



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL APPEAL NUMBER 2 OF 2017

SOLOMON MWANGI KARARA.....APPELLANT

VERSUS

RIFT VALLEY BOTTLERS LTD..... 1ST DEFENDANT

KIPYATOR BIWOTT.....2ND DEFENDANT

JUDGMENT

In the lower court the appellant herein sought the following prayers against the respondent:-

- 1. Special damages for Kshs 3,150,000/= being the value of motor vehicle registration No. KCD 746 D.***
- 2. Mesne profit of Kshs 16,000/= per day till the date of delivery of the judgment.***
- 3. General damages for loss of use and psychological trauma caused to him.***
- 4. Cost of the suit.***
- 5. Any other relief that the court may deem fit to grant.***

The appellant's case is that on 9/5/2015 he bought a Motor Vehicle Registration Number KCD 746 D, a Toyota Hilux, double cabin for Kshs 3,150,000/=. It was sold to him by Comvan Motor Limited. The said vehicle was used by Appellant for hire, in the business of transporting miraa from Kitale to Lodwar. The said business was earning him an average of Kshs 16,000/= daily in profits.

On 26th August, 2015 the vehicle was being driven by PW 2 from Lodwar to Kitale. At Kamatira Hills, between Makutano and Chepareria, it collided with a Motor Vehicle Registration No. KBQ 772C, of which was being driven by the 2nd Respondent towards Chepareria direction from Makutano. This vehicle, KBQ 772C, Isuzu lorry, owned by the 1st Respondent, was being driven at high speed and left its lane to that of oncoming vehicles, causing the said accident. The second Respondent was charged, pleaded guilty and was fine Kshs 10,000/=.

PW 3, a Motor Vehicle Assessor, valued motor Vehicle Registration Number KCD 746D, and indicated its pre-accident value as Kshs 3,350,000/=. The salvage value was indicated as Kshs 500,000/=.

Both parties to suit consented to judgment on liability in the ratio of 90%:10% in favour of the appellant as against the Respondents. On quantum the learned Trial Magistrate found that the Plaintiff in producing

invoices rather than Bank deposit slips, bank statements or KRA return, failed to proof income or profits of

Kshs 16,000/= per day and hence the claim under the heading of loss of use failed. He therefore awarded to the Plaintiff Kshs 1,390,000/= being made out as the difference of the pre-accident value of the vehicle (Kshs 3,150,000/=) and the salvage value of which he got by deducting from the cost of the motor vehicle (Kshs 3,150,000/=), the cost of repairing the salvage, Kshs 1,760,000/=. He rejected the salvage value given of Kshs 500,000/= as it was given after the vehicle had been vandalized and parts rusted due to poor storage. Kshs 1,390,000/= was subjected to the consented liability to give a total of Kshs 1,251,000/= of which was awarded to the appellant, plus costs and interest at court rates.

The appellant dissatisfied with the said award, appealed to this court on the following grounds:-

- 1. The Trial Magistrate erred in law and fact by introducing extraneous matters in his judgment.**
- 2. The Trial Magistrate erred in law and fact by failing to appreciate that the appellant has proved mesne profit by calling an accountant.**
- 3. The Trial Magistrate erred in law and fact by failing to appreciate the fact that salvage value was Kshs 500,000/= and not Kshs 1,760,000/=.**
- 4. The Trial Magistrate erred in law and fact by failing to appreciate the evidence of expert witnesses.**
- 5. The Trial Magistrate erred in law and fact by failing to appreciate that the subject motor vehicle was a written off as per evidence of the expert and that the applicant suffered loss of use.**

In the Appellant's submissions counsel indicates that PW 3 did an assessment of the salvage value (cost of wreckage) and it was Kshs 500,000/= as seen in page 79. The vehicle had been bought three months prior to the accident. The trial magistrate concluded that the salvage value was Kshs 1,760,000/= and yet there was no report or evidence tendered to that effect. Counsel also submitted on mesne profits that the appellant proved on a balance of probability by producing daily worksheets and calling PW 4 an expert who gave his opinion on how the motor vehicle which was in business was operating. The learned magistrate dismissed this claim and counsel submitted that he raised the standard of proof far beyond and standard required which was a misdirection on his part. They urged the court to find that the appellant lost mesne profit or in other words lost income at an estimated average of Kshs 16,000/= per day from 26th August, 2015 to date.

