Safe World Telecom Ltd v Koech (Civil Appeal E029 of 2023)
[2025] KEHC 4085 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4085 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL E029 OF 2023

JK NG'ARNG'AR, J

APRIL 2, 2025

BETWEEN

SAFE WORLD TELECOM LTD ..... APPELLANT

AND

PETER CHERUIYOT KOECH ..... RESPONDENT

(Being an Appeal from the Judgment of Senior Principal Magistrate, Muleka E. at the Magistrate's Court at Sotik, Civil Suit Number E102 of 2019)

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for material damages arising from a road traffic accident on 17th January 2019 involving motor vehicles registration numbers KAP 200V and KCN 078U. The Respondent blamed the Appellant for causing the accident and causing damage to his motor vehicle registration number KAP 200V.

2. The trial court conducted a hearing where the Respondent called three witnesses and the Respondent called one witness before closing their respective cases.

3. In its Judgment dated 25th April 2023, the trial court found liability in the ratio of 80:20 in favour of the Respondent. The trial court further awarded the Respondent a net award of Kshs 1,893,435/=.

4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 24th May 2023 appealing against the award on quantum and relied on the following grounds:-

    I. The learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.

II. The learned trial Magistrate erred in fact and in law when he awarded damages for loss of user and towing costs when the same were not supported by any evidence or specifically pleaded and/or at all.

III. The learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.

IV. The learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of the law.

V. The learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.

VI. The learned trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

5. My work as the 1st appellate court is to re-evaluate the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of Kiilu & Another vs. Republic (2005)1 KLR 174

6. I now proceed to summarise the respective parties' cases in the trial court and their submissions in the present Appeal.

The Plaintiff's/Respondent's case.

7. Through his Plaint dated 6th June 2019, the Respondent stated that his motor vehicle registration number KAP 200V was hit from behind by the Appellant's motor vehicle registration number KCN 078U causing damage to his vehicle.

8. The Respondent stated that the Appellant's driver was negligent in causing the accident. The particulars of the negligence were listed in paragraph 7 of the Plaint.

9. The Respondent's claim against the Appellant was for special damages and loss of user.

10. In his written submissions dated 5th November 2024, the Respondent submitted that his claim against the Appellant was for material damage and that it could only be awarded as a general damage. That he pleaded and testified that he was in the butchery business where he made Kshs 5,000/= a day which translated to Kshs 150,000/= a month. He further submitted that the trial court properly exercised its discretion while awarding loss of user and the court's finding on the same was not erroneous as it was fair, proper and justified. He relied on Jackson Mwabili vs Peterson Mateli (2020) eKLR.

11. It was the Respondent's submission that he did not produce receipts that proved his earnings but it was trite law that awards must be within consistent limits. He relied on Charles Oriwo Odeyo vs Appollo Justus Andabwa & another (2017) eKLR.

12. The Respondent submitted that the special damages were specifically pleaded in the Plaint and proved.

The Defendant's/Appellant's case

13. Through its statement of defence dated 27th September 2021, the Appellant denied that he was the registered owner of motor vehicle registration number KCN 078U and further denied the occurrence of the road traffic accident on 17th January 2019

14. The Appellant denied the particulars of negligence levelled against it. That if any accident happened, it was caused solely by the negligence of the Respondent. It particularized the negligence in paragraph 11 of its Defence.

15. The Appellant denied that he caused damage to the Respondent's motor vehicle and put the Appellant to strict proof on the issue of loss of user.

16. In its written submissions dated 22nd October 2024, the Appellant submitted that the trial Magistrate relied on wrong principles that resulted in an inordinately high award. That damages should represent a fair compensation and should not be excessive.

17. It was the Appellant's submission that the Respondent's driver was negligent in causing the accident and the Respondent was therefore not entitled to general damages. On special damages, the Appellant submitted that the receipt on the Assessor's Report was not generated from an electronic tax register machine and was therefore not tax compliant. It relied on Leonard Nyongesa vs Derrick Ngula Righa (2014) eKLR. It was its further submission that there was no evidence to prove the towing costs of Kshs 15,000/=.

