



**Matunda (Fruits) Bus Services Limited v M'Ambutu (Civil Appeal
E922 of 2023) [2025] KEHC 299 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E922 OF 2023**

**H NAMISI, J
JANUARY 23, 2025**

BETWEEN

MATUNDA (FRUITS) BUS SERVICES LIMITED APPELLANT

AND

MURIUNGI PIUS M'AMBU TU RESPONDENT

*(Being an Appeal against the Judgement of Hon. S. A Opande, Principal
Magistrate delivered on 24 August 2023 in Milimani CMCC NO. E13520 of 2021)*

JUDGMENT

1. Following a road accident on 2 December 2020 involving the Appellant's motor vehicle registration number KBK 708D and the Respondent's motor vehicle registration number KCD 474Q, causing extensive damage to the Appellant's motor vehicle. The Appellant filed suit against the Respondent seeking the following reliefs:
 - i. Special damages in the sum of Kshs 1,038,787/=;
 - ii. Costs of the suit
 - iii. Interest on (i) and (ii) above
 - iv. Any other relief that the Honourable Court may deem fit and just
2. The particulars of the special damages were as follows:
 - Loss of use charges - Kshs 636,237/=
 - Cost of repairs - Kshs 366,000/=
 - Assessment charges - Kshs 6,000/=



Towing charges - Kshs 30,000/=

Motor vehicle search - Kshs 550/=

Total - Kshs 1,038,787/=

3. The Respondent entered appearance on 7 March 2022 and filed a defence. By consent, judgement on liability was entered in ration 80:20 in favor of the Appellant as against the Respondent. Parties filed submissions on the quantum of damages.
4. In its judgement, the trial court noted that sufficient evidence had been tendered in form of receipts for costs incurred amounting to Kshs 372,550/=. On the issue of loss of user, the trial court opined that the Appellant had not pleaded the same under general damages, but under special damages. The issue of loss of user only came up strongly in the submissions by the Appellant which were filed only 3 hours from the time of writing the judgement and long after the Respondent had filed their submissions. On that basis, the claim was denied. The trial court entered judgment as follows:
 - a. The Defendant are hereby held 80:20 in favor of the Plaintiff as against the Defendant;
 - b. The Plaintiff is awarded Kshs 372,550/= as special damages;
 - c. The Plaintiff is awarded the costs of the suit;
 - d. Interest on (b) and (c) at court rates from the date of judgement
5. Being aggrieved by the judgment of the trial court, the Appellant lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact by failing to award special damages for loss of use when the same had been pleaded and proved;
 - ii. That the learned Magistrate erred in law and in fact in making the finding that the Appellant failed to plead for loss of use under general damages when the same was pleaded as special damages and specifically proved;
 - iii. That the learned Magistrate erred in law and in fact in making a finding that there was no specific prayer for loss of use when the evidence on record clearly shows that that is the first item under paragraph 7 of the Plaint where the Appellant tabulated special damages;
 - iv. That the learned Magistrate erred in law and in fact in making a finding that loss of use is a claim for general damages when the evidence or record show that the Appellant tabulated his losses and pleaded them specifically;
 - v. That the learned Magistrate erred in law and in fact in failing to consider the receipts and loss of income audit report on record.
6. Parties were directed to file written submissions. Whereas the Appellant filed submissions, the Respondent did not file any submissions.

Analysis & Determination

7. The Court of Appeal for East Africa set out the duty of the first appellate court in the case of *Selle – Vs- Associated Motor Boat Co.* [1968] EA 123 as follows -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of



particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”

8. An appeal to the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. This Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did.

9. I have keenly read the Record of Appeal and submissions by the Appellant. The Appellant takes issue with the impugned judgement on the basis of the damages for loss of user. In the submissions filed in the trial court, the Appellant relied on the cases of *David Bagine vs Martin Bundi, C.A No. 283 of 1996*, where the Court of Appeal stated thus:

“We must and ought to make it clear that damages claimed 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.”

10. From the Record of Appeal, I can discern that the Appellant produced the following receipts/invoices as proof of the special damages:

Petty Cash Voucher for towing charges - Kshs 30,000/=

Receipt for Accident Assessment - Kshs 6,000/=

Invoices and Receipts for Vehicle Repairs - Kshs 366,000/=

Invoice for Motor vehicle search - Kshs 550/=

Total - Kshs 402,550/=

11. To prove the loss of user, the Appellant produced a Compensation Claim Report prepared by Taxplan Consulting Limited. In the introductory part, the Report states that Taxplan Consulting Limited was engaged by the Appellant for technical assistance in determining the revenues lost as a result of the accident. The report indicates that the Consultant analysed the actual daily income generated by the motor vehicle and the expenses incurred for a period of 7 working days, between 17 to 25 December 2020. Based on this information, the Consultant was able to determine the daily net income as Kshs 100,404/=. The Consultant concluded that a sum of Kshs 1,807, 272/= would be a justified claim for loss of use of the motor vehicle for 18 days.

12. In *David Bagine v Martin Bundi (supra)*, the Court of Appeal, referred to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited [1948] 64 TLR 177*, and again observed that:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

13. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR*, the Court of Appeal reiterated the fact that it is a legal requirement that apart from pleading special



damages, they must also be strictly proved with as much particularity as circumstances permit. In following this line of thought, what the Appellant pleaded in the Plaint and the evidence provided in support of that claim for loss of use are different. Whereas in the Plaint the Appellant pleaded loss of user charges amounting to Kshs 636,237/=, the figure in the Report by the Consultant is significantly different.

14. Guided by the case of Capital Fish Kenya Ltd (supra), it is the finding of this Court that though the Appellant produced a Report indicating that the loss of use for the material period amounted to Kshs 1,807, 272/=, the Appellant is bound by their pleadings, and as such only entitled to Kshs 636,237/=.
15. Having considered the facts of this case, the applicable law as well as the submissions by the Appellant, I hereby set aside the judgement dated 24 August 2023 and substitute it with the following orders:
 - i. The Defendants are hereby held liable in the ratio of 80:20 in favour of the Plaintiff;
 - ii. The Plaintiff is awarded Kshs 1,038,787/= as special damages;
 - iii. The Plaintiff is awarded costs of the suit;
 - iv. Interest on (ii) and (iii) at court rates from the date of judgement until payment in full.
16. Bearing in mind the outcome of this appeal, each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

..... for the Appellant

N/A for the Respondents

