REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 2027 OF 1995

GEORGE MONTET ..... PLAINTIFF

VERSUS

FREDRICK KOKAI KUSERO .... DEFENDANT

JUDGEMENT

George Montet (herein referred to as the plaintiff) is the registered owner of the motor vehicle registration No. KYZ 967, Nissan matatu. Fredrick Koikai Kusero (herein referred to as the defendant) is the owner of motor vehicle KUY 284.

On the material day of the 27th day of November 1994 along the Nairobi road, the two motor vehicle were involved in a collision. The plaintiffs vehicle was being driven by an agent whilst the defendant was driving his own vehicle.

It is not disputed that after the investigations the defendants was found to be in the wrong. He was duly charged and convicted.

As both parties are friends they entered into an agreement dated the 5th of December, 1994 whereby Fredrick, the defendant agreed to repair the Nissan matatu as soon as possible" and to the satisfaction of George, the plaintiff.

George took precaution and had the matatu vehicle assessed by a valuer known as the Current Insurance Assessors. Mr. Wahome came to court and referred to his report dated 6.12.94 and marked "without prejudice". (I do not know what he had in mind when he stated this).

He informed this court that the value of the vehicle before the accident is 420,000/-. That the salvage value he estimated at Ksh.170,000/-.

If there would be any repairs done, it would be uneconomical as the spare parts alone exceed 54% of the cost of pre-accident value; namely Ksh.230,135 would be required for spares.

George had informed this court that he had bought the vehicle on hire purchase at almost a sum of Ksh.600,000/-.

Nonetheless as both parties had agreed Fredrick, should do the repairs, George took no action on this

matter.

The repairs was slow and was not to his satisfaction. He then enlisted the services of an advocate. A letter dated the 18.5.95 was written to Fredrick demanding the pre accident value of Ksh.420,000/- and loss of user of Ksh.3,000/- per day. George's Nissan matatu vehicle was a communal vehicle.

Fredrick did not reply to this letter. George filed suit against him on the 28.6.95 claiming the pre accident value and loss of user.

The defence entered appearance and filed defence. This file went missing. The file I have before me is a reconstructed file.

Before the trial commenced Fredrick changed advocates. The parties were once more given an opportunity to seek a settlement of this case. They were not able to completely agree.

The defendants conceded partially to liability. Judgement by consent was entered as follows:-

> "By consent, judgement be and is hereby entered in favour of the plaintiff against the defendant to the extent of 90%."

The parties also conceded to part of the Special Damages namely:-

> "By consent judgement be and is hereby entered for the plaintiff on Special Damages for:-
>
> i) Assessors fee Ksh.3,000/-
>
> ii) Police abstract Ksh. 100/-
>
> Subject to the [agreed] contribution"

The advocate for the defendant Mr. Meenye in his submission stated that his client has no problem with conceding to the pre accident value of Ksh.420,000/-. He asked that ksh.170,000/- being salvage value he deducted giving a total of Ksh.250,000/-. Less 10% contribution being Ksh.225,000/- which the court award to the plaintiff.

1. Loss of User.

What the defendant disputes is the loss of user. This was too excessive at Ksh.3000/- per day. He relied on the authority of

> David Bagine vs Martin Bundi
>
> CA 283/96

(Bench of Gicheru, Shah & Pall JJA).

It was held in the above case that loss of user is a special damage. It must be specifically pleaded. It is inacceptable for the Plaint to read "to be proved at the hearing of the suit."

The loss suffered must be specific and must be strictly proved. Further the loss of user was assessed for 3 years. The court held that:- "damages for loss of user of a chattel can be limited (if proved) to a period in this instance ... a period during which the respondents lorry could have been repaired ....."

In this present case the plaintiff gave evidence and produced his documents showing that he earns an average of Ksh.3,000/- after deduction. This amount he gets per day.

In cross examination he admitted that the has a higher purchase loan to pay. He cannot always pay it and at times is in arrears. He insisted that he earns Ksh.3,000/- per day, or thereabouts.