18. The Appellant submitted that the loss of user should be awarded as special damages and the same should be pleaded and proved. It relied on S J vs Francessco Di Nello & another (2015) eKLR. It further submitted that the claim for special damages should be disallowed as the Appellant did not prove the special damages.

19. I have gone through and carefully considered the Record of Appeal dated 8th January 2024, the Appellant's written submissions dated 22nd October 2024 and Respondent's written submissions dated 5th November 2024. From the grounds of the Appeal, it was apparent that the Appeal was limited to quantum only. I have however noted that the Appellant submitted on liability. It is trite that parties are bound by their pleadings and from the Memorandum of Appeal, the only issue for my determination therefore was whether the trial court's award was inordinately high.

Quantum

20. The Respondent claimed that after the accident his motor vehicle registration number KAP 200V was extensively damaged. The Respondent pleaded the following special damages in his Plaint:-

    a. Pre Accident Kshs 350,436/=

    b. Salvage value Kshs 70,000/=

    c. Assessor's Report Kshs 6,000/=

    d. Towing costs Kshs 15,000/=

    e. Motor Vehicle Search Kshs 550/=

21. In regards to special damages, it is trite that the special damages are to be specifically pleaded and specifically proved in a court of law.

22. Jackson Wameru (PW3) testified that he worked with Regent Automobile Valuers and Assessors. He testified that the proposed repair costs of the motor vehicle was Kshs 300,000/= and that the total value of the repairs was similar to the value of the car therefore the motor vehicle was written off. He produced the Assessor's Report as P.Exh 4a. There was no challenge on the estimated costs of the repairs during cross examination.

23. I have looked at the Assessor's Report dated 7th March 2019 and it listed all the damaged parts of the subject motor vehicle and the amount it would take to replace the damaged parts which came to a total of Kshs 228,000/=. The whole costs of repairs was also detailed including labour and the total came to Kshs 350,436/=. It is my finding that this claim was specifically pleaded and proved and the same is awarded.

24. On the claim for Kshs 6,000/= for the Assessor's Report, the Respondent produced a receipt from Regent Automobile Valuers and Assessors as P.Exh 5. The receipt indicated that the Respondent paid Kshs 6,000/= for the Assessment services. It is my finding that this claim was pleaded and proved and I therefore award Kshs 6,000/= as an expense on the Assessor's Report.

25. In regards to towing costs, the Respondent pleaded for Kshs 15,000/=. I have gone through the trial court record and there was no proof produced by the Respondent in the form of a receipt that he incurred an expense of Kshs 15,000/= as towing costs. This claim is therefore rejected.

26. On the issue of the loss of user, the Respondent stated in his Plaint that he used his motor vehicle for business and it earned him Kshs 150,000/= per month and that as a result of the accident, he could no longer earn. In his testimony the Respondent (PW1) testified that the subject motor vehicle earned him Kshs 5,000/= per day which translated to Kshs 150,000/= per month. When he was cross examined, PW1 reiterated that he made Kshs 5,000/= from his motor vehicle.

27. The question then becomes whether loss of user is a special or general damage. On one hand, the Court of Appeal stated that the loss of user was a special damage. In David Bagine v Martin Bundi [1997] KECA 54 (KLR), the Court of Appeal held:-

> " 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"....."

28. On the other hand, the Court of Appeal recently classified loss of user as a general damage. In Samuel Kariuki Nyangoti v Johaan Distelberger [2017] KECA 691 (KLR), the Court of Appeal held:-

> " .....The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages....."

