



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 89 of 2004

SUMMER LIMITED MERU

APPELLANT

VERSUS

MOSES KITHINJI NKANATA

.....RESPONDENT

J U D G M E N T

1. In his Amended Memorandum of Appeal filed in 9.5.2006 and which parties agreed would be the basis for arguments, the Appellant sets forth its grounds of Appeal as being:-
 1. The Learned Trial Senior Resident Magistrate erred in Law and in fact by making an award of Kshs.20,000/- leaving a balance of Kshs.180,000/- when the following evidence was not available.;
 - a. a pre-accident value of the Motor Vehicle as should be given by a Motor Vehicle Assessor.
 - b. the salvage value of the Motor Vehicle as should be given by a Motor Vehicle Assessor and the Plaintiff.
2. The Learned Trial Senior Resident Magistrate erred in law and in fact by allowing the Plaintiff's claim in his plaint which demanded the total write off claim of Kshs.200,000/- and a claim for loss of user upto the time of judgment which claims were a contradictory and should have been dismissed.
3. The Learned Trial Senior Resident Magistrate erred in Law and in fact by making an award of Kshs.200,000/- less salvage value of Kshs.20,000/- and the sum of Kshs.20,000/- being salvage value was not based on any evidence and was a creation of the Trial Senior Resident Magistrate.
4. The Learned Trial Senior Resident Magistrate erred in Law and in fact by making an award of Kshs.365,000/- for a period of one year when no documentary evidence was produced to support earnings of Kshs.1,000/- per day as loss of user by the Plaintiff.
5. The Learned Trial Senior Resident Magistrate erred in Law and in fact by failing to show

whether the award of Kshs.365,000/- as loss of user for one year was based on a situation where there was evidence of total loss of the vehicle or was based on the Motor Vehicle particularly having been damaged and this resulted to injustice.

6. The Learned Trial Senior Resident Magistrate erred in Law and in fact by failing to hold that the Respondent did not discharge his burden of proof as required by the Law, and the decision made was against the weight of the evidence adduced.

2. The case before the Lower Court was quite straightforward as only the Plaintiff led evidence which was as follows:-

PW1 Moses Githinji, then Plaintiff and now Respondent stated that on 24.6.2002 he was at his home at 10.30 a.m. when he was informed that his motor vehicle registration number KHS 948 Peugeot 404 had collided with motor vehicle registration number KAL 282C Isuzu Lorry, at Kanyakine. He produced documents to show that the motor vehicle belonged to him and that he had paid Kshs.200,000/- for it.

3. The driver of KAL 282C was later found guilty of causing the accident and was jailed for 2 years (Nkubu Traffic Case No.199/02).

4. It was the evidence of PW1 that the motor vehicle KHS 948 was used for business purposes(as a public Service Vehicle) and that he used to receive an income of averagely Kshs.3,000/- per day from that motor vehicle but his attempt at producing a certain booklet containing figures but without an identification or evidence of the maker thereof was rejected by the court.

5. He ultimately claimed Kshs.200,000/- as the value of the motor vehicle since it was completely damaged, Kshs.3,000/- per day from the date of the accident to the date of judgment or such other reasonable period, special damages and costs.

6. In her Judgment, the Learned Trial Magistrate found for a fact that since the question of liability was not contested, she found the Appellant liable to the Respondent for his loss as a result of the accident and put the loss at 100% against the Appellant. She gave judgment for loss of the motor vehicle at Kshs.180,000/- having reduced the value by Kshs.20,000/- as a result of wear and tear. She also allowed Kshs.100/- as costs of the Police Abstract and Kshs.1000/- per day as loss of user for a period of 365 days(one year) and in total gave judgment for Kshs.545,100/- in favour of the Respondent plus costs and interest thereon.

7. From the submissions before me and predicated on the grounds of appeal, the only two matters in contention are;

- i. Was the award of Kshs.180,000/- justifiable?

- ii. Was the award of Kshs.1,000/- per day for one year reasonable and was it in any event

awardable?

