REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL APPEAL NO. 75B OF 2015

BETWEEN

CROWN BUS SERVICES LIMITED.....APPELLANT

AND

CHARLES ORANG'O MOKAYA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Obina, PM

dated 7th July 2015 at the Chief Magistrates Court

at Kisumu in Civil Case No. 293 of 2013)

JUDGMENT

1. The case subject of this appeal arose from an accident which occurred on 23rd March 2012 along the Kisumu-Kericho road involving the respondent's motor vehicle registration number KAB 163K and the appellant's bus registration number KAW 101G. As a result of the collision, the respondent's vehicle was damaged and the respondent made the following claims in its plaint:

(a) Pre-accident value of the motor vehicle registration no. KAB 163K, Toyota Hilux being Kshs. 320,000.00.

(b) Loss of use for ninety (90) days at Kshs. 5,000.00 per day with effect from 23/03/2012.

(c) Kshs. 48,568.00 being the cost expenses incurred as a result of the accident.

(d) Costs of the suit.

(e) Interest on (a), (b), (c) and (d) with effect from the date of filing until payment in full.

2. In the course of proceedings, the issue of liability was settled in the ratio 90:10 against the appellant. The matter proceeded for assessment of damages and the trial magistrate and made the following award:

Pre-accident value of the vehicle	Kshs. 291,068.00
Cost of valuation & Search	Kshs. 6,068.00

Towing Charges	Kshs. 6,000.00
Loss of use (3,000/- per day for 90 days)	Kshs. 270,000.00
Less salvage value	(Kshs 30,000.00)
Total	Kshs 537,068.00
Less 10% contribution	**Kshs. 483,361.20**

3. It is this judgment that has precipitated this appeal. In the memorandum of appeal dated 12th August 2015, the appellant challenged the judgment and decree on the following grounds;

1. The Learned Trial Magistrate erred in fact and in law by awarding the Plaintiff quantum of damages for loss of user for a total loss claim.

2. The Learned Trial Magistrate erred in fact and in law in failing to consider the Appellant/Defendant's submissions which confirmed that the material damage claim was where total loss has occurred a party is not entitled to be compensated under loss of user.

3. The Learned Trial Magistrate erred in fact and in law in awarding damages which were not supported by any evidence.

4. The Learned Trial Magistrate erred in fact and in law in disregarding the Defendant/Appellant's written submissions in regard to awards relating to loss of user.

4. Counsel for the appellant, in his oral submissions, compressed the grounds of appeal into two broad grounds. First, that the trial magistrate erred in awarding damages for loss of user when the vehicle was a total loss. Counsel supported his case by referring to the case of ***Sabuni v Kenya Commercial*** **[2002] KLR 1** and ***Ryce Motors Limited & Another v Elias Muroki*** **MSA CA Civil Appeal No. 119 of 1995[1996]**eKLR.

5. Second, counsel argued that special damages pleaded were not proved to the required standard. He pointed out that the loss of use ought to have been proved by providing the necessary receipts and that in fact the sum pleaded of Kshs. 5000/- was not proved.

6. Mr Onsongo, counsel for the respondent, supported the judgment on the grounds that the claim for loss of user, having been pleaded, was properly awarded and that the respondent proved his case. Counsel pointed out in any case, the appeal was incompetent as it was contrary to **section 67(2)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** which prohibits appeals from consent decrees. In this case he urged that the appeal was a result of the consent on liability.

7. I will deal with the jurisdiction issue first. It is correct to state that an appeal against a consent decree is not permitted under **section 67(2)** of the ***Civil Procedure Act*** which states, *"No appeal shall lie from a decree passed by the Court with the consent of parties."*

8. However, this is not the case here. As counsel for the appellant pointed out, this appeal was against the judgment on quantum arising from assessment of damages after the consent on liability was recorded. The consent on liability did give rise to the final judgment hence the appeal as set out in the memorandum of appeal is an appeal against the judgment and decree awarding damages. These damages were not the subject of the consent hence the judgment is outside the purview of the **section 67(2)** of the ***Civil Procedure Act***.

