



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 458 OF 2011

SQUIRT ENTERPRISES (K) LTD.....APPELLANT

VERSUS

NAIROBI CITY WATER & SEWERAGE CO. LTD.....RESPONDENT

(Appeal from the original judgments and decree of Ole Keiwua (SRM) in Milimani Commercial Courts, CMCC No. 2187 of 2010, delivered on 26th August, 2011)

JUDGMENT

1. The Appellant, **Squirt Enterprises (K) Ltd** sued the Respondent **Nairobi City Water & Sewerage Co. Ltd**, for a sum of Kshs 521,000/= being a sum of material damage suffered on 22nd January 2010 when the Respondent or his agents illegally and unlawfully impounded Motor Vehicle Registration no. KAB 884Z for a period of 7 days after which they released the motor vehicle which was extensively damaged. When the matter came up for hearing in the trial court, the trial Magistrate found the Respondent liable and awarded the Appellant a sum of kshs 17,000/= for damages.
2. The Appellants, aggrieved by the Trial Court's decision filed this appeal on

the following combined grounds:

1. *The Learned Magistrate erred in law and in fact by failing to make a finding as to the loss and damages to be awarded to the plaintiff, despite having found that the actions of the defendant in impounding the plaintiff's motor vehicle was illegal;*
2. *The Learned Magistrate erred in law and in fact by making a finding that there was no material placed before him to enable him make a finding as to the loss and damages to be awarded to the plaintiff;*
3. *The Learned Magistrate erred in law and in fact by failing to have regard to the weight of the evidence brought out by the plaintiff's witnesses;*
4. *The Learned Magistrate erred in law and in fact by failing to consider the submissions done by the plaintiff's counsel, notwithstanding the weighty issues of law and fact raised therein;*
5. *The Learned Magistrate erred in law and in fact by making a judgement which in itself was contradictory and fell short of what ought to be reflective of a judgment;*
6. *The Learned Magistrate applied the wrong standard of proof thereby arriving at a wrong conclusion that the plaintiff had failed to prove the loss and or damage suffered;*
7. *The trial Magistrate misdirected himself in and fact by applying wrong principles of law thereby erroneously arriving at the wrong decision."*

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial

court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In the civil appeal case of, **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

4. I have perused the Lower Court Record. I note that during trial the Appellant called three witnesses who adduced evidence to the effect that the motor vehicle was impounded by the Respondent which extensively damaged it to the tune of kshs 521,000/=. PW1, Francis **Makori Nyagari**, an accountant and auditor who was engaged by the Appellant for purposes of determine the loss suffered. He claimed that compiled a report after looking at the record, cash sales and delivery notes availed to him by the Appellant and concluded that the loss amounted to kshs 521,000/=. PW2, **Michael Mwangi Ndungu**, a director with the appellant also adduced evidence to the effect that, the Appellant does water transportation services and has in its possession the requisite documents that includes the business permit, and authorisation from the public health. He testified that the motor vehicle was detained for seven days with an aim of frustrating its business. He stated that loss amounted to kshs 287,000/= since he had been making a total of kshs 41,000/= to kshs 48,000/=. He claimed further that since the vehicle was carrying luggage and the springs and wheels were pressed, he was forced to replace them where he used kshs 84,000/= for the springs and kshs 138,000/= for the wheels. PW3, the Appellants driver, **Antony Njoroge Wambui** testified that on the material day he was driving the vehicle when he was stopped by the Nairobi Water Company who then detained the motor vehicle and in the process damaged it.
5. The respondent also called DW1, **Peter Musyoki Kibisia**, who testified that she was informed by one of her officers the subject motor vehicle refused to stop and when it eventually stopped the driver and the turn-boy ran away and upon inspecting the motor vehicle they found that it had no licence to trade. She averred that the decision was made to tow it to their Kabete offices. She claimed that on 27th October 2010, the owner came with a court order to have the motor vehicle released which she later did on condition that he complies and he claimed that the vehicle had been vandalised. DW2, **Veronica Mukami** who was at the scene testified that they stopped the motor vehicle and the driver refused to stop forcing them to pursue the motor vehicle which the driver abandoned and ran away. She claimed that he was later arrested and produced licence from Nairobi City Council but did not have the licence from Nairobi City Water and Sewerage Company Limited. She averred that they requested him to drive the motor vehicle to their offices but he refused forcing them to tow the Motor vehicle.
6. I have re-evaluated the evidence as adduced in the lower court. When the matter came before this court, the parties recorded a consent to have the matter disposed of by way of written submissions. I have considered the submissions of the parties as filed in this court.
7. The Appellant submitted that the Magistrate found the Respondent's actions to be illegal since he recognised that the Appellant was authorised to operate the business of water transport and that a permit was issued by the City Council of Nairobi and it also had a certificate from the Ministry of Public Health and sanitation confirming that the waster was satisfactory for human consumption. He also produced the court order issued in Milimani CMCC 4395 of 2008 which restrained the Respondent from detaining or arresting him or any motor vehicle owned by him. He argued that the allegations that he is only supposed to operate on Ngong Road is misrepresentation of fact since he is only supposed to park there and not only operate . He submitted further that material was placed before the magistrate including the receipts showing that 4 tyres were replaced and the