In response counsel for the respondents submitted that the P-Exhibit 7, that is the assessment report shows the Motor Vehicle Registration Number KCD 746D was written off and once a vehicle is declared written off the appellant is not entitled to loss of user but only to value of the vehicle. He further cited ***Eldoret HCCA 109 of 2005 Miwa Hauliers and Moses Shikhokha Wetaba Godfrey Auma*** in which Justice M. K. Ibrahim stated that ***"the claim therefore was specific and ascertained once there was a total loss of the vehicle. The plaintiff could only get the value of the vehicle at the time of the accident. To award damages under loss of user will amount to double compensation."*** Urging the court not to award Kshs 16,000/= per day as it is not awardable and further that even if the appellant had provided proof by way of receipts it would still not be awardable.

On the issue of salvage value of the motor vehicle, counsel for the respondents submitted that P-Exhibit 8 (a) showed that the vehicle was inspected on 26th October, 2016 more than a year after the initial assessment report P-Exhibit 7 was made on 26th August, 2015 and that the assessment had a statement that "having inspected the subject matter on 27/10/2016 in its current state we noted deteriorations on its condition hence loss of value." The assessor set the value at Kshs 500,000/= after considering environment factors and the probability of some parts of the vehicle having been vandalized. It was his opinion that the salvage value ought to have been more than Kshs 500,000/= and that is a figure between Kshs 700,000/= and Kshs 1,000,000/= he urged the court to dismiss the appeal.

I have considered the facts of the case, the judgment of the lower court, grounds of appeal and submissions by both sides. The liability was consented to and is not in dispute. What is disputed is the lower court's considerations in arriving at

Kshs 1,251,000/= as the award to the appellant.

On special damages the trial court made a finding that, ".....the plaintiff having only paid the purchase price to the extent he did, that is the only claim he can lodge against the defendant. The claim for the balance of the money he was yet to pay would mean gaining unduly." This statement can only be correct if after the accident the appellant was not entitled to clear the balance of the purchase price of the motor vehicle. There is no evidence that the motor vehicle sale agreement was to that effect, and such finding is therefore wrong.

Valuation of a used vehicle by an expert include weighing various factors like mileage, condition and whether it is accident free. The price at which it was bought or sold cannot be a fact as goods can be sold and bought below or above their market value. This forms the basis of trade and why sale or purchase deals are categorized as bad, good and best. It was therefore wrong for the trial court to find that the motor vehicle, having been bought for Kshs 3,150,000/= could not have had pre-accident value, as shown by the valuer, of Kshs 3,350,000/= after 3 months of use. At the purchase point the appellant could have been given a good deal of a price below its market value.

The salvage value should have been considered at the point of the accident and not more than a year later when the indicated factors like vandalism, rust and variation wastage of its parts had a hand in lowering the value. The given figure then of Kshs 500,000/= was not the right figure to work with. Equally, the way the trial court worked it out was not correct. Salvage value cannot equal the pre-accident value of a motor vehicle less the value of repair of the salvage. This is so as when an accident vehicle is repaired, more so after a serious accident, is hardly restored to its original status or condition. That is why accident free vehicles sells better. For lack of any other reliable information or figures to work with, and given that the figure of the range proposed by the Respondents Advocate appears reasonable, the salvage value can be settled at Kshs 1,000,000/=

The trial court did not award loss of earnings or business. This is so as he discredited the produced "invoices". However I do find produced monthly forms showing income and expenditure, as well the net balance for each business trip undertaken by the vehicle. There are also attached daily worksheets showing daily expenditure of the said business. It appears to me the business was operated in a professional manner where details of accounts were well kept. The evidence establishes on a balance of probability that the said vehicle was prior to the accident engaged in a business and was earning the appellant an average amount of about Kshs 16,000/= as claimed. As was rightly observed in *the case of Joseph Mwangi Gitumbi –vs- Gateway Insurance Co. Ltd, civil suit No. 224 of 2017*, a claimant is in law expected to mitigate his losses by taking up such measures to cushion his losses. Where a vehicle is lost, buying another takes time. Six months is reasonable time in which an aggressive business person can rise and get back to his feet. Where the business is of operation of a motor vehicle, it is understandable it cannot be on the road each and every day of the month. Sometimes it will be out of road for service and repairs. In a month I will hold that such times may be of up to 7 days, giving 21 days in average for business.

Given the above considerations I will adjust the award as follows:-

Loss of the motor vehicle:- Kshs.3,150,000/-

- Kshs.1,000,000/-

Kshs.2,150,000/-

Loss of earning or business:- Kshs.16,000/-x21x6=

Kshs.2,016,000/-

The total award is therefore adjusted to Kshs.4,166,000/-

- 10/100(416,600)

Kshs.3,747,400.

Cost of the suit goes to the appellant. It is so ordered.

Ms. Chebet holding brief for Mr. Borongo for the applicant, Mr. Barasa holding brief Mr. Onyinkwa for the respondent. Judgment delivered in the advocate's presence this 23.11.2017.

S. M. GITHINJI

JUDGE

23.11.2017