9. I now turn to the issue of loss of user. I do not read the cases cited by the appellant to mean that the respondent is not entitled to claim for loss of user where the vehicle is a write off or total loss. In the ***Sabuni Case*** **(Supra)**, Ringera J., expressed the view that;

> *However I do agree with the submission that once the plaintiff has been compensated for the value of the vehicle he cannot then claim for damages for loss of user thereof subsequently. That would clearly be double compensation. That, however is not, in my understanding, the same thing as to say that a claim for value of the article destroyed and for loss of user thereof cannot be entertained in the same accident.* [Emphasis mine]

10. In the ***Ryce Motors Case*** **(Supra)**, the Court of Appeal clarified its earlier decision in ***Peter Njuguna Joseph & Another v Ann Moraa*** **Civil Appeal No. 23 of 1991 (UR)** where it had held that;

> *We are here concerned that with the actual loss of user of the vehicle which has been immobilized by the accident. The owner must take all reasonable steps to ensure that the vehicle is back on the road with a reasonable period. The owner must mitigate his damages by having the vehicle repaired if it is not a write off. If the vehicle is to be a write-off, then the owner is entitled to pre-accident value of the damaged vehicle. He would then be paid a reasonable figure for loss of user until such time he received the pre-accident value of the write-off vehicle.*

11. The case of ***Ann Moraa (Supra)*** seemed to suggest that a claimant was entitled to loss of use until his or her claim was settled or in the words of the court, *"until such time he received the pre-accident value of the write-off vehicle"*. However, the ***Ryce Motors Case (Supra)***, the Court of Appeal clarified the position and observed that;

> *In our view the statement in ANN MORAA's case that the plaintiff is entitled to wait until he is paid the pre-accident value of his destroyed property does not reflect the correct legal position. The position in law is that a man in the position of the respondent must take reasonable steps to mitigate his damages and for this purpose there is no distinction between a damaged and destroyed vehicle.*

12. Thus in either case, the respondent, having lost the motor vehicle, would be entitled to reasonable damages for loss of use. In any claim for negligence, recovery of damages is determined on the basis of the principle of foreseeability. As the Court of Appeal held in ***Joshua Mugwe Wanganga v Joseph Nyaga Karingi*** **NYR CA Civil Appeal No. 4 of 2011 [2014]eKLR**, *that in order to be recoverable, the damages must be foreseeable. In other words, the damages must not be too remote.*

13. It is not in dispute that damages for loss of user are ascertainable and quantifiable and are therefore in the nature of special damages. The law in this respect that such damages must be pleaded and proved (see ***Sabuni Case*** **(Supra)** and ***Macharia Waiguru versus Murang'a Municipal Council & Another*** **NYR CA Civil Appeal No. 25 of 2013 [2014] eKLR**). In this case, the claim for loss of user was pleaded at para. 6 and prayer (b) of the plaint. The question in this appeal is whether the plaintiff proved this claim to the required standard and in light of the principle elucidated in the ***Royce Motors Case*** **(Supra)**.

14. In his testimony, the respondent (PW 1) stated that he used to hire a taxi at Kshs. 5,500/- when the vehicle was being repaired. This amount was not supported by any documentary or other evidence to show from whom the taxi was being hired. Furthermore, the respondent's vehicle was being used, it appears, for business. The business records produced in court show that the vehicle was used to transport mainly assorted agricultural produce in various parts of the region. It was thus not established that the another vehicle was being used for the same business as the records produced only show that the business went on until the day the vehicle was involved in an accident. Moreover, the business records show that it would have been impossible to expend Kshs. 5,500/- a day, given the varied destinations the respondent was doing business.

15. It is well established that the appellate court will interfere with an award of damages when the trial court erred in appreciation or application of the law (see ***Butt v Khan*** **[1981] KLR 349).** In this case, the element of loss of user was not proved to the required standard. Further, the trial court erred in awarding damages for loss of use for the period of 90 days without taking into account the respondent's duty to

mitigate his loss (see ***Ryce Motors Case (Supra)***).

16. I allow the appeal and set aside the judgment only to the extent that I dismiss the award for loss of user amounting to Kshs. 270,000/-.

17. The appellant shall have the costs of this appeal.

DATED and **DELIVERED** at **KISUMU** this **19th day of December 2017.**

D.S. MAJANJA

JUDGE

Mr Karia instructed by Kairu & McCourt Advocates for the appellant.

Mr Onsongo instructed by Onsongo and Company Advocates for the respondent.