vehicle, a *matatu*. This fact is not in dispute.

In support of the special damage claim and loss of business, the respondent produced a motor vehicle Assessment report on the damage (MFI 3). It was later produced as PExt 3 by PW3 Clement Wasike a motor vehicle Engineer and holder of a Diploma in Mechanical Engineering from Jomo Kenyatta University and trading as Paramount Assessors. He testified that after assessment, the vehicle was repaired at a cost of Kshs.245,630/= which sum included purchase of spare parts. No challenge was mounted on the assessment report nor the repair costs.

6. In **Nkunene Diary Farmers Co-op Society Ltd & Another -vs Ngacha Ndeyiya (2010) e KLR and cited Haulage Services Ltd -vs- Complast Industries Ltd Another (2015) e KLR**, the Court of Appeal held that:

“In our view special damages in a material damage claim need not be shown to have actually 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 were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”

The Assessor(PW3) as I have stated gave the approximate costs of each spare part in the report. After repairs, actual cost was slightly less than the estimates. The claim is thus allowed in the sum of Kshs.245,630/= being the actual repair costs.

7. A claim for loss of business by the vehicle while it was under repair is subject to proof as it is also a special damage.

In an attempt to prove the same the Respondent produced several invoices and repayment receipts.

I have looked at the Assessment report dated 14th September 2010. The assessor gave a completion period (of repairs) of 3 weeks. It is therefore not in dispute that the vehicle was out of business for about three weeks it was under repair, and therefore lost business thereof.

8. In his evidence the Respondent stated that the vehicle was plying between Nairobi and Kisumu but did not have any records of the vehicles income. He also could not say for sure when the vehicle was released after the repairs, and therefore no documents to support that it was out of business for 34 days. Other than stating that he used to make Kshs.6,000/= per day, no proof was tendered.

In **Cecilia Mwangi & Another -vs- Ruth W. Mwangi Civil Appeal No. 252 of 1996** (unreported) it was held that:

“Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved...”

Booklets produced by the Respondent (PExt 8A & 8B) cannot be held to be proof of the vehicles earnings, a position stated by the Court of Appeal in **Ryce Motors & Another -vs- Muroki (1995 -1998) 2 EA 363**. See also **Summer Ltd -vs- Moses Githinji Nkanata (2006) e KLR** Where Justice Lenaola (as he then was) and citing the decision in **Ryce Motors Ltd (Supra)** The Court of Appeal said:

“The Learned Judge had before him by way of plaintiffs evidence exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of paper showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act.”

They continued to state that:

“the said pieces of paper in our view do not go to prove special damages.-----”

9. They proceeded to disallow the claim on loss of business.

The above represents the scenario in the present appeal. Nothing credible was presented before the trial court in proof of the claim for loss of business. Indeed, the Respondent stated in his evidence in Chief and upon cross examination that he did not have any documents to prove the income nor the loss.

The award for loss of business in the sum of Kshs.204,000/= is therefore set aside.

10. The Respondent paid a sum of Kshs.146,000/= for spare parts. He produced payment receipts which had no stamp duty or revenue stamps. The trial court admitted the same as evidence. It is submitted by the Appellants that the said receipts ought not have been admitted for lack of stamp duty.

The matter of unstamped payment receipts has been put to rest in numerous court decisions.

Under the **Stamp Duty Act, Cap 48 Laws of Kenya** it is a mandatory requirement that any receipts produced in evidence must have a revenue stamp for them to be admissible except in criminal proceedings by a collector to recover stamp duty, unless it is duly stamped -

- Sections 19(1) (a) (b) of the Act.

See **HCCA No. 71 of 2015 Eunice Auma Onyango -vs- Salin Akinyi Oluoch (2015) e KLR & Leonard Nyongesa -vs- Derrick Ngula Right – Civil Appeal No. 168 of 2008 at Mombasa** (unreported).

It is also trite that a receipt ought to be stamped by the Receiver of the payment, and not the giver or the payee.

Section 88 of the Act places that duty upon the receiver, not the payee to affix revenue stamps on a receipt.

11. In the instant appeal, the fact that the Respondent paid to the seller of the spare parts and was issued with payment receipts was enough proof that he did incur the cost of Kshs.146,000/= in purchasing the spare parts.

The said sum is however stated and included in the total sum assessed by the vehicle assessor, being part of the estimated cost of repairs. I have found that the said sum as shown in the Assessment report includes the sum of Kshs.146,000/=. It was properly awarded to the respondent by the trial Magistrate.

12. A towing charge of Kshs.8,500/= of the accident vehicle from the scene of accident to Lari police station on the 13th September 2010 was strictly proved by production of the cash sale receipt. However, no proof of payment of Kshs.10,500/= towing charges to Lari police station was tendered. An invoice must be supported with the payment receipt for it to be sufficient and strict proof of the expenditure.

In its totality, it is my findings that the award of Kshs.204,000/= in respect of loss of business is not supported by any evidence and was therefore erroneously awarded. It is set aside.

13. Based on the above findings, I find that the appeal hereof succeeds partly in the following manner:

•Special Damages being repair costs to the Respondent's vehicle Registration Number KBK 427 L a Nissan Sunny Saloon is upheld as

strictly proved at - **Kshs.278,250/=**

•The award of - **Kshs.205,000/= being loss of profits/business is set aside NIL**

•Towing charges **Kshs. 10,500/=**

•Total - **Kshs.288,750/=**

90 % thereof - **Kshs.259,875/=**

14. That is the amount awardable to the Respondent. The said sum shall accrue interest at court rates from the date of the trial courts judgment. The appeal having succeeded in part, each party shall bear own costs, but the appellants shall pay costs of the trial court case to the Respondent.

Dated and Signed this 23rd Day of October 2017.

J.N. MULWA

JUDGE

Delivered this 31st Day of October 2017.

R. LAGAT KORIR

JUDGE