



**Kinoti v Meworld Business System Ltd (Civil Appeal E117 of 2022)
[2025] KEHC 1611 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E117 OF 2022
LW GITARI, J
FEBRUARY 7, 2025**

BETWEEN

JOSEPH KIRIMI KINOTI APPELLANT

AND

MEWORLD BUSINESS SYSTEM LTD RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment in the Chief Magistrate's Court at Meru Civil Case No.E260/2021 where the appellant vide an amended plaint which was amended on 29/3/2022 claiming;Kshs.883,550/-Loss of user for seven monthsCosts of the suit and interests at court rates.
2. The claim arose out of a road traffic accident which occurred on 21/10/2020 at 5.00 pm involving motor vehicle KAU 143 D and KCH 673 B which were being driven on Meru-Nanyuki road. The vehicles were involved in a road traffic accident which the plaintiff claimed that it was caused by the negligent manner of driving by the respondent's driver. The appellant's motor vehicle was damaged as a result of the collision. The plaintiff filed the suit before the lower court and served the respondent who also filed an amended defence and denied the appellant's claim. The parties settled the issue of liability by consent at the ratio of 90:10 in favour of the plaintiff. The parties then produced the documents in support of their claims and they were marked as exhibits. The respondent applied to cross –examine the appellant on the issue of quantum. The parties then agreed to file submissions.
3. The learned magistrate then rendered her Judgment on quantum in the sum of Ksh.388,350/- in favour of the appellant together with costs.
4. The appellant was dissatisfied with the Judgment of the learned magistrate and filed this appeal based on the following grounds:-
 1. The learned magistrate erred in law and fact in failing to find that the appellant's claim for loss of user was based on expenses incurred to hire alternative transport and not loss of earnings



and therefore erroneously alluding to lack of evidence thus subjecting that the subject motor vehicle used for commercial business to dismiss the appellant's claim for the loss of user.

2. That the learned magistrate erred in law and in fact in failing to find that the appellant had proved special damages by pleading and producing receipts in support of the expenses on alternative transport.
3. The learned Resident Magistrate erred in law and fact in failing to find that motor vehicle registration number KAU 143 D Isuzu Canter (sic) having been assessed as a write off, the appellant was entitled to be compensated at the full Chattel Pre-accident value of Ksh.850,000/- . The appeal prays that the lower court's Decree/Judgment be set aside and be substituted with an order awarding ksh.850,000 as the pre-accident value and Ksh.840,000/-

The appeal was canvassed by way of written submission.

5. The appellant was only witness who testified before the lower court. He adopted his witness statement where he had blamed the defendant's driver for causing the accident and causing extensive damaged to motor vehicle registration number KAU 143 D AN Isuzu Canter.
6. On being examined by the defendant's counsel he stated that the pre-accident value was ksh.850,000/-. The salvage value was Ksh.450,000/- He testified that Ksh.883,500/- is the amount he wanted the court to order that he be paid. He admitted that the value he was seeking was more than the value of the vehicle given on the assessment report. He testified that the total costs of repairs was Ksh.590,000/-
7. He stated that the costs of hiring alternative transport was Ksh.473,000/- as shown on exhibit 5. He admitted that the receipts do not show the exact number plate of the vehicles he hired from Vitech.
8. The appeal was disposed off by way of written submissions. The appellant's submissions are dated 17/11/2023 filed by Thurania Atheru & Co. Advocates.
9. The respondents submissions are dated 26/2/2024 filed by Wambugu and Muriuki Advocates.
10. I have considered the submissions. I will refer to the submissions in my analysis and determination for the issues for determination. I have considered the submissions. The issues for determination are:-
 1. Whether the learned magistrate erred by failing to give the appellant the full pre-accident value of the motor vehicle
 2. Whether the learned magistrate erred by failing to award the appellant the amount claimed for the loss of user of his motor vehicle.
11. This is a 1st appeal and this court has a duty to revisit the evidence on record, evaluate it and reach its own conclusion in the matter, see *Selle & Another -v- Associated Motor Boat Company Ltd (1968) E.A 123* and *Mwanasokoni -v- Kenya Bus Service Ltd (1982-88) 1KAR 278*. The court should however leave room for the fact that it did not have an opportunity to see or to hear the witnesses when they testified and leave room for that.
12. On the first issue which is whether the learned magistrate erred in law not awarding the appellant the pre-accident value of the motor vehicle, this court to consider whether the learned magistrate considered an irrelevant factor, or, left out of account a relevant factor or, that the amount awarded is in-ordinately low or inordinately high that it must be wholly erroneous estimate of the damages.
13. The assessment report which the appellant relied was made by Elite Automobile Valuers and Assessors. They assessed the pre-accident value at 850,000/- and salvage value of Ksh.450,000/-. It was the opinion of the assessors that the claim be settled on a total loss basis as repairing the subject motor



vehicle was uneconomical. The report gives the costs of repairs at ksh.262,000/- and costs of spare parts Ksh.382,000/- giving a total of ksh.590,000/- which was more than fifty per cent (50%) of the value of motor vehicle. The appellant admitted that the motor vehicle was written off. In awarding damages, the court considers the pre-accident value and the value of the salvage to determine the damages to be awarded to the claimant. The law assumes that the claimant will be able to sell the salvage thereby recovering the entire pre-accident value. It is trite that damages are supposed to compensate but not for unjust enrichment. It is a principle when awarding damages that they should not be so excessive as to present an erroneous estimate. See *Butt-v- Khan (1977) 1KAR & Kemfro Africa Limited T/A Meru Express Services & Another –v- A.M Lubia & Another (1082-1988) 1 KAR*.