- springs were destroyed due to the weight of the water bringing the costs to Kshs 234,000/= including labour. He added that in business goods and services are often taken on credit and that's why there was a discrepancy in the dates of the receipts which showed the date the purchase was done and the day of the repair. He further argued that though the Magistrate found the Respondent liable, he on the same limb ought to have held him liable for the loss and damage.
8. The Respondent in his submissions argued that special damages must be proved unlike in this case where the Appellant did not prove since the evidence produced was suspicious and the estimates claimed have not been proven. It argued that the appellant produced documents that contained entries made in 2008 and 2009 yet the claim was for 2010. It averred that the claims that the damage was caused by the weight of water was not supported by any probable evidence. It trashed the report claiming that the report does not contain profit and loss statement covering the period in dispute which would give this court a clue on what was lost. It asserted that the explanation for the dates of the receipts is new evidence that should be introduced at this stage which evidence is prejudicial since the Respondent did not get an opportunity to cross examine to discredit the said evidence.
 9. Having set out the background of this appeal, I now wish to consider the merits or otherwise of this appeal. I will address the grounds 1,2, and 6 together since they are somewhat interrelated. The grounds challenge the loss and damage awarded to the Appellant despite the material placed before the court. I have perused the exhibits produced in court, the Appellant produced the Audit report dated 9th April 2010 and compiled by Nyagari & Associates, Certified Public Accountants who upon examining the Motor vehicle KAB 884Z delivery note, invoices of water sales suffered, motor vehicle daily records and receipts of spare parts purchased to replace the damaged parts of the motor vehicle concluded that the loss incurred by the Appellant in his business amounted to kshs 521,000/= during the seven days the vehicle was in possession of the Respondent, they also prepared a layout of the Income and expenses incurred and total of profits suffered, which layout concluded that the loss suffered was kshs 521,000/= . It is evident that for their services and court attendance charges, the Appellant paid a sum of kshs 17,000/=. The Appellant also produced receipts proving the loss incurred, they included one dated 1st February 2010 for 6 pieces of tyres that cost kshs 138,000/= and another one also dated 1st February 2010 from Fortune Auto Spare Parts Ltd for Isuzu direct front and rear main leaf that costs Kshs 84,000/= . The Appellant has also attached the permit from the County Government and one from the Ministry of Public Health and Sanitation that allowed him to operate his business. I have also observed that the Respondent produced two Nairobi Water Company notices which provided that Nairobi Water Company that derived its authority from the Ministry of water and Irrigation was required to take charge of Private Water Vendors and ensure quality of water is not compromised and that all private water vendors were required to register for licensing with Nairobi Water Company within 7 days.
 10. In view of the two notices that are binding to private water operators, the Appellant has not produced any license showing that he had the permit to trade from the Nairobi Water Company. It is clear that the Respondent had good reasons to stop the motor vehicle in the first place by virtue of the notice from the Respondent. On the issue of towing, it is the word of the appellant's driver, PW3 against that of DW2, an officer of Respondent who claims that he did not run away or refuse to drive the motor vehicle as claimed by DW2, that forced them to tow it to their offices. Given that the Appellant lacked the requisite trading licence from the Ministry of Water, the action to tow the motor vehicle was valid. Had the same been towed and confiscated while the Appellant had the requisite trading licence from the Ministry of Water, then the Respondent would have been held liable, but that is not the case here.
 11. I therefore find that the Respondent had justifiable reasons to impound the motor vehicle for trading without a valid trading licence from Nairobi Water Company . The question arising therefore is whether the Respondent should be held liable for the loss and damage incurred, that should not be the case. It is not in dispute that the Appellant incurred the losses he did, but such losses were a making of his own. The loss suffered was not as a consequence of towing of the motor vehicle but of the impounding of the motor vehicle which was inevitable. The fact that he had the County Council Licence to trade and the Ministry of Health permit is commendable. However, he was a private water vendor who according to the evidence adduced bought water from boreholes and as such he was required to obtain a trading licence from the Respondent which he did not hence suffering the consequences that included the immense loss that arose from the

- motor vehicle being held by the Respondent for Seven Days.
12. Having found that the Respondent is not liable, then the quantum is not payable in the circumstances.
 13. On ground 3,4,5 and 7 where the Appellant claims that the Magistrate erred in failing to have regard to the weight of evidence of the Appellants case, failing to consider submissions and in applying wrong principles of law hence arriving at a wrong decision; I have perused the Trial court's record and the Judgement by the trial Magistrate. Despite the fact that the Learned Magistrate observed that the Respondent was liable which is contrary to what I have found, I am convinced that he correctly applied the principles of the law in arriving at his decision. He found the Respondent liable, though he was not and that he considered the submissions of the parties and generally the evidence adduced as required.
 14. In the end, I find no merit in the appeal and I hereby dismiss the appeal with costs to the respondent.

Dated and delivered in open court this 22nd day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent