**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appeal 19 of 2004**

**KOBIL PETROLEUM LIMITED……..APPELLANT**

**VERSUS**

**M.A. BAYUSUF & SONS LIMITED…… RESPONDENT**

**JUDGMENT**

This appeal is from the judgment and decree of the Learned Senior Principal Magistrate, J. S. Mushelle dated 9th February 2004, in Mombasa Chief Magistrate's Civil Case No. 3859 of 2002. The plaintiff in that suit, M. A. Bayusuf & Sons Limited (the respondent in this appeal) was awarded Kshs. 1,113,600 plus interest and costs. The said sum was in respect of what the respondent described as waiting charges incurred by the respondent on account of the defendant (the appellant) in the year 1997/98. In its appeal the appellant has raised seven grounds. In my view however, the appeal raises two broad grounds: that there was no contract between the appellant and the respondent with respect to waiting charges upon which the Learned Senior Principal Magistrate could base his decision and that the respondent's claim was in the nature of special damages which were not strictly proved.

The respondent's case before the Learned Senior Principal Magistrate was quite simple. It was pleaded in paragraph 3 of the plaint as follows:

"3. The plaintiff claims from the defendant is for (sic) the sum of Kshs. 1,380,000/= being the amount due and owing in respect of waiting charges incurred by the plaintiff on account of the defendant in the years 1998/1999. Full particulars of which have been supplied and are well within the defendant's knowledge."

At the trial, the respondent called its Financial Controller one Hassan Mzee Khamis. He testified that in the month of October 1997, the respondent transported the appellant's fuel from Mombasa in two trucks KTA 977 and KVD 182 to East African Portland at Athi River at the appellant's request. When the trucks arrived at Athi River they were not off loaded because the appellant claimed to have had no space for the fuel. The appellant then instructed the respondent to proceed to Muhoroni to deliver the same cargo to the appellant's customer. The delivery at Muhoroni was made on 18th November 1997 which was about thirty days from the date the respondent's trucks left Mombasa. The respondent's said witness, blamed the appellant for the thirty days delay and informed the court that the respondent charged Kshs. 20,000/= per day per truck for the period of delay. The total sum claimed was Kshs. 1,392,000.00 which the appellant had failed to pay. In cross examination, the said witness admitted that previous delays had not been charged for by the respondent because the periods involved were negligible.

In its statement of defence, the appellant denied the respondent's claim, contending that the waiting charges had not been agreed and had been unilaterally imposed by the respondent. At the trial, the appellant called one Barnabas Taabu Magio, its distribution clerk, who testified that the transportation business between the appellant and the respondent was based on written agreements which did not provide for waiting charges. The witness admitted the facts given by the respondent's witness regarding delayed delivery. The witness testified that no transportation charges were payable as the same had been paid by the appellant. He produced a transportation agreement between the appellant and the respondent which did not provide for waiting charges. He further testified that previously, the respondent had not raised waiting charges even where the appellant had delayed to take delivery for upto fifteen days and further that no other transport company the appellant dealt with raised waiting charges despite delay.

In a short judgment the Learned Senior Principal Magistrate considered that the delay of thirty days was excessive and proceeded to hold as follows:

"The plaintiff stated that it was earning an arrear (sic) of Kshs. 20,000/= per day. Since it had been a practice to give an allowance for delay, the court will give a reasonable duration of six days for each truck and leave a balance of twenty four days.

For the two trucks therefore, it will calculate to (sic)

24 x 20,000/= x 2…….. Kshs. 960,000.00

Add 16% VAT……..Kshs. 153,600.00

Total therefore Kshs.1,113,600.00

I therefore proceed to make the following orders:-

(i) the Defendant to pay Kshs. 1,113,600/=

(ii) the Defendant to pay the Plaintiff (sic) costs of the suit plus interest at court rates."

The appellant was aggrieved and has lodged this appeal as already stated. In his submissions, counsel for the appellant has argued that the respondent failed to prove how its claim had been arrived at and the Learned Senior Principal Magistrate had erred in assessing the waiting charges in favour of the respondent contrary to the evidence adduced before him.

Counsel for the respondent on his part submitted that the decision of the Learned Senior Principal Magistrate should not be disturbed as he exercised his discretion correctly and judiciously having seen and heard witnesses testify, an advantage which this court does not enjoy.

