Okwaro v Okungu (Civil Appeal E049 of 2023)
[2025] KEHC 6772 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6772 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E049 OF 2023

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

JOHN MARK OKWARO ..... APPELLANT

AND

RICHARD OTIENO OKUNGU ..... RESPONDENT

(Being an appeal from judgement and decree of Senior Principal Magistrate's Court at Nyando (S.O. Temu SPM) in civil suit number E170 of 2021 dated 28th February 2023)

JUDGMENT

1. The respondent instituted suit against the appellant in Senior Principal Magistrate's court at Nyando vide civil suit number E170 of 2021 claiming the following;
    1. Kshs 500,000.00 being cost of water bowser which was damaged beyond repair.
    2. Loss of earning from the water bowser which should be calculated from the time the bowser was rendered useless to date.
    3. Cost of the suit.
    4. Any other relief the court may deem just and fit to grant.
2. The appellant filed defence denying liability and that the respondent had suffered damages but when the respondent closed his case, the parties entered into a consent on liability at 80:20 in favour of the plaintiff. The court subsequently entered judgement for appellant on quantum at Kshs 300,000.00 being special damages, Kshs 200,000.00 as general damages and costs of the suit.
3. The judgement prompted this appeal where the appellant has raised the following four grounds;

1. That the Learned Magistrate erred in law and in fact by awarding general damages on a special damage claim when there was no such basis for such an award.

2. That Learned Magistrate erred in law and in fact by awarding general damages without explaining how he arrived at that figure.

3. That the Learned Magistrate erred in law and fact in awarding the Respondent a sum of KSH. 300,000/= as special damages that were not proved to the required standards in law.

4. That the Learned Magistrate erred in law and in fact by misapplying the principles in awarding damages.

4. This being a first appeal, I will proceed as required in law to re-evaluate the evidence produced by the parties in the trial court and come to my own independent conclusion but bearing in mind that I did not take the evidence first hand or observe the demeanour of the witnesses.

5. The respondent was the only witness in the matter. He testified that he was the owner of a water bowser which was usually pulled by his tractor registration number KCT 284. On 30-20-2020, the defendant's driver was driving his motor vehicle registration number KAB 512Y which was pulling trailer number ZD 0618 when the same lost control and fell on his water bowser which was parked off the road thereby damaging it extensively and as a result the bowser was rendered useless.

6. The respondent added that he was claiming Kshs 500,000.00 being the purchase price of the bowser and loss of user from that time of the accident to the date of his testimony. The record shows that he produced documents in his list of documents and supplementary list of documents which upon perusal this court finds were police abstract dated 23-11-2020, cash sale receipt for Kshs 500,000.00 for fabrication of the bowser, photographs of the damaged bowser and several invoices from one Pamela Angira.

7. On being cross examined, he stated that he had not produced an assessment report or tax returns to prove income. He added that the bowser was uninsured and he was in the process of registering it. He also told the court that the bowser used to earn him Kshs 5,000.00 per day. He also admitted that he did not have audited books for the business but the same could be calculated from the receipts he had produced.

8. The appeal was argued by way of written submissions. I have read the submissions of the appellant dated 14-06-2024 and those of the respondent which are undated. The appellant submits that without the respondent having produced an assessment report, there could not be proof of the value of the bowser which was all that the respondent would have been entitled to. He also submits that the sum of Kshs 200,000.00 awarded as general damages was not justified and had no basis.

9. It is trite law that special damages must be specifically pleaded and strictly proved. The particulars of loss pleaded in the plaint did not list the special damages he suffered. The only pleaded damages are loss of use to the tune of Kshs 60,000.00 per week. The plaint went on to state that the bowser was rendered useless and was sold to scrap metal dealers at Kshs 2,000.00. I do not take this to be specific pleading in terms of loss of the bowser although in his prayers the respondent prayed for Kshs 500,000.00 being the costs of purchasing the bowser. This cannot be the true special damages he specifically suffered because it did not take into account depreciation and the price at which he sold the salvage which is alleged to have been Kshs 2,000.00.

