



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 112 of 2005

JACKSON KIPROTICH KIPNGENO 1ST APPELLANT

KENYA POWER & LIGHTING CO. LTD 2ND APPELLANT

VERSUS

DANIEL KIPLIMO KIMETTO 3RD RESPONDENT

JUDGEMENT

This is an Appeal against part of the Chief Magistrate's Court in Eldoret CMCC No. 266 of 2003, Daniel Kiplimo Kimetto –v- Jackson K. Kipngeno and Kenya Power & Lighting company Limited and delivered on 8th November, 2005.

In the said suit the Plaintiff (present Respondent) sued the Defendants (present Appellants) for general and special damages arising from a motor vehicle accident between the parties respective vehicles, which occurred on 28th October, 2002 at Kidiwa Market in Eldoret.

In his Complaint, the Plaintiff contended that on or about the 28th day of October, 2002 while the Plaintiff's car was safely and rightfully parked at the Kidiwa Market within Eldoret Municipality the 2nd Defendant through its agent or servant, the 1st Defendant, drove, managed and/or controlled motor vehicle registration No. KAG 874 so negligently that he caused it to violently hit the Plaintiff's motor vehicle registration No. KAE 689U thereby occasioning severe damage to the said motor vehicle and the Plaintiff has suffered loss and damages related to the motor vehicle. The Plaintiffs set out the particulars of the negligence on the part of the First Defendant, the driver of the second Defendant's vehicle.

The Plaintiff claimed as follows:-

1. Cost of repair – Kshs. 131,558.20
2. Loss of user – Kshs. 28,200/=
3. Other expenses – Kshs. 5,000/=

After hearing the Plaintiff and his three witnesses, the

Defence were called upon to present their defences. The Defendants did not call any witness or present any evidence. The Trial Honourable Magistrate in his judgement found the Defendants liable for the accident. He awarded special and general damages to the Plaintiff as against the Defendants as follows:-

1. Cost of repairs - Shs. 111,490/=
2. Loss user - Shs. 20,000/=
3. Assessment expenses Shs. 5,000/=
4. General Damages - Shs. 50,000/=

T O T A L - Shs. 186,490/=

He also awarded costs of the suit to the Plaintiff.

The Defendants being aggrieved lodged this Appeal against the award of damages for loss of user and general damages. They did not appeal the question of liability and special damages relating to material damage (cost of repair) and the assessment expenses. The Memorandum of Appeal raised the following grounds:-

1. That the Learned Trial Magistrate erred in law and fact in awarding damages for loss of user when the same was not proved.
2. That the Learned Trial Magistrate erred in law and fact in awarding damages for loss of user when there was overwhelming evidence that the documents produced in support were doctored.
3. That the Learned Trial Magistrate erred in law and fact in awarding general damages when there was no basis for such an award.
4. That the Learned Magistrate erred in law and in fact in awarding General Damages when the same was improperly pleaded or not pleaded at all.

In the Court of Appeal case which the Appellants relied

upon, **CIVIL APPEAL NO. 283 OF 1996, DAVID BAGINE -V- MARTIN BUNDI**, their Lords Justices of Appeal held that:-

“We must and ought to make it clear that damages under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can.” These damages as pointed out earlier by us must be strictly proved”

Since loss of user is special damages, the Plaintiff properly pleaded and claimed it as special damages. He had to strictly and specifically prove it as such.

In his evidence the Plaintiff stated that he had to hire a taxi to take his children to school. They went to Testimony School while he resided at West Indies in Eldoret. He claimed he hired a taxi registration No. KZR 029. He claimed he spent Shs. 28,200/= on the taxi. He produced an agreement with the taxi driver. He also produced a book in which all the trips made by the taxi driver and the cost of each trip was recorded. It included the trips to and from school, carrying Mr. Kimetto to Iten and other places and also carrying the family to their home. The record showed that the vehicle was used for 28 trips over a period of 6 weeks during which time the vehicle was being repaired. The taxi driver was called as PW 2 and after his testimony on oath was cross-examined by the Defendants’ Counsel.

Mr. Tuiyot for the Appellants submitted that the taxi driver could not have been in position of hiring

out the vehicle since he did not have possession of the motor vehicle during the material period. He said that the taxi driver took possession of the motor vehicle on 1st December, 2003 after he purchased it.