The defendant on the other hand gave evidence and claimed that he enquired with the other matatu dealers and was told Ksh.3000/- is what is earned. The trips between Ngong and Nairobi return is about 30/- per person when told that for 18 persons in the vehicle a sum of Ksh.540/- would be realised, this was conceded by the defendant.

I have noted from the Plaint that loss of user of Ksh.3000/- per day was pleaded in the Plaint. The defendant did not ask for further and better particulars on this. The plaintiff has produced a document which I am satisfied are the documents of the records of his motor vehicles operation.

That this vehicle was earning an average of ksh.3,000/- per day. I would therefore enter judgement on this rate of Ksh.3000/- per day. The question now arises is for how long should this loss of user be given? I shall be guided by the case of David Bagine Vs. Martin Budi (Supra)

Whereby a reasonable period should be given of repairs. The assessor had recommended that the vehicle be not repaired as it is beyond economical repairs.

The parties agreed the repairs be done. From the report the engine was still intact and only portion of the repairs should have been done. This would have taken a reasonable time of not more than 6 months. The fact stands is that the defendant was to repair, it has now been 6 years and no satisfactory repair had been done (I shall discuss this at a later stage). The advocate for defendants say this repair would have been done within 5 months. I would allow a reasonable time as five months and as recommended by the advocate for the defendant.

2. ***Salvage***

As to the issue of salvage of the vehicle the assessor computed to at ksh.170,000/-.

The unique aspect of this case is that the defendant undertook to do the repairs. It therefore meant that the plaintiffs motor vehicle was in the possession of the defendant to under take this work. From the evidence it is claimed that the vehicle is still in the same garage it was taken to.

The defendant claimed he has done the repairs, the plaintiff claims that no repairs had been done. That in fact the vehicle has been extensively damaged (although no proof of this had been given.)

The assessor, PW2 in his report stated that the following was in tact in the vehicle.

1. suspension

2. Engine

3. Gear box

4. Road wheels

5. brakes

6. Warning sings

What required to be repaired was:-

1) The windscreen pillows

2) Dash Board

3) Steering assy

4) Grille

5) Bumper Bar

6) Head light

7) Chassis unit

8) Associated part as per his schedule list valued at Ksh.230,135/-.

The defendant came to court and stated he did the repairs. He brought no proof at all that the above repairs have done this by bringing is own assessor who would, after inspection confirmed the repairs had been done. He would have produced receipts of the payments made towards such repairs. Further he would have written to he plaintiff to collect the vehicle failure to, he would not have been responsible for it.

It was the plaintiff who in May of 1995 wrote to the defendant complaining of the slow process of repairs. The defendant took no action. The reasons I gather was partly due to the collapse of his insurance company. He would thus have to meet the costs from his pockets.

I would distinguish this case from the David Bagine v Martin Bundi case (supra).

In that the repairs there was to be carried out by the plaintiff.

In this case the defendant failed to prove that he in fact carried out the repairs. If he did all he needed to do is to return the vehicle duly repaired and this matter would have ended at that.

I find that the defendant failed to do this. The salvage vehicle is still in his possession. As such the amount of Ksh.420,000/- will not be objected to less the salvage amount of ksh.170,000/-. The defendant is to have this:-

I enter judgement for the plaintiff accordingly.

In summary

1) Material of Nissan matatu damage in collision.

2) Liability:

By consent of the parties entered on 4.4.00 the defendant to bear 90% of liability and the plaintiff is to bear 10%.

3) Quantum

Special Damages

1) Pre-accident value Ksh.420,000/-

2) Loss of user @ 3,000 x 5 months Ksh.450,000/-

3) Assessors fee (agreed) Ksh. 3,000/-

4) Police abstract report (agreed)Ksh. 100/-

Ksh.873,100/-

Less 10% Ksh. 87,310/-

Ksh.785,790/-

I award costs of this suit to the plaintiff. I award interest on the Special Damages from the date of filing suit.

Dated this 11th day of April 2000 at Nairobi.

M.A. ANG’AWA

JUDGE