10. Even if this court was to take the Kshs 500,000.00 as the properly pleaded damages, I do not think that the same was proved. There was no assessment report to give the court the pre-accident value of the bowser as that is what the respondent would have been entitled to. I agree with the holding of the

Honourable Justice Janet Mulwa in Pemuga Auto Spares & Barclays Bank of Kenya Ltd v Margaret Korir Tagi (2015) KEHC 3406 (KLR) which has been cited by the appellant thus;

> It is the courts view that once a vehicle has been written off, the only compensation is the per-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. '

11. The respondent sought to rely on the cash sale receipt from metal fabricators to prove the value of the bowser. I have had a look at this receipt and in my view, it cannot pass for proof of the value of the tractor. The court is not a valuer or assessor and does not have the requisite capacity to value, assess or establish the pre-accident and salvage of the bowser. The Honourable Magistrate thus erred when he took it upon himself to give the value of the bowser by stating that;

> The plaintiff produced receipt for the purchase of the said bowser but he did not produce any receipt for assessment done after the accident. Special damages must be pleaded and supported. The plaintiff's claim cannot be settled at 100 per cent refund without depreciation. I will thus award the plaintiff Kshs 300,000.00 for the damage on his water bowser.'

12. Scrutiny of the police abstract produced by the respondent show that the accident occurred on 31-10-2020 although the plaint pleaded 30-10-2020 while the cash sale receipt from Hongera Steel Fabricators which is said to be proof of purchase of the bowser is dated 14-11-2020. It is illogical that the accident could have occurred before the bowser was purchased. This is a clear indication that the receipt was made for the purpose of the suit. On the basis of the above, it is my finding that the award of Kshs 300,000.00 as compensation for the loss of the bowser was not supported by evidence and the same should be set aside.

13. The court may in its discretion award general damages for loss of user where there is proof that the claimant was deprived of the use of his property for a certain period. However, parties are bound by their pleadings. The respondent pleaded specific loss of income at Kshs 60,000.00 per week and he was in law bound to prove that. In Mwau Haulier & Another v Godfrey Auma (2007) KEHC 745(KLR), Honourable Justice Ibrahim as he then was while addressing a claim for loss of user held;

> I have also perused the proceedings and it is clear from the record that the Plaintiff did not lead or tender any evidence to prove loss of user. There is no evidence to show how the sum of Kshs 96,000/= was arrived at. In any event, the claim was on the basis that the vehicle was totally written-off. The claim therefore was specific and ascertained once there was total loss of the vehicle. The Plaintiff could only get the value of the vehicle at the time of the accident. To award damages under loss of user will amount to double compensation. There was no consequential damage after the write-off, unless one pleads it and proves it.'

14. The proceedings do not show any objection to production of any of the documents the respondent sought to produce as exhibit. The record actually indicate that the plaintiff produced documents in his list of documents and supplementary list of documents. The judgement however state that there was objection to production of receipts which the respondent stated were proof of his returns but it is not clear whether the objection was sustained or overruled. The submissions by the appellant indicate that the court allowed the production. This court will therefore take it that all the documents were

produced. In David Sironga Ole Tukai v Francis Arap Muge & 2 others (2014) KECA 155 (KLR), the Court of Appeal held as follows;

> The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.'

15. Notwithstanding what I have stated in the above paragraph, I have been unable to see any receipts which were in proof of daily returns. What I have seen are invoices in the respondent's supplementary list of documents dated 31-05-2022. The invoices are from one Pamela Atieno Angira and are dated 1-08-2020, 3-07-2020, 24-07-2020, 17-07-2020 and 10-07-2020 for Kshs 15,000.00 each which gives a total of Kshs 75,000.00 for a period of one month. That is far lower than the pleaded Kshs 60,000.00 per week. Again, in ordinary business circumstances, the respondent should have been the one issuing invoices and not the said Pamela Atieno Angira. Further, the invoices predated the alleged purchase of the bowser which should get one wondering whether the bowser got into business before it was purchased. I interpret this to have been an attempt to manufacture documents for purposes of the suit. I do hold in the circumstances that the damages for loss of user were also not proved.

16. In awarding the general damages of the Kshs 200,000.00 the Honorubale Magistrate stated that;

> I will thus award the plaintiff a global figure under general damages for the loss he had suffered but not based on loss of user which was not properly proved.'

17. Having found that the loss of user was not proved, the trial court had no business in reframing the case for the respondent. The case belonged to the respondent and the appellant had defended the same based on the pleadings served upon him. By reframing the case for the respondent at the stage of writing the judgment, the trial court prejudiced the appellant in terms of the defence he had chosen to mount against the case.

18. The upshot of the above is that this appeal succeeds. The judgment of the subordinate court is hereby set aside and substituted for judgment of this court dismissing the respondent's case with costs. The appellant shall also have the costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Odour for the appellant and in absence of the respondent.