The car hire agreement between the Plaintiff and the taxi driver was dated 30th October, 2002. The trips began on 30.10.02 and ended on 4th December, 2002. The taxi driver testified that he bought the vehicle on 1.12.2003 but had taken possession in mid 2001. He produced a Sale Agreement for the purchase of the motor vehicle from one Samwel Rotich Kimeli. It was dated 1st December, 2003. It was executed by both Vendor and Purchaser before an Advocate. The terms of the Sale Agreement were, inter alia:-

“1. The Vendor shall sell and the Purchaser shall purchase the Vendor’s vehicle registration No. KZR 029 Datsun Cherry at a consideration of Kshs. 70,000/= (Seventy Thousand) only payable as follows:-

2.

3. The PURCHASER shall take possession of the motor vehicle at the signing of this Agreement and the VENDOR has handed over the Log-book to the Purchaser at the signing hereof and the PURCHASER acknowledge the receipt thereof.

4. The motor vehicle is sold as AS-IS Basis.

.....”

The Agreement was signed by both parties on 1.12.2003.

From the taxi driver’s own testimony and the Sale Agreement, it is clear and certain that the agreement to purchase the vehicle took place on 1.12.2003. He paid a down payment of Shs. 30,000/= and the balance payable by instalments over a period of 4 months. However, the Purchaser who is the taxi driver took possession of the motor vehicle registration number KZR 029 on 1st December, 2003.

Under the provisions of Section 97 and 98 of the Evidence Act, the taxi driver could not introduce oral evidence to vary or depart from the express and clear terms of a written document, the Sale Agreement. The said evidence was inadmissible under the law. The Trial Magistrate erred in law allowing or accepting such evidence. I do agree with Counsel for the appellant the taxi driver did not have the vehicle with him on 30.10.02 to enable him hire the vehicle between 30.10.02 to 4th December, 2002. The Sale Agreement was PW 2’s own document and he was bound by it.

I do hold that the schedule of trips and payments allegedly made and record recorded in P. Ex. No. 7 were doctored and a fabrication. PW 1 and PW 2 lied to the trial Court by presenting manufactured documents and evidence. It follows that there was not strict and specific proof that the Appellant incurred a sum of Kshs. 20,000/= as awarded. This head of claim had to be proven strictly and not on a balance of probabilities which standard applies to general damages.

With regard to the claim of general damages the trial Court awarded a sum of Shs. 50,000/= to the Plaintiff. The Learned Trial Magistrate held that:-

“The Plaintiff also lodged a claim for general damages. The Plaintiff’s Counsel submitted an award of Kshs. 150,000/=. She submitted that the Plaintiff suffered mental torture and anguish both in struggling to bring the vehicle back onto the road and lack of the use of its services. This was not challenged by the Defence.

I am in agreement that the Plaintiff who has been inconvenienced as the Plaintiff was in this case by the accident is entitled to some compensation. He had to struggle to repair the vehicle and had to do without services of the said motor vehicle for a period of not less than three months. I do award

general damages under this head of Shs. 50,000/=.”

First and foremost, the Plaintiff did not plead in the Plaint that he had suffered any mental torture and anguish for the deprivation of the use of the motor vehicle and the “struggle” putting it back onto the road. In any case, had he mitigated his inconvenience by looking for alternative means like hiring another vehicle, then the Court would have awarded him damages for Loss of User. In this case, he tried to prove this claim by use of deceptive and dishonest means of attempting to get it. He cannot blame the Plaintiffs for the failure to prove this head of claim. He was otherwise entitled to this relief to cushion him from the inconvenience and deprivation of the motor vehicle.

Of more importance, there is no relief known to law for damages for mental torture and anguish for a claim of material damage to a motor vehicle. This was not a personal injury claim for any physical or emotional compensation. At this stage in our civil jurisprudence relating to claims arising from motor or traffic accidents, this head of claim is unknown and novel. There was no legal basis for this award of general damages. The Court did not even try to demonstrate how it assessed the said amount/quantum. It merely plucked the figure from the air. I hold that this is an erroneous or wrong principle of law that has no precedent in our law.

In the light of the foregoing, I do hereby quash and set aside the award of damages for Loss of User in the sum of Shs. 20,000/= and the award of general damages in the sum of Shs. 50,000/= making a total of Shs. 70,000/=. The judgement decretal sums shall be reduced by the said amount. I also do quash and set aside to the costs which accrued on this sum. The balance shall therefore be a sum of Shs. 106,490/= together with costs on the said sum.

The Respondent shall pay the costs of this Appeal to the Appellants.

DATED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF JUNE, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mrs. Kittony for the Respondent

Mr. Chanzu for the Appellant