14. The Court of Appeal in the case of *Jimnah Munene Macharia –v- John Kamau Erara – Civil Appeal No.218/1998* (cited by the respondent stated that:-

“Where there is no proof of actual repair the plaintiff is only entitled to pre-accident value less the salvage.”

15. The appellant admitted that the vehicle was in the garage and had not been repaired.

16. In *Bungoma Line Sacco Society Limited –v- Super Bargains Hardware (K) Limited (2021 eKLR* the court stated that-

“..... the vehicle had been declared a write off, and hence the only way out to compensate the victim was to allow the pre-accident value, less the salvage as the vehicle could not be economically viable to repair it.”

17. The appellant relied on the case of *Kaiji Vagilani & 2 Others –v- Francis Mwanza Mulwa (2017) eKLR* which is a High Court decision. I am not persuaded by the High Court decision on the Court of Appeal in *Jimna Munene Macharia (supra)* stated that the claimant was entitled to pre-accident value less the salvage value. The appellant admitted that the salvage was in his custody without repairs. It therefore follows that the pre-accident value was payable less the salvage value. The Court of Appeal affirmed this in the case of *Concord Insurance Company –v- David Otieno Awinyo & Aother (2005) eKLR* where the court while discussing the measure of damage to chatters agreed with the principles by *Herman LJ in Darbishire-v- Waran (1963) 1 WLR 1067* at page 1070 where the court stated that-

“The Principle is that of restitution *integrum*, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come up be settled that in general the measure of damages is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs the damaged article greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff’s duty to minimize his damage.....”

18. More recently in *Burdis –v- Livsey (2002) 3 WLR 702*, the English Court of Appeal stated at page 792 paragraph 84.

“When a vehicle is damaged by the negligence of a 3rd Party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out repairs necessary to restore the vehicle to its pre-accident condition.”

19. The court stated that the only compensation in such a scenario is the pre-accident value as assessed less the value of the salvage.



20. In this case the learned magistrate considered that the pre-accident value in the valuation report give the pre-accident value at Ksh.850,000/- while salvage was 450,000/- The court awarded the difference which was Ksh.400,000/- The decision to award the appellant difference of the pre-accident value and the salvage was proper. This court will not interfere with that finding by the learned Magistrate

2. Whether the learned magistrate erred by failing to award the appellant the claim for loss of user.

21. The learned magistrate relied on Civil Appeal No. 283/1996 (David Bagine –v- Martin Bundi where the court had held that damages for loss user are in the nature of special damages which must be strictly pleaded and proved. The learned magistrate held that the appellant did not specifically plead and did not prove the special damages.

22. It is the contention by the appellant that he did not make a claim for loss of earnings or profits but only for loss of user which should be distinguished from loss of earnings. That loss of user is not about income or earnings lost, but loss a claimant suffers for the in ability to use the vehicle. He relies on the case of Jackson Mwanambili-v- Peterson Materi (2019) eKLR where the court stated that, “A claim for loss of user in this case, refers to compensation suffered as a result of not being able to use his damaged vehicle.”

23. That Appellant submits that he did not need to prove how much he was earning from the business and therefore the court took into account an irrelevant factor in assessing damages for loss of user.

24. He urges the court to award him damages for loss of user and special damages. He submits that he produced receipts from Vitech Investment dealers to proof that the appellant paid for alternative transport double compensation. One for loss of user- that he paid for alternative transport as a result of not being able to use his damaged vehicle. His evidence was that his vehicle used to do business transporting firewood and stones. This is distinguished from the loss of user in the case he cited, that is Kaiji Vagjian & 2 Others-v- Francis Mwanza Mulwa (2017) eKLR

25. The appellant stated that he used to the said motor vehicle for transport business, see paragraph 5 of the amended plaint. His contention was that he incurred loss of Ksh.9000/- per day to hire alternative transport. This suggests that he suffered loss. The appellant did not plead what he used to make from the transport business to prove the claim of Ksh.9,000/- per day.

26. The loss of transport business to claim loss of user needed to be specifically pleaded and proved. The Court of Appeal in Ryce Motors Limited & Another –v- Elias Muroki 1996 eKLR emphasized-

“There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. “

27. The court stated that where there was a claim that the vehicle was bringing income per day, it must be supported by acceptable evidence.

28. I find that the claim by the appellant’s claim that he incurred Ksh.9000/- loss per day was not specifically pleaded and proved. The receipts produced did not show the registration number of the motor vehicles he used to hire. His contention that he incurred loss of Ksh.9000/- was not supported by any acceptable evidence.

29. The appellant having pleaded that he was using the vehicle for transport business cannot at the same time claim loss of user without an evidence to support the claim of doing business and the income. He did not adduce plead specifically how must income he made either per day or per week.



30. In short, his claim was not specifically pleaded or proved. A party is bound by his own pleadings. The claim for loss of user is a claim for special damages which must be specifically pleaded and proved. This he failed to do and the learned magistrate cannot be faulted for finding that the claim for loss of user was not proved.
31. The learned magistrate allowed the special damages for towing, Assessment Report and issuing a demand notice totaling to 31,500/- which were specifically pleaded and proved.

Conclusion:

32. For the reasons stated I find that the Judgment by the learned magistrate was well founded and I have no reason to interfere with it.

Order:

1. The appeal lacks merits.
2. The appeal is dismissed.
3. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE

