



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 101 of 2001

ROY TRANSPORTERS LTD. APPELLANT

VERSUS

MICHAEL K. MWATHA RESPONDENT

***(Being an appeal from the Judgment of the Senior Principal Magistrate Hon J.R. Karanja (SPM) in
Makueni Principal Magistrate Case No. 1418 of 2000 dated 19th***

July 2001)

(Before B. Thurania Jaden J)

J U D G M E N T

The Respondent was the Plaintiff in the lower court. The Respondent's motor vehicle Registration No. KAL 828 was involved in a Road Traffic Accident with motor vehicle KAG 666Z on 3/6/2000 along the Mombasa – Nairobi road. The Respondent's motor vehicle was extensively damaged. The Respondent sued the Appellant who was the owner of motor vehicle KAG 666Z. The Respondent claimed a total of Kshs.499,600/= as special damages.

At the close of the Respondent's case, the parties by consent apportioned liability at 90% against the Appellant. No evidence was adduced by the Appellant's side. The trial magistrate entered judgment for the Respondent for a sum of kshs.473,810.90 cents plus costs and interests less 10% contributory negligence.

The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:-

1. The trial Senior Principal Magistrate erred in law and in fact by entering judgment for the claim of loss of user which was not proved or supported by any sufficient evidence and should have been rejected.

2. The trial Senior Principal Magistrate erred in law in deciding the case against the weight of the evidence on non-user claim.

Manthi Masika Advocates appeared for the Respondent while **Mose Mose & Millimo Advocates** appeared for the Respondent.

The appeal was canvassed by way of written submissions which I have duly considered.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

“An appeal to this court from a trial by the High Court is by way of 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 or 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955), 22 E.A.C.A. 270”.

PW1 **Patrick Mambo** a motor vehicle assessor who inspected the Respondent’s motor vehicle gave the cost of repair at Kshs.395,411.90. He charged Kshs.3,500/= for his report. PW1 estimated the period of repairs as 2 months. He explained during the cross-examination that the motor vehicle needed to be dismantled completely to facilitate effective repairs.

According to the evidence of the Respondent (PW1), it took a period of two months to repair the motor vehicle. His evidence establishes that the accident occurred at **Konza** area along the Mombasa-Nairobi road and the motor vehicle was towed to **Kyumbi Police Post**. The motor vehicle was then inspected before it was towed to **Nairobi** for repairs. Pressed further on the issue of the period taken to repair the motor vehicle, he explained that he also had to source for money to finance the repair works.

In his judgment, the trial magistrate relied on the assessor’s report which estimated the period of repairs

as two months.

Taking the evidence on record in totality, the evidence that the motor vehicle took two months to repair is uncontroverted by any other evidence. According to the motor vehicle assessor (PW1) the motor vehicle had to be dismantled completely to facilitate effective repairs. The owner of motor vehicle had to wait for inspection at the police station and he also had to source for funds for the repair work. Whether 60 days was a reasonable period for the repair of the motor vehicle is a question of evidence. There cannot be a rule of thumb in determining reasonableness (*See Mark Khan Transporters Ltd-vs- Peter Mbugua (2009) E KLR*).

Without any evidence to controvert the Respondent's position, the court cannot just pick on figures from the air. I therefore accept the Respondent's evidence that the vehicle took two months in repair. I would apply the same rationale to the daily earnings that the Respondent testified he used to make from the motor vehicle. The trial magistrate calculated the daily earnings at Kshs.2,240 which was an average. The Respondent had asked for Kshs.2,600/= per day. This was reasonable in the circumstances.

The daily earnings record book produced as an exhibit by the respondent reflected off duty days and expenditure incurred in servicing the motor vehicle. The expense that could have been incurred in paying for insurance and taxes for the two months period may not make a significant difference to this case especially taking into account that the average figure used by the trial magistrate falls far below the figures reflected in the earnings record book.

In the end, I find the appeal has no merits and dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of April 2013.

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JUDGE