



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 112 OF 2014**

**TAHIR SHEIKH TRANSPORTERS LTD .....1<sup>ST</sup> APPELLANT**

**AWADH GHALIB ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPH GICHUKI WAWERU .....3<sup>RD</sup> RESPONDET**

**JUDGMENT**

1. The appellants were the defendants in a civil suit instituted by the respondent in the lower court. The respondent was the plaintiff in CMCC No. 966 of 2012 filed at the Chief Magistrate's court Eldoret in which he had sued the appellants claiming special and general damages against the appellants jointly and severally as a result of damage occasioned to his motor vehicle Registration No. KAU 854 G in an accident whose occurrence he blamed on the negligence of the 2<sup>nd</sup> appellant. He also prayed for costs of the suit and interest.
2. In his plaint dated 4<sup>th</sup> December, 2012, the respondent claimed that the 2<sup>nd</sup> appellant was negligent in the manner in which he managed and/or controlled motor vehicle Registration No. KBN 806 thus its collision with his aforesaid motor vehicle; that as a result of the accident, his vehicle sustained damage whose repair was estimated to cost Kshs. 1,609,476; that he suffered loss specifically pleaded in paragraph 7, 8 and 9.

In paragraph 7, the respondent claimed damages in the sum of Kshs 1,609,476 being the amount of money he allegedly paid towards repair of the vehicle. In paragraph 8 special damages were pleaded as follows:-

- a. Towing charges – Kshs. 90,000/-
- b. Assessors fees – Kshs. 10,000/-
- c. Search – Kshs. 500

At paragraph 9, the respondent sought compensation for loss of use of the motor vehicle and earnings at the rate of Kshs.25,000 per day from the date of the accident to the date the appellants made good his claim. At paragraph 7 he claimed loss of Kshs.1,609,476 being repair costs.

3. The appellant's in their joint defence dated 8<sup>th</sup> January, 2012 denied all the averments in the plaintiff's claim and put him to strict proof thereof.
4. After full hearing, the learned trial magistrate delivered his judgment on 21<sup>st</sup> August, 2014 and entered judgment for the plaintiff against the defendants jointly and severally in the total sum of Kshs. 4,208,100 broken down as follows;

Towing charges .....	kshs.90,000.00
Motor vehicle assessor's fees .....	Kshs. 10,000.00
Search fee.....	Kshs. 500.00
Costs of repairs.....	Kshs. 1,607,600.00
Cost of repairs.....	Kshs. 1,607,600.00
Loss of user.....	Kshs. 2,500,000.00

together with costs and interest.

5. The appellants were aggrieved by the decision of the trial court hence this appeal. In their memorandum of appeal, the appellants raised five grounds of appeal as reproduced verbatim hereunder:-

***(i). The learned magistrate erred in fact and in law in finding that the plaintiff was entitled to general damages for loss of user and costs of repair that were excessive and commensurate to the nature damage of his motor vehicle.***

***(ii). The learned magistrate erred in fact and in law in awarding costs of repair where no receipts were produced to prove the same.***

***(iii). The learned Magistrate erred in fact and in law in using 100 days rather than the 30 days estimated repair period as per the evidence on record.***

***(iv). The learned magistrate's findings on quantum of damages are not supported by facts or law.***

***(v). The learned magistrate erred in fact and in law in the calculation of the general damages which were inordinately high and in failing to consider conventional awards for General Damages in cases of similar damages and circumstances.***

6. By consent of the parties, this court issued directions that the appeal would be disposed of by way of written submissions. The parties thereafter duly exchanged and filed their submissions buttressing their respective positions.

7. This is a first appeal to the High Court. I am mindful of my duty as the first appellate court which is to re-evaluate and reconsider the evidence adduced in the trial court in order to arrive at my own independent conclusions. See: *Williamson Diamonds Ltd v Brown [1970] EA 1; Selle V Associated Motor Boat Company Ltd & Others [1968] EA 123.*

8. I have carefully considered the pleadings in the lower court, the evidence on record, the judgment of the trial court, the written submissions filed by the parties, the grounds of appeal and the authorities cited by both parties. Having done so, I find that the appellants have only challenged the quantum of damages awarded to the respondent but have not questioned the trial court's finding on liability.

The only issue then that arises for my determination is whether the learned trial magistrate erred in awarding special damages to the respondent in the total sum of Kshs.4,208,000 against the appellants. Put another way, whether the amount of special damages awarded under the different heads was excessive in the circumstances of this case.

9. It is important to point out at this stage that the award of damages in any given case is always at the discretion of the court. But that discretion must be exercised judiciously on the basis of the evidence adduced before the trial court and in accordance with the law.

10. I have noted that the respondent's claim in this case is a material damage claim which by its very nature constitutes a claim for special damages. The law is that special damages must be specifically pleaded and strictly proved.

See: *Virani t/a Kisumu Beach Resort V Phoenix of East Africa Assurance company Ltd [2004]2 KLR 269*; *Bagajo V Christian's Children Fund Inc [2004]2 KLR 73*; *Banque Indo Suez V DJ Lowe and Company Ltd [2006]2 KLR 208*.

The respondent in his plaint at paragraphs 7,8 and 9 had specifically pleaded the damages he sought against the appellants by itemizing and quantifying his claim. He was therefore entitled to an award of the damages claimed provided he was able to strictly prove them.

11. In support of his claim, the respondent testified before the lower court and produced documentary evidence to prove the loss he had allegedly sustained as a result of the damage to his motor vehicle. He produced a receipt from Simba garage (Exhibit 8) to prove the total cost of repairs carried out on the vehicle. He also tendered evidence showing the amount paid as towing charges and documents to prove that prior to the accident, he was earning income from the use of the motor vehicle at the rate of Kshs. 25,000/- per day which he lost when the damaged motor vehicle was being repaired.

