



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1210 of 2005

FRANCIS KARIUKI RAGUI.....1ST PLAINTIFF
FREDRICK NDERITU (suing through his father & next friend
FRANCIS K. RAGUI).....2ND PLAINTIFF
DAVID WAWERU.....3RD PLAINTIFF

Versus

KATE CAMP LIMITED1ST DEFENDANT
EMMANUEL WANYAMA.....2ND DEFENDANT

JUDGMENT

The Plaintiffs herein sued the Defendants for compensation arising out of a road traffic accident that occurred on the 9th of April 2004 when the 1st Defendant's motor vehicle Registration Number KAE 828 W lost control and hit the 2nd and 3rd Plaintiff occasioning them bodily injuries and the same vehicle also hit the 1st Plaintiff's studio shop. The accident took place at Lokichoggio in Kenya.

On the 3rd of March 2008 the parties compromised the suit on the issue of liability and recorded a consent before me that the Defendants bear 80% liability and the Plaintiff 20% liability.

They undertook to carry on further negotiations to reach a final consent settling the remaining part of the suit. The claim as regards the 2nd and 3rd Plaintiff's case on general damages was settled on 25th/26th June 2008 when a further consent was recorded by a Deputy Registrar leaving out special damages being claimed by the 1st Plaintiff.

The parties promise to come back to court with a further and final consent brought back no consent. In the end parties gave up the effort and agreed to have this judgment based on filed written submissions which M. Ndwiga & Co. Advocates for the Plaintiffs and B. Mbai & Co. Associates Advocates for the Defendants filed.

For the 1st Plaintiff the following was submitted. Effectively, what is outstanding for this court's determination is the amount of damages payable to the 1st Plaintiff for the damage to his studio shop crushed by the 1st Defendant's motor vehicle Registration Number KAE 828 W.

At paragraph 7 of the Amended Plaintiff filed in this court on the 15th of August 2007 the 1st Plaintiff avers that his studio shop was extensively damaged and the building, goods, items, electric machines, electronic cameras, photographs, frames paintings, fixtures and fittings all were destroyed. And the destruction to the tune of 1,911,456/=. Further, that he was the sole breadwinner for the family which entirely relied on the income from the said shop and as a result of the accident he lost the sum of Kshs.2,794.40 per day for 30 days which he took to undertake the repairs

therefore accumulating a total loss of income of Kshs.83,332.00

This written submissions shall therefore proof before this Honourable Court through document and photographs how the said loss is arrived at:-

The 1st Plaintiff an adult male residing in Lokichoggio Town – Kenya had been running his studio business since 1999 and he attaches hereto his **Business Permits for the year 2002, 2003 and 2004 marked as document number 1.**

He would every so often travel from Lokichoggio to Nairobi to purchase the different wares he sold at his shop and we attach **various receipts for his travel marked as document number 2.**

We also attach hereto **various receipts** from year 2000 showing the different wares he purchased for sale at his aforesaid shop in Lokichoggio **marked as document No. 3**

My lord from the receipts it is clear that the 1st Plaintiff would purchase electricals, electronics goods etc from various electronic shops in Nairobi and that the following are some of the goods he bought:-

1. HBs
2. Wizer Camera
3. 4 way Extension
4. Lamp Holder
5. Electrical wires
6. Markers
7. Bed switches
8. Soldering Wires
9. Sockets
10. Switch boxes
11. Bulbs Assorted
12. Radio Cords
13. Multiplugs
14. ACs
15. Music tapes
16. Cassette
17. Insulating Tapes
18. Fitting Solar
19. Clips
20. Solar Tube
21. Batteries
22. Enlargers
23. Grease
39. Solar fitting
40. Soldering wire
41. Top Plugs
42. Success cards
43. Taxi – lamp
44. Cellotape
45. Sunglasses-Assorted
46. Ladies shoes
47. Super glue
48. Diaries
49. Scratch Cards
50. Copper Rods
51. Counter Books
52. Receipt Books
53. Cash sale books
54. Envelopes
55. Brown Paper
56. Cassettes
57. Condenser
58. Brake Pads
59. Battery terminals
60. Carbon brush
61. Bushes

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|--------------------------|-----------------------|
| 24. filter Oil | 62. Exhaust Gasket |
| 25. Battery water | 63. Suspension bushes |
| 26. Wipers | 64. Clips |
| 27. Cylinder Head Gasket | 65. First Aid Kit |
| 28. Sealed beam | 66. |
| 29. Boll joints | |
| 30. Multi Plugs | And others |

My Lord the availed receipts are just but a number to prove that the 1st Plaintiff actually purchased Studio items, photograph materials, electrical items, electronics, general merchandise and various goods for sale in his shop.

