



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 67 of 2007

PATRICK WAMBUGU GITAHU T/A WAMBUGU GARAGE.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

JUDGMENT

The plaintiff whose business premises, a motor garage, was destroyed by fire triggered from the defendant's electricity pole brought this action claiming-

- a) the cost of all goods burnt valued at Kshs.3,729,280/=
- b) general damages
- c) loss of business
- d) costs and interest

Although the defendant denied this claim in its statement of defence, the parties recorded a consent on liability against the defendant in the ratio of 80% and the plaintiff 20%. What is, therefore, before this court is the assessment of damages.

The plaintiff called evidence to the effect that his claim is based on assessment conducted by Paramount Assessors. He however confirmed that all the records were destroyed in the fire incident. It is also on record that part of the value of goods claimed belonged to his customers.

Evidence by Paramount Assessors was led by Andrew Kiragu who confirmed that most of the stock and goods in the garage were burnt beyond economic value while some were only partially destroyed. It was his evidence that the valuation was based on figures obtained either from the dealers or from the plaintiff. The defendant did not call evidence. Counsel then put in written submissions.

I have considered these as well as authorities cited by learned counsel for the defendant. The plaintiff claims special damages arising from the loss of assorted tools listed under paragraph 6 of the plaint whose total value is Kshs.150,000/=, 4 engines valued at Kshs.240,000/= used spare parts worth Kshs.1,125,000/=, new spare parts of the value of Kshs.740,500/=, 2 motor vehicles whose total value is given as Kshs.772,700/=, the cost of repairs of two motor vehicles partially burnt at Kshs.121,882/= and two rooms valued at Kshs.550,000/=. It is not clear to me why the plaintiff has made a claim for both general and special damages, given the circumstances of this case.

It is trite learning that damages are generally awarded in the form of a lump sum, providing a once and for all assessment of the losses flowing from the tort. An aggrieved party in negligence is not entitled to make a profit out of his misfortune. Stated another way in the oft-quoted words of **Lord Blackburn**, the court should award;

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation .”

See **Livingstone Vs. Rawyards Coal Co.** (1880) is App. Cas.25 at 39.

Having made a specific claim for the value of all the items lost in the fire, a claim for general damages is untenable. It is similarly trite law that special damages must not only be specifically pleaded but also strictly proved. See **Siree Vs. Lake Turkana El Molo Lodges Ltd.** (2002) 2EA 521.

The plaintiff's claim under paragraph (a) – Costs of goods lost and valued at Kshs.3,729,280/= and paragraph (c) – loss of business from the date of damage to the date of payment in full at Kshs.20,000/= per month - are in the form of special damages. They have been pleaded and all that was incumbent upon the plaintiff was to strictly prove them.

Starting with the last claim for Kshs.20,000/= per month as loss of business, no evidence was led to show the level of profit generated in the business. There was, however, an attempt to present

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evidence in support of the claim for the value of the destroyed goods. The plaintiff engaged the services of an expert, Paramount Assessors, described in their report as motor accident assessors, loss adjusters, motor vehicle valuers and consultants. The report prepared by the assessors is divided into eight (8) parts as follows:

- i) tools
- ii) engines
- iii) assorted spare parts
- iv) new spare parts (Room 3)
- v) 3 burnt vehicles (Room 4)
- vi) Parts to be fitted in XGK 0444 – partially burnt
- vii) Parts to be fitted in KAQ 274Y also partly burnt
- viii) Cost of two destroyed rooms (i.e. rooms 5 & 6)

There are three observations to be made with regard to the values assessed in respect of each item listed. It was the case of the plaintiff that he supplied the list to the assessors from his memory as all his records were destroyed. The value of the listed goods was also obtained from “dealers.” Thirdly, values attached to some of the goods are manifestly unrealistic.

