REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 142 OF 2012

DAVID LANGAT…..…….…….....1ST APPELLANT

ABUD ABED OMAR……..…….……2ND APPELLANT

VERSUS

MUTURI GACHIRA THENJE.…….....…….RESPONDENT

(Being an appeal from the original judgment of D. A. Alego, Principal Magistrate in Eldoret CMCC No. 331 of 2011 delivered on 22nd November 2012)

JUDGMENT

1. The appellants are aggrieved by the judgment and decree in the Principal Magistrates Court dated 22nd November 2012. The appellants have lodged a memorandum of appeal dated 13th December 2011. The appeal relates to two matters only: first, that the learned trial magistrate erred by awarding the respondent special damages of Kshs 100,038 for repairs of the suit vehicle; and, secondly, in making an award for loss of use in the sum of Kshs 1,260,000. The appellant's case is that the items were not specifically pleaded or strictly proved. The appellant relied on written submissions filed on 14th July 2015.

2. The appeal is contested by the respondent. There is no cross-appeal. In brief written submissions filed on 8th July 2015, the respondent stated that liability and quantum of general damages were entered by consent. Regarding the claim for special damages, the respondent contended that the judgment of the lower court was sound. The respondent relied on the submissions and authorities filed in the lower court appearing at pages 20 to 22 and 23 to 30 of the record of appeal. I was implored to dismiss the appeal.

3. On 14th July 2015, I heard learned counsels for both parties. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.

4. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.

5. The respondent was the plaintiff in the lower court. He brought a suit against the appellants claiming damages for negligence. On 7th March 2011, the respondent was a passenger in his vehicle KWP 673. It was being driven along Eldoret Turbo road. He claimed that a trailer, KBL 554F ZB 1109, which belonged to the 2nd appellant knocked his vehicle; caused serious injuries to him; and extensive damage

to the vehicle. The trailer was being driven by the 1st appellant. The respondent blamed the appellants for negligence. By a written consent recorded on 21st June 2012, the parties agreed on liability in the ratio of 20% to 80% in favour of the respondent. They recorded a further consent onq the same date that general damages be assessed at Kshs 70,000.

6. The respondent had prayed for special damages of Kshs 188,138; costs and interest. At paragraph 11 of the plaint, the special damages were particularized as follows-

a) Treatment bills Kshs 5,000.

b) Spare parts for KWP 673 Kshs 100,038.

c) Mechanic's fees Kshs 25,000.

d) Assessors fees Kshs 6,000.

e) Medical report Kshs 2,000.

f) Loss of use Kshs 50,000.

g) Police abstract Kshs 100.

7. The total claim for special damages was thus Kshs 188,138. The plaint was never *amended*. After hearing the evidence, the learned trial magistrate found that the respondent had proved special damages in the sum of Kshs 1,094,431. The respondent had testified that the pick-up genearted income of Kshs 5,000 to Kshs 10,000 per day. Learned counsel for the plaintiffs submitted in the lower court that daily income be assessed at Ksh 7,500. The learned trial magistrate averaged the income at Ksh 7,000 per day. As the pick-up was off the road for six months, the amount came to Kshs 1,260,000. To that she added Kshs 100,0038 repair costs, assessment fees of Kshs 6,000 and medical report Kshs 2000 all totaling Kshs 1,368,038. After apportioning the liability at 80% to 20% in favour of the respondent, the net amount was Kshs 1,094,431. She also awarded the respondent costs and interest.

8. I stated that the plaint was never amended. The only special damages pleaded or particularized in the plaint were for Kshs 188,138. With respect to the learned trial magistrate, she erred by allowing the respondent to lead evidence on special damages that had not been pleaded in the plaint. Special damages must be specifically pleaded and strictly proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Ouma v Nairobi City Council* [1976] KLR 297, *Kenya Bus Services v Mayende* [1991] 2 KAR 232 at 235, *Coast Bus Services Limited v Sisco Murunga & another*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported), *David Bagine v Martin Bundi*, Nairobi, Court of Appeal, Civil Appeal 283 of 1996 [1997] eKLR.