That when we tally the availed receipts for the year 2000, 2001, 2002, 2003 and 2004 before the accident occurred we come up with the following:

Year	Totals of receipts availed
2000	Kshs. 276,980
2001	Kshs. 204,000
2002	Kshs. 621,870
2003	Kshs. 908,220
2004	Kshs.1,190,053

The 1st Plaintiff would on a yearly basis take stock of his business and we attach as **Document No. 4 stock lists for 2002, 2003 and 2004**

Stock for year 2002 – stood at Kshs. 729,132.00

Stock for year 2003 – stood at Kshs.1,494,246.00

Stock for year 2004 – stood at Kshs.2,624,116.00

That in the premises were also **studio apparatus i.e an Optic Camera, Solar Panel, Payphone fully programmable, and a Zent Camera** (paragraph 7 – Amended Plaintiff) valued at **Kshs. 84,500 receipts of their purchase attached hereto as document No. 5** which were also all destroyed.

In a cash register book the 1st Plaintiff recorded his daily sales since 2002 and from a perusal of the same the business earned him an average income of Kshs.2,794.40 on a daily basis. We attach the said **Daily Summary Book as Document Number 6.**

Also attached hereto is the **cash sale book** from which the 1st Plaintiff would issue receipts to his customers **as document No. 7**

That when the accident occurred the 1st Plaintiff took **photographs** of the damaged premises and we attach them hereto as **document No. 8.** That from the same it is evident the damage caused to the premises and to the business.

That after the accident the 1st Plaintiff was able to **salvage goods valued at a sum of Kshs.188,605/=** as exhibited by a document dated the 9th April 2004 attached hereto as **No.9**

That the Plaintiff repaired the said premises to its current status and fixed glass counters, shelves, the veranda, the painting and the roofing. He has no receipts for this but claims a sum of Kshs.109,405 (paragraph 7) Amended Plaintiff and we urge this Honourable Court to award the said figure or such reasonable figure as the court can deduce from the current state of the said shop from **Photographs attached hereto as Document Number 10.**

Further the 1st Plaintiff instructed a valuer – Omanwa & Associates to prepare a **Valuation Report** of the

Estimates of his business and stock goods damaged which was undertaken and a report duly prepared which we attach hereto as **Document No. 11.**

That the said valuer charged the 1st Plaintiff as sum of **Kshs.10,000/= a receipt** of which we attach as **document No. 12**

Our very humble submission is that the Plaintiff has from his pleading and documents attached hereto been able to proof on a balance of probabilities the following salient points.

That he ran a business known as Loki Studio that dealt in the sale of various items ranging from Studio items, photography material, electrical items, electronics, general merchandise etc.

Our very humble submission is that the Plaintiff has from his pleading and documents attached hereto been able to proof on a balance of probabilities the following salient points.

1. That he ran a business known as Loki Studio that dealt in the sale of various items ranging from Studio items, photography materials electrical items, electronics, general merchandise etc
2. That he kept stock of his business from the stock taking records for year 2002,2003 and 2004.
3. That he purchased the aforesaid items in Nairobi.
4. That an accident took place on 9/4/04 that destroyed his aforesaid business.

The question that loudly begs is how much the loss or damage to the 1st Plaintiff's business was – a question that these submissions attempt to answer.

From the stock taken by the 1st Plaintiff on the 4/4/04 his business held goods valued at Kshs.1,927,636/=. This is a material damage claim that is specifically pleaded and which the Plaintiff has proven through the documents produced. There are receipts to confirm he had purchased goods for sale, he would so often travel from Lokichoggio to Nairobi to purchase these goods, and he had a business permit to do his kind of trade. These receipts are in their original form and though some do not have the 1st Plaintiff's name they are in his possession and we urge Your Honour to take **Judicial Notice** of the fact that usually shops in Kenya rarely issue receipts in one's name unless you specifically ask even our supermarkets which are mega shops do not issue receipts in one's name.

He took stock of the value of goods in his shop every year, he kept a cash sale book for his sales, and he recorded a daily summary of his shop.

From the records, and cash sale book and the stock sold in the 4 days between the 4th April 2009 and 9th April 2004 totaled a sum of Kshs.21,480. When after the accident the 1st Plaintiff salvaged the goods not damaged the same totaled Kshs.188,605/=.