29. In the face of the two opposing authorities, I concur with Musyoka J. in Martin Gicimu Kamanga v Board of Governors, St Anne's Junior School, Lubao [2021] KEHC 1809 (KLR) where he held that loss of user was a general damage thus:-

> " It would seem, from the judicial authorities above, that the law is not settled on the matter. However, the decisions in David Bagine vs. Martin Bundi [1997] eKLR (Gicheru, Shah & Pall) and Summer Limited Meru vs. Moses Kithinji Nkanata [2006] eKLR (Lenaola J), are a little dated, and it would appear that there has been a shift in jurisprudence since then, going by the positions taken in Wambua vs. Patel & Another [1986] KLR 336 (Apaloo

J) and Jebrock Sugarcane Growers Co. Limited vs. Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu) (unreported), that the fact that damages are difficult to estimate, and cannot be assessed with certainty or precision, does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages. That position appears to have led to Samuel Kariuki Nyangoti vs. Johaan Distelberger [2017] eKLR (Githinji, Karanja & Kantai JJA), where the court treated loss of user or profits as a claim in general, rather than special, damages, in cases where the plaintiff did not keep books of account or records, given the nature of their business. The current law, therefore, appears to be that stated in Samuel Kariuki Nyangoti vs. Johaan Distelberger [2017] eKLR (Githinji, Karanja & Kantai JJA), and adopted by the High Court in such decisions as Jackson Mwabili vs. Peterson Mateli [2020] eKLR (Mwita J) and Mac Master Limited vs. Onesmus Mutuku Muia [2018] eKLR (DK Kemei J). Of course, under English Common Law, loss of user or profits is strictly a special claim, as stated in David Bagine vs. Martin Bundi [1997] eKLR (Gicheru, Shah & Pall) and Summer Limited Meru vs. Moses Kithinji Nkanata [2006] eKLR (Lenaola J). It would appear, however, that that English approach to loss of user works injustice in Kenya, where African communities, despite high levels of literacy, still operate in the pre-literate mode, where record keeping is not part of the African psyche and consciousness, for information is kept mentally and is transmitted orally. Operating in the pre-literate mode is part of African nature and mentality. It is just part of the African way of life, and modern education has not done much to change it. The decisions in Wambua vs. Patel & Another [1986] KLR 336 (Apaloo J) and Samuel Kariuki Nyangoti vs. Johaan Distelberger [2017] eKLR (Githinji, Karanja & Kantai JJA) take cognizance of that. The matatu business culture evolved out from that environment, given that the matatu business is strictly an indigenous African model and not an import from elsewhere, and applying the English Common Law approach to assessment of damages for loss of user or profits in respect of that business, in the circumstances, would only work injustice. There is a whole paradigm shift in jurisprudence here, where what is strictly a special damage under English Common Law is now treated as general damage under Kenya Common Law."

30. For this court to interfere with an award, it must be satisfied that the trial magistrate misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 (2004) 2 KLR 55 stated that:-

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

31. I have gone through the trial court's award where the trial Magistrate used the daily income of Kshs 1,500/= down from the pleaded Kshs 5,000/=. The trial Magistrate stated that he used the sum of Kshs 1,500/= as the Respondent had failed to produce any receipts showing that he earned the Kshs 5,000/= daily.

32. The trial Magistrate also noted that the time spent or lost between filing of the suit (4th July 2019) and its conclusion (13th December 2022) was 1268 days. In his calculations, the trial Magistrate factored in the Respondent's 20% liability and came to the award of Kshs 1,522,000/=.

33. Flowing from the above, I have not found any evidence to suggest that the trial Magistrate acted on wrong principles or took into account an irrelevant factor when awarding general damages to the Respondent. In my view, the award was a fair estimate and a just award and I therefore uphold the same.

34. In the final analysis, I award Kshs 350,436/= and Kshs 6,000/= as special damages and uphold the award of Kshs 1,522,000/= as loss of user which makes it a total award of Kshs 1,878,436/=.

35. In the end, the Memorandum of Appeal dated 24th May 2023 is merited as the damages awarded to the Respondent is reduced from Kshs 1,893,435/= to Kshs 1,878,436/=. The Appellant shall have the costs of the Appeal while the costs and interest in the main suit remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 2ND DAY OF APRIL, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the absences of parties and Siele and Susan (Court Assistants)