This being a first appeal, I am obliged to reconsider and re-evaluate the evidence which was presented before the Learned Senior Principal Magistrate and make my own conclusion bearing in mind that I have neither seen nor heard the witnesses testify (see Peters – v – Sunday Post Limited [1958] EA 424, Selle & Another – v – Associated Motor Road Company Limited & Others [1968] EA 123 and Ephantus Mwangi & Another – v – Duncan Mwangi Wambugu [1982-88] 1 KAR 278). Hancox JA as he then was in the Ephantus Mwangi case observed as follows:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

An appeal court will also interfere on findings of fact if it is shown that the trial court failed to take account of particular circumstances or probabilities material to an estimate of the evidence. (See the same Ephantus Mwangi case).

I must therefore bear the foregoing in mind as I consider this appeal. The respondent pleaded his claim against the appellant as if it was a liquidated demand. At the trial before the Learned Senior Principal Magistrate, it became clear that the waiting charges claimed were not premised on any agreement. The respondent's witness stated in cross examination that the rate it applied of 20,000/= per truck per day was a standard rate. The witness did not lay before the court any material to establish that the rate it applied was indeed a standard rate in their type of business, trade or practice. What indeed emerged from a cross examination of the respondent's witness and the evidence of the appellant's witness is that there was no standard rate of charge for delayed delivery. The respondent's witness freely admitted that previously the respondent had not charged for delays of upto 15 days.

In the premises, the respondent's claim was clearly for special damages. The Learned Senior Principal Magistrate in his judgment infact treated the respondent's claim as one for special damages. He said as follows:-

"By the time the trucks returned, it was 18th November 1997. That was almost thirty days. For those days the plaintiff lost business to the tune of 20,000/= per day for each of the trucks."

And concluded as follows:-

"The plaintiff stated that it was earning an arrear (sic) of Kshs. 20,000/= per day. Since it had been a practice to give an allowance for delay, the court will give a reasonable duration of six days for each truck and leave a balance of twenty four days."

Loss of business seems to have been the basis upon which the Learned Senior Principal Magistrate found for the respondent. Loss of business is a special damage and should have been pleaded in the plaint even before evidence could be lead upon the same. Particulars of the business loss should also have been given in the plaint in order to alert the appellant of the case it was to meet and prepare to defend.

The Court of Appeal in Savannah Development Company Limited – v – Posts & Telecommunication Employees Housing Co-operative Society Limited cited the English case of Esso Petroleum Company Limited – v – Southport Corporation [1956] A.C. 218 where is was said:-

"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them….. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

The same court also cited Bullen & Leake (12th Edition) at page 50 as follows:-

"…Whenever the plaintiff has suffered any "special damage" this must be alleged in the statement of claim with all necessary particulars and the plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly in his statement of claim or particulars. Special damage in the sense of a monetary loss which the plaintiff has sustained upto the date of trial must be pleaded and particularized otherwise it cannot be recovered."

As I have already observed, the respondent expressed its claim as if it was a liquidated demand. It did not allege business loss nor did it particularize the same. In my view the respondent did not explicitly plead the special business loss alleged. At the trial the respondent's witness testified of the delay and what it charged for the same. The respondent did not adduce evidence on how it had lost Kshs. 20,000/= per day per truck for the period of the delay. The witness did not, for instance, allege that during the period of claim, specific or indeed any contractual obligations had not been met by the respondent. The defendant in my view can be described as a well known entity in heavy transport business and is expected to keep ordinary books of accounts of its business. The respondent's witness did not make reference to any such books to indicate the loss the respondent allegedly incurred for the period in question. In the premises, there was no material which was placed before the Learned Senior Principal Magistrate which would come anywhere close to strict proof of the damages claimed. There was therefore no factual basis for the

finding that the respondent incurred waiting charges at the rate of Kshs. 20,000/= per truck per day or at any other rate.

The Law is now settled that a special damage claim must be pleaded specifically and strictly proved (See Jivanji – v – Sanyo Electrical Company [2003] KLR 452). The respondent violated the settled Law and was not entitled to judgment and the Learned Senior Principal Magistrate, with all due respect, had no jurisdiction to assess and award the special damages he awarded.

In the result this appeal is allowed, the judgment of the Learned Senior Principal Magistrate is set aside. I order that the respondent's suit in the Lower Court be dismissed with costs. The appellant shall have the costs of this appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2009.

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Okongo for the Appellant and Mr. Mogaka for the Respondent.

**F. AZANGALALA**

**JUDGE**

**13TH MAY 2009**