Therefore we humbly submit that for goods damaged the Plaintiff is entitled to Kshs.1,717,551 arrived at as below;

i. Value of stock as at 4/4/04	-	Kshs. 1,927,636
ii. Less value of stock sold before the accident	-	Kshs. 21,480
iii. Less Value of salvaged stock	-	<u>Kshs. 188,605</u>
Total		Kshs.1,717,551

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Other loss

Repair of damage to the shop (fixture)	-	Kshs. 109,405
Studio Apparatus Drawings/paintings	-	Kshs. 84,500

Loss of income at Kshs.2,794.40 x 30 days - Kshs. 83,832

Total Kshs.1,995,288

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We humbly submit that the 1st Plaintiff has on a balance of convenience established the said loss as a result of which the court should award him the compensation claimed.

The same would be subjected to the 15% contributory negligence conceded by the 1st Plaintiff.

We so submit.

For the Defendants, the following was submitted: What remains pending for determination is the First Plaintiff's claim for special damages with respect to damage caused to his business as pleaded at paragraph 7 of the Amended Plaintiff dated 14th August 2007 and filed in court on 15th August 2007. It is now trite law that special damages must not only be pleaded but strictly proved. The First Plaintiff's claim as pleaded is for:-

- a) Material special damages for the loss and damages occasioned to the studio shop belonging to the First Plaintiff for the sum of Kshs.1,911,456/=.
- b) Loss of user of the studio shop Kshs.83,832/=.
- c) Costs and interest at court rates.

The first Plaintiff in support of his claim has tendered copies of receipts to prove purchases, stock list, daily summary book cash sale books, photograph and valuation report. In the defendants Amended Statement of defence dated 28th August 2007 and filed in court on 31st August 2007. The defendants have denied the claim and put the Plaintiff to strict proof. To begin with the First Plaintiff has failed to appreciate that when it comes to strict proof of special damages the balance or scale is higher than a mere balance of probabilities but more towards beyond reasonable doubt for the special damages claimed are actual figures not probabilities or expectations. The documents produced in support by the First Plaintiff clearly offend the provisions of the stamp duty Act in so far as the receipts do not bear revenue stamps thus their evidential value fails. Secondly, the bundle of receipts as produced and the argument by the First Plaintiff appears to mean the stock from year 2000 till the date of accident is being added on yet it was meant for trade meaning it was not sold but accumulated hence the claim.

The said reasoning and submission by the First Plaintiff is erroneous and misleading. The First Plaintiff having engaged in a business entity as he wishes the court to believe must have been buying and selling goods not just stocking them up. From the picture created the First Plaintiff appears to have had a lot of dead stock in his shop. He was only buying but not selling. Thirdly My Lord the First Plaintiff has failed to produce audited accounts for the previous years trading which clearly would reflect or give a better impression of the financial position and viability of the business vis a viz the claim as pleaded especially noting the very remote location the business was situated and the substantial claim raised. It is my submission that there is a big divide and contrast that such a humble location can sustain such a thriving studio business.

The report produced a documents No. 11 purports to be a report and valuation of stocks and goods damaged. The said report is undated and clearly prepared in support of the First Plaintiff's claim. The report I submit is clearly biased in favour of the First Plaintiff and relies on information provided by the Plaintiff. The authors of the said report do not appear to have conducted an independent audit, visited the scene, taken stock of goods damaged and those that were not affected by the accident. The said report further falls short of an accounting document for the prices as quoted on goods fails to differentiate between purchase price and sale price to enable calculation on profit, for the First Plaintiff must have been aiming at profit making and not passing over the goods sourced from Nairobi at the same cost as purchased without even factoring in travel and transport costs. Again, the Assets column fails accounting standards for it does not pay attention to depreciation, which is an accounting principle applicable on such assets.

The evidential value of the said document therefore fails as it does not in any way assist the court. It paints a rosy picture of the business with utter disregard to accounting practices and principles. The defendants insurers at the material time M/S UAP Provincial Insurance Company Limited under the doctrine of subrogation did appoint investigators and a loss adjuster upon the claim being made who both submitted their findings which I hereby annex to my submissions as defence exhibits 1 and 2 respectively. On the investigations it was established that there were fundamental breaches in procedure following the accident and all that the police record appears to have is what the First Plaintiff hold them over the incident. The loss adjusters in their report pointed out the claim to be exaggerated. The receipts produced in support were not dated nor did they bear the name of the First Plaintiff nor his studio therefore their authenticity is questionable. Again whether the goods were bought before or after the accident cannot be ascertained hence they fail the test on strict proof.