From the description of Paramount Assessors, set out earlier in this judgment, it is clear that the assessors have held out themselves as experts in the fields of motor accident, loss adjacement, motor vehicle valuers and consultants. The Court of Appeal in **Mutonyi Vs. Republic** Cr. Appeal No.92 of 1981 has described the evidence of an expert as follows:

“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.”

These principles although expressed in a criminal case apply equally to civil cases. The functions of an expert witness was set out in the following passage from the judgment of President Cooper in **Davie Vs. Edinburgh Magistrates** (1933) Sc 34 at 40

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence.”

In **Mutonyi Vs. Republic** (supra) the Court of Appeal laid down the following guidelines on expert evidence. They said;

“So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion –

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
3. Give evidence of the facts which may be ascertained by him or facts reported to him by another witness.”

The term “Art” is defined in Black Law Dictionary to mean, *inter alia*, an occupation or business that requires skills Looking at the report presented in this trial by Paramount Assessors, and without losing sight of the standard of proof in civil cases, the evidence is far below the threshold of balance of probability.

The report is a mere compilation of six pages comprising photographs and a three-page list. It is signed by C. Wasike as Principal Assessor. There is no mention of his qualification, skills and experience in the sphere in question.

There is no description of the methodology used in arriving at the value of the burnt goods. It was the evidence of the witness from Paramount Assessors, which evidence was corroborated by the plaintiff that the list was supplied by the plaintiff from the bank of his

memory; that the value was obtained from dealers in the spare parts in question and in respect of the motor vehicles, from the owners.

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There was no evidence of the dealers who supplied the value or even in respect of which items. None of the owners of the destroyed motor vehicles were called to confirm the value of the vehicles and how that value was arrived at.

What is also curious is the fact that despite their field of expertise, Paramount Assessors also conducted a valuation of the buildings that were destroyed. It should be clear from what I have stated so far that the basis of the plaintiff's claim is weak and does not meet the requirement of strict proof of special damages. Judged by the standards enunciated in the **Mutonyi Vs. Republic**, (supra) the assessor's evidence was most unsatisfactory. There is no single value of the damaged property that is reliable.

Not even special damages in respect of police abstract form, court attendance charges for Paramount Assessors or their fees for the report is recoverable as they were not pleaded.

The sum effect of what I have stated is that there is no doubt that an electric fault on the defendant's electricity pole caused the fire that gutted the plaintiff's business. I believe it cannot also be denied that as a result of the fire, the plaintiff's goods and those of his clients were destroyed, some beyond economic repair while others were only partially damaged.

It is also acknowledged that the plaintiff's business records were destroyed in the fire and in so far as his loss is concerned, he has had to fall back to his memory. The question therefore is; in the circumstances stated above, is the plaintiff without remedy for lack of documentary proof of his claim? To borrow the phrase used in

Kenya Bus Services Ltd. Vs. Mayende. (1991) 2 KAR 232, the plaintiff has merely "thrown" the figures at the court.

The courts in Kenya have been considerate in claims based on documentary evidence which are either non-existence, misplaced or, I may add, destroyed.

The classical consideration of this situation was given by Apaloo, J (as he then was) in **Wambua Vs. Patel & Another** (1980) KLR 336 cited with approval in **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros Vs. Augustine Munyao Kioko**, Civil Appeal No.203/2001. The judges in **Kimatu** case (supra) said:

"We appreciate the expectation of Mr. Inandar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there are dicta in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult."

Apaloo, J (as he then was) considered such difficulties in the case of a village-man in his mid-fifties dealing in cattle trade, who was injured in a road traffic accident. He states:

"I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is the Kenya Meat Commission, he kept no books of account or any business book. So his income expenditure were all store up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. I think the figure the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method."

Taking into account this trend and bearing in mind the circumstances of this matter, I enter the judgment in favour of the plaintiff against the defendant in an all-inclusive sum of Kshs.600,000/= less 20% contribution equals Kshs.480,000/= plus costs and interest.

Dated, Signed and Delivered at Nakuru this 19th day of February, 2010.

W. OUKO
JUDGE