8. On the first point, my view is that the amount of earnings from the matatu business is not a matter that can be left to judicial discretion or reason. It is a special damage that must be specifically proved. Without such proof it cannot be awarded. I note that the learned trial Magistrate said this on the point;

“Under this head, I do note that no documentary evidence was supplied to support the averment of Kshs.3000/- daily profit. In the absence of records, I make an award of Kshs.1,000/=. The Plaintiff has failed to mitigate his losses, therefore, I allow the same for a period of 1 year”.

9. Like the trial Judge in Ryce Motors Ltd and Anor – vs – Muroki (1995-1998) 2 EA 363, the learned trial Magistrate was given a booklet to support the claim for Kshs.3,000/- per day which she rejected. The Court of Appeal said this when the matter came before it on Appeal;

“The Learned Judge had before him by way of Plaintiff’s evidence exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act.....”

The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The Plaintiff simply gave evidence to the effect that his matatu was bringing him income of Kshs.4,500/- per day. He did not support such claim by any acceptable evidence and we set aside the award in its entirety”.

10. The Plaintiff in the Ryce case was in the same position as the Respondent in this case and once he was unable to prove his daily income from the matatu business then the claim for loss of user must be rejected. I must do the same in this regard and will set aside the entire award of Kshs.365,000/- as the same was not based on any plea that was strictly proved before the lower court. In fact the lower court agreed that there was no proof of the claim for loss of user and having done so, it should not have made any award under that heading.

11. The second question is whether the claim for the pre- accident value of the motor vehicle was properly awardable? Counsel for the Appellant relied on the Court of Appeal decision in Peter Njuguna Joseph & Anor – vs. – Anna Moraa C.A 23/91 to argue that the pre-accident value is only awardable if there was evidence of that value and that in this case no such value was proved and the whole claim must be dismissed. Further, that the salvage value given at Kshs.20,000/- by the trial Magistrate was not authenticated nor supported by evidence and should be disregarded.

12. I have looked at the evidence tendered before the lower court. The Respondent produced an agreement for sale dated 7.12.2001 showing that the consideration for the sale of the motor vehicle was Kshs.200,000/=. The agreement was properly produced and was not challenged. The accident occurred on 11.7.2002 and the vehicle was written off as it was completely damaged. The Plaintiff (**now Respondent**) in his evidence, which again was unchallenged said in his cross-examination in the lower court;

“ I am not using the vehicle any more. The scrap is heaped in a garage”.

13. In his examination- in- chief he said;

“The vehicle scrap was cut into pieces. I took to a garage. I did not sell the scrap. It is useless”.

14. This evidence would show that there was nothing left of the motor vehicle and I have looked at all the authorities cited and I see none that says that an assessment of useless scrap metal of what was once a motor vehicle should be done to indicate its pre-accident value.

15. In Khanna – vs – Samwel (1973) E.A 225 it was merely held that ***“the damage to the car should be reduced by the extra amount for which the work had been sold”***. In the instant case, the wreck was useless and could not be sold. The damage must still be the whole of the pre-accident value, in this case unchallenged at Kshs.200,000/= as pleaded in the plaint. In my view that claim should be sustained.

16. The claim for Kshs.100/= for the Police Abstract is also unchallenged and must remain.

17. The upshot of this judgment is that the Appeal be and is hereby allowed and the judgment and decree set aside in Meru CMCC No. 990/2003. There will instead be judgment in the sum of Kshs.200,100/= in favour of the Respondent plus costs and interest.

18. The Appellant having only partly succeeded will have ½ of the costs of this Appeal.

19. Orders accordingly.

Dated, signed and delivered at Meru this 14th Day of June 2006.

ISAAC LENAOLA

JUDGE

In the Presence of

Mr. Masika Advocate for the Appellant

Mr. Mithoga holding brief for Mr. Kariuki Advocate for the Respondent

Isaac Lenaola

JUDGE.