



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL APPEAL 109 OF 2005**

**MIWA HAULIERS..... 1<sup>ST</sup> APPELLANT**  
**MOSES SHIKHOKHA WETABA .....2<sup>ND</sup> APPELLANT**  
**=VERSUS=**  
**GODFREY AUMA ..... RESPONDENT**

**JUDGMENT**

This is an appeal against the decision of the Hon. Chief Magistrate Mrs. F.N. Muchemi in CMCC No. 249 of 2003 delivered on 21<sup>st</sup> October 2005.

In the said case which arose out of a road accident, the trial Court awarded a total sum of Kshs 315,000/= to the Defendant made up as follows:-

- (a) Pre-accident value of motor vehicle Kshs 285,000/=
- Less salvage of Kshs 45,000/=
- ..... Kshs 240,000/=
- (b) Towing charges ..... Kshs 10,000/=
- (c) Valuation report ..... Kshs 4,000/=
- (d) Loss of User ..... Kshs 96,000/=

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Total Kshs 350,000/=

Less 10% contribution ..... 35,000/=

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Kshs **315,000/=**

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The parties had agreed on liability on the ratio of 90% - 10% in favour of Plaintiff.

This was a claim for material damage and loss of user. It is my view that the claim for loss of user is not special damages and it was irregular to include in the claim for special damages. A claim for loss of user could only be a claim in general damages and for determination by the Court.

I have also perused the proceedings and it is clear from the record that the Plaintiff did not lead or tender any evidence to prove loss of user. There is no evidence to show how the sum of Kshs 96,000/= was arrived at. In any event, the claim was on the basis that the vehicle was totally written-off. The claim therefore was specific and ascertained once there was total loss of the vehicle. The Plaintiff could only get the value of the vehicle at the time of the accident. To award damages under loss of user will amount to double compensation. There was no consequential damage after the write-off, unless one pleads it and proves it.

In the premises, I would disallow the award of loss of user in the sum of Kshs 96,000/=.

The towing charges in the sum of Kshs 10,000/= was not proven. No receipt was produced to prove payment. The Plaintiff merely referred to the plaint. This must also be disallowed.

I therefore do hereby allow the appeal and set aside the judgment. I do hereby enter judgment for the Plaintiff (Respondent) as follows:

(a) Pre-accident value of motor vehicle Kshs 285,000/=

Less salvage of Kshs 45,000/=

..... Kshs 240,000/=

(b) Valuation Report ..... Kshs 4,000/=

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Sub-total ..... Kshs 244,000/=

Less 10% contribution ..... Kshs 24,400/=

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Total Kshs 219,600/=

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The Plaintiff shall be paid costs and interest on the said sum from the date of Judgment by the trial Court. Each party to bear his/its costs of this appeal.

**DATED AT ELDORET THIS 5TH DAY OF NOVEMBER 2007.**

**M.K. IBRAHIM,**

**JUDGE.**