The record shows that the appellants did not offer any evidence at the trial to counter the respondent's evidence or to challenge it in any way.

12. In their submissions, the appellants have faulted the award of Kshs.1,607,600 as cost of repairs contending that the trial magistrate in arriving at this sum relied on figures shown in the motor vehicle assessment report instead of relying on actual repair costs as shown in exhibit 8. They have also challenged the award of Kshs. 2,500,000 as special damages for loss of user claiming that the plaintiff should have mitigated his losses and ought to have been compensated for only 30 days and not for the 100 days the trial magistrate used to compute the award. They also claimed that the trial court erred in using the rate of Kshs 25,000 as loss of income per day in the said computation.

13. The respondent countered these arguments by submitting that he had proved his case to the required standard as his evidence was not controverted by the appellants; that the issue of mitigation of damages did not arise during the trial and could not therefore be raised on appeal

14. As a general rule, an appellate court ought to be slow in interfering with the discretion of the trial court in the award of damages. The court should only interfere with an award of damages if it is satisfied that the lower court applied the wrong principles, failed to consider relevant factors and thereby arrived at an unjust decision or that the award was inordinately low or high as to lead to an inference that it amounted to an erroneous estimate – See: *Karanja V Malele [1983] KLR 42*; *Arky Industries Ltd V Amani [1990] KLR 309*.

An appellate court would also not ordinarily interfere with a finding of fact by a trial court unless that fact is not anchored on the evidence placed before the court or is based on a misapprehension of the evidence or on wrong legal principles – See: *Makube V Nyamoro [1983]KLR 403*.

15. I have looked at the evidence on record and the judgment of the trial court. I concur with the appellants' submissions that indeed the award of Kshs.1,607,600 was based on the estimated cost of repairs as shown in the motor vehicle assessment report and not on the actual cost of repairs. An award of damages is meant to compensate a plaintiff for the actual loss suffered and is meant to put him in the same position he would have been had the loss complained of not occurred. It is not meant to be a source of profits.

In this case, the actual amount expended on the vehicles repair cost was shown in Exhibit 8. The learned trial magistrate should not have relied on the global figure shown on the said receipt which was the same figure reflected in the repair estimates. He ought to have calculated the itemized amounts shown in the receipt in order to arrive at the actual amount expended in the repair of the

vehicle. The amount arrived at after such a calculation is the amount which should have been awarded to the respondent. A calculation of those amounts gives rise to a sum of Kshs. 1,369,600 and not Kshs.1,607,600 which was awarded by the trial court. It is therefore clear that the learned trial magistrate fell into error when he failed to ascertain for himself the actual amount the respondent had spent in having his vehicle repaired and instead relied on the repair estimates. In the event that he ever made additions of the single items of repair costs shown in the said receipt, then it is obvious that he made a mathematical error. This is an error which this court is duty bound to correct by substituting it with the amount the respondent was legally entitled to which is the actual amount spent as repair cost. For the above reasons, I hereby set aside the award of Kshs. 1,607,600 and substitute it with the sum of Kshs. 1,369,600 as special damages for cost of repairs.

- 16.Regarding the challenge on the award of damages for loss of user, after analysing the trial courts record, I agree with the respondent that the appellant did not in fact raise the issue of mitigation of damages either in their statement of defence or during the trial. But the trial magistrate appears to have had it in mind when he computed the damages payable under that head based on a period of 100 days instead of the 295 days claimed by the respondent. In doing so, he relied on the authority of Wiliam Ndirya Omollo V Come Con Africa Limited Eldoret HCC 46 of 1997 in which Nambuye J ( as she then was) made findings based on that legal principle.
- 17.In arriving at the period of 100 days, the learned trial magistrate took into account that it had taken 3 months to have the motor vehicle’s assessment report obtained and a further 30 days was required to carry out the repairs. This would translate to a period of 4 months – 120 days when the vehicle would not have been expected to generate any income for the respondent. The trial magistrate cannot therefore be said to have exercised his discretion wrongly by basing the award for loss of user on 100 days as opposed to the 295 days claimed by the respondent.

The respondent had in his evidence claimed that he had been earning an income of Kshs. 25,000/- per day from the vehicle. This claim was not controverted by the appellants. They did not offer any evidence during the trial. The trial magistrate was therefore entitled to accept the evidence of the respondent as his credibility had not been shaken by the appellants in any way. Consequently, the learned trial magistrate cannot be faulted for having used the multiplicand of Kshs. 25,000 to arrive at the award of Kshs. 2,500,000. I thus find no reason to interfere with the said award. And as the awards made in respect of the other heads of special damages were not contested, I have no reason to examine them for their validity or otherwise. The same will accordingly remain undisturbed.

- 18.In the end, this appeal partially succeeds to the extent that the amount awarded in the sum of Kshs.1,607,600 for cost of repairs is reduced to Kshs. 1,369,600.

The judgment entered by the lower court is consequently set aside. It is substituted by a judgment of this court in favour of the respondent against the appellants jointly and severally as follows;

Towing charges .....	Kshs. 90,000.00
Motor vehicle assessment report .....	Kshs.10,000.00
Search fee .....	Kshs. 500.00
Cost of repairs .....	Kshs. 1,369, 600.00
Loss of user .....	Kshs. 2,500, 000.00
Total .....	Kshs. 3,970,100.00

The amount will attract interest at court rates from today’s date until full payment.

The respondent is awarded costs in the lower court but since the appeal has partially succeeded, each party will bear his/its own costs of this appeal.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED** at **ELDORET** this 22<sup>nd</sup> day of July 2015

In the presence of:

Mr. Korir for the respondent

Mr. Lobolia Ct Clerk

No appearance for the appellants.