It is my submission that production of a receipt alone is not strict proof. The receipts must comply with the legal requirements to be of any evidential value and secondly it must bear a date and particulars of the purchaser. I wish to draw the courts attention to the report by Alpha.dot Security dated 10th November especially at page 3 to 6.

The photographs provided by the First Plaintiff clearly show only the front part of the shop was affected yet the claim appears to suggest that the entire shop was destroyed. From the loss adjusters report it is evident that the value of goods was overstated and the receipts obtained cannot be authenticated as submitted herein before. Again the loss adjuster did point out at paragraph 5 and 6 at page 5 that depreciation was not taken into account nor date of purchase on assets given. At page 6 My Lord of the said report the findings of the First Plaintiff's valuer are put into question as raised at paragraph 7 of page 6.

On the loss of business as pleaded paragraph 8 of page 6 it is clear that such a finding cannot be supported by the documents availed for in the absence of invoices or receipts such sales cannot be determined or supported. It is also pointed out that the loss of use has been overstated for the First Plaintiff has relied upon a wrong method of working it out. The First Plaintiff has used revenue only to compute loss of use instead of obtaining the average revenue less cost of goods sold and selling expenses incurred.

In conclusion, the First Plaintiff's claim has not been established nor proved as required by law and I urge Your Lordship to so find and dismiss the claim in its entirety.

To conclude this judgment, this is a case where clearly during the motor traffic accident which took place at Lokichoggio Town on 9th April 2004, the Defendant's motor vehicle rammed into the 1st Plaintiff's studio shop, damaging part of the shop as well as some of the shop goods inside the shop.

The impression I get from written submissions in this suit is that parties have taken advantage of the situation, and that explains why negotiations for a settlement failed. Each side has gone to the extreme, the 1st Plaintiff exaggerating his claim while also forgetting stamp duty, and therefore finding it difficult to specifically prove the claim on the balance of probabilities bearing in mind that for special damages, the balance or scale is higher than a mere balance of probabilities as it is more towards proof beyond reasonable doubt because special damages claimed are actual figures and not probabilities or expectations. It is strict proof. Instead the 1st Plaintiff went a stray though he thought he could prove the case. At the same time, the Defendants, on the other hand, became too mean to the extent of being completely blind to the undisputed fact of damage to the studio shop and to some shop goods in that studio. The Defendant's Counsel therefore finishes by saying:

“In conclusionthe First Plaintiff's claim has not been established nor proved as required by law and I urge Your Lordship to so find and dismiss the claim in its entirety.”

I think it will be unfair for me to accede to that plea, and doing my best in the circumstances, let me accept what the 1st Plaintiff says is value of stock as at 4th April 2004.

That is	Kshs.1,927,636/=
Less stock sold before the accident	Kshs. 21,480/=
Less value of salvaged stock	<u>Kshs. 188,605/=</u>

Total Kshs.1,717,551/=

Add loss of income at Kshs.2794.40 x 30days Kshs. 83,832/=

Total Kshs.1,801,383/=

I will not accept claim for repair of damage to the shop (fixture) for Kshs.109,405/=. I will not also accept claim for studio apparatus, Drawings/Paintings.

I remain with the total sum of Kshs.1,801,383/=.

But since the 1st Plaintiff failed to specifically prove special damages to the standard required, I will reduce the total sum of Kshs.1,801,383/= by half.

That is Kshs.1,801,383/=

2

=Kshs.900,691/=

Rounding it to Kshs.900,690/=

I note that Mr. Ndwiga in his written submissions says liability was to be at the ratio of 85% to 15% in favour of the Plaintiffs. There is a slight error as it is Mr. Mbai who got it right when he says it was at the ratio of 80% to 20% in favour of the Plaintiff.

Accordingly working the figures out, 20% is Kshs. 900690 x 20

100

= Kshs.180,118/=

The 1st Plaintiff should be paid Kshs.900,690/= less Kshs.180,118/=

= Kshs.720,572/=

Finally therefore I do hereby enter judgment for the 1st Plaintiff against the Defendants jointly and severally in the sum of Kshs.720,572/= special damages plus costs of the suit and interest on the decretal sum at court rate till payment in full.

Dated this 5th day of February 2009.

J.M. KHAMONI

JUDGE

Present:

Mr. Onyambu for M. Ndwiga & Co., Advocates for Plaintiff

Mr. Nyangicha for B. Mbai & Associates, Advocates for Defendants

Court Clerk: Kabira

Further Order

Upon oral application by Mr. Nyangicha, there be a stay of execution for 30 days from to-day.

J.M. KHAMONI

JUDGE