9. The claim for loss of use was required to be claimed as special damages. It cannot be assessed in the manner of general damages. The respondent had claimed a sum of Kshs 50,000 for loss of use. In the absence of an amendment to the plaint, she could only lead evidence to prove that sum. She did not lead any evidence to show she paid for alternative transport. Fundamentally, evidence of special damages cannot just be *thrown at the court.* See *David Bagine v Martin Bundi*, Nairobi, Court of Appeal, Civil Appeal 283 of 1996 [1997] eKLR.

10. The special damages for loss of use could only be made subject to the ceiling of Kshs 50,000 pleaded in the plaint. The respondent had testified that the pick-up would generate Kshs 5,000 to Kshs 10,000 per day. A notebook of cash earnings (exhibit 3) was produced in evidence. The learned trial magistrate erred by trying to come up with an average sum of Kshs 7,000 per day. I thus set aside the award of Kshs 1,260,000 for loss of use. But seeing that the respondent's evidence in the notebook was not controverted, I am prepared to award her the amount specifically pleaded of Kshs 50,000 for loss of use less 20% contributory negligence as agreed by the parties.

11. The respondent admitted in cross-examination that the motor vehicle was never repaired. At page 60 of the record, he answered as follows-

> *"I have not paid the 100,000 for repairs for my car. I never spent 50,000 for alternative transport. I left transport business after this mishap. I have not paid any other dues."*

12. From the assessment report of Wareng Auto Assessors dated 11th April 2011 (exhibit 2A) the pre-accident value of the motor vehicle was given as Kshs 200,000. The vehicle was purchased by the respondent for Kshs 140,000 on 2nd December 2010. I have seen the sale agreement (exhibit 1). That may explain why the vehicle was written–off. The assessor estimated the costs of repair at Kshs 100,038. The repairs were not carried out.

13. Granted that evidence, the plaintiff should have prayed for the *pre-accident value of the suit vehicle*. Instead the particulars at paragraph 11 (b) of the plaint were *"towards spare parts for repair of motor vehicle KWP 673*". For the avoidance of doubt, paragraph 11 of the plaint read- "*the plaintiff has incurred expenses of Kshs 100,038 in repairing the…vehicle which amount he claims from the defendant"*. I have gone through the record carefully. The plaint was never *amended*. The claim for the value of the respondent's vehicle was not specifically pleaded or proved in the circumstances.

14. The special damages claimed for the repairs were not proved either. I reproduced earlier the respondent's answer in cross-examination. He stated clearly that *he had not paid the Kshs 100,000 for repairs of his vehicle.* What was before the trial court was an *opinion* by the motor vehicle assessor for the *estimated cost of repairs*. It is a cardinal precept of the law of evidence that he who alleges must prove. See sections 107 and 109 of the Evidence Act. With great respect to the learned trial magistrate, I find that the award of Kshs 100,038 under the head of *spare parts* was erroneous. For the same reasons, the sum of Kshs 2,000 for the medical report was not strictly proved. No receipt or other documentary evidence was tendered to prove the expenditure.

15. In the result, this appeal succeeds in part. The judgment and decree of the lower court dated 22nd November 2012 is hereby set aside. Judgment is now entered in favour of the respondent against the appellants as follows-

a) Liability is apportioned by consent at 20% to 80% in favour of the respondent.

b) General damages are assessed by consent at…..Ksh 70,000.

Loss of use…….……Kshs 50,000.

Assessment fees…….....…...Kshs 6,000.

Total…….....…Kshs 126,000.

Less 20% contributory negligence…...…….Kshs 25,200.

Final award…….……...….Kshs 108,800.

c) I award the respondent costs in the lower court and interest. In the interests of justice; and considering the predicament the respondent finds himself in; I order that each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 29th day of September 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Akelo for Mr. Kamau for the appellants instructed by Kamau Lagat & Company Advocates.

Mrs. Khayo for the respondent instructed by Andambi & Company Advocates.

Mr. J. Kemboi, Court clerk.