Otieno v South Sioux Farms Limited (Civil Appeal E025 of 2023) [2025] KEHC 5978 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5978 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E025 OF 2023

OA SEWE, J

MAY 8, 2025

BETWEEN

NICHOLAS ONYANGO OTIENO ..... APPELLANT

AND

SOUTH SIOUX FARMS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Omwanza, Senior Principal Magistrate, delivered on the 13th April 2023 in Oyugis Senior Principal Magistrate's Civil Case No. MCCC/204/2021)

JUDGMENT

1 This appeal arises from the decision of the Senior Principal Magistrate, Hon. B. Omwanza, SPM, in Oyugis MCCC/204/2021 in which the appellant had sued the respondent in connection with a road traffic accident that occurred on or about the 13th October 2020 involving the appellant's Motor Vehicle Registration No. KCY 427P, Toyota Hiace Matatu.

2 The appellant's contention before the lower court was that his motor vehicle was lawfully being driven along Sondu-Oyugis Road when, at Kadongo Trading Centre or thereabouts, the respondent's driver and/or person having the control, management of the respondent's Motor Vehicle Registration No. KCG 050V & ZF 1785, so negligently drove, managed and/or controlled the said Motor Vehicle KCG 050V & ZF 1785, that he caused it to violently hit the appellant's Motor Vehicle Registration No. KCY 427P head on. The appellant further contended that, in consequence thereof, Motor Vehicle KCY 427P was extensively damaged and declared a write-off.

3 The appellant supplied Particulars of Negligence of the respondent's servant/driver/agent at Paragraph 5a to k of the Plaint dated 15th December 2020, while the Particulars of Damage to Motor Vehicle Registration No. KCY 427P were given by the appellant at Paragraph 6 of the Plaint. In terms of Special Damages, the appellant's claim was as follows:

a Accident Assessment Report Kshs. 6,000.00

b Police Abstract Kshs. 100.00

c Copies of Records from NTSA Kshs. 3,000.00

d Towing charges Kshs. 30,000.00

4 The appellant had averred in his Plaint that the pre-accident value of the Motor Vehicle Registration No. KCY 427P was ascertained at Kshs. 2,500,000.00. He asked also stated that the wreckage was given a salvage value of Kshs. 400,000.00. The appellant further asserted that the Motor Vehicle was being used as an income generating chattel and would fetch Kshs. 5,500.00 per day. He therefore claimed that amount by way of loss of user for 6 months. Accordingly, the appellant prayed for judgment against the respondent for:

a Pre-accident value of Motor Vehicle Registration No. KCY 427P

b General Damages

c Special Damages

d Costs of the suit

e Interest on [a] and [c] at court rates.

f Any other relief the Court may deem fit and just to grant.

5 Although the defendant filed a Statement of Defence dated 4th November 2021 alleging negligence on the part of the appellant, no evidence was adduced by the defendant at the hearing. Upon considering the evidence of the appellant and his witness, the lower court fixed liability against the respondent at 100% against the respondent. In terms of quantum, the lower court awarded Kshs. 21,000,000.00 by way of general damages, and Kshs. 36,100.00 as special damages together with costs. The lower court took into account that the motor vehicle had been written off; as well as its salvage value of Kshs. 400,000.00. The lower court also took into consideration the pre-accident value of the motor vehicle of Kshs. 2,500,000.00.

6 As for the appellant's claim for loss of user at Kshs. 5,500.00 per day for 6 months, the learned magistrate took the view that to award the same would amount to double compensation; and that in any event the appellant had not demonstrated that indeed he was making Kshs. 5,500.00 daily from the said motor vehicle.

7 Being aggrieved by the lower court's decision on loss of user, the appellant filed the instant appeal on the following Grounds:

a The learned magistrate erred in law and fact in failing to award loss of user of Motor Vehicle KCY 427P of Kshs. 5,500.00 per day six months as general damages when the same was proved on a balance of probabilities.

b The learned magistrate applied wrong principles in law in failing to allow loss of user of Motor Vehicle Registration No. KCY 427P of Kshs. 5,500 per day for 6 months.

c The learned magistrate erred in law and fact in failing to award general damages for loss of user of Motor Vehicle KCY 427P as pleaded and testified on by the appellant which evidence was unchallenged and/or uncontroverted by the respondent.

d The learned magistrate erred in law and fact in making a finding that an award of general damages for loss of user of Motor Vehicle Registration No. KCY 427P of Kshs. 5,500.00 per day for 6 months would amount to double award of General Damages.

e The learned magistrate erred in law and fact in law by failing to consider the doctrine of precedent which was binding on him on the issue of General Damages for loss of user of Motor Vehicle KCY 427P.

f The learned magistrate erred in law in failing to apply both High Court and Court of Appeal decisions which were binding on him on the issue of General Damages for loss of user of Motor Vehicle Registration No. KCY 427P.

g The learned magistrate erred in law and fact in failing to award General Damages for loss of user of Motor Vehicle KCY 427P of Kshs. 5,500.00 per day for 6 months, having made a finding that the Motor Vehicle Registration KCY 427P was declared a write-off.

h The learned magistrate erred in law in failing to properly evaluate the totality of the evidence on record with regard to loss of user of Motor Vehicle Registration No. KCY 427P.

i The judgment against the prayer for General Damages for loss of user of Motor Vehicle Registration No. 427P of Kshs. 5,500.00 per day for 6 months was against the weight of the unchallenged evidence presented by the appellant.

8 In the premises, the appellant prayed for orders as hereunder:

a That the Appeal be allowed and judgment in Oyugis MCCC/204/2021 be set aside in part.

b That the Court do assess commensurate, correct and reasonable award on General Damages for loss of user of Motor Vehicle Registration No. KCY 427Y for 6 months.

c That costs of the Appeal and the original suit be awarded.

9 The appeal was canvassed by way of written submissions. Directions to that effect were given herein on 2nd December 2024. Thus, in the appellant's written submissions dated 15th January 2025, he proposed only one issue for determination, namely, whether the appeal has merit. He submitted that where no rebuttal evidence is adduced by the defence before the trial court, the evidence of the plaintiff stands uncontroverted. In support of this argument, the appellant relied on Interchemie E.A. Ltd v Nakuru Veterinary Centre Ltd [2001] eKLR.

10. It was further the submission of the appellant that where the accident motor vehicle was being used as means for earning income, then an award of General Damages for loss of user for 6 months would be warranted. He relied on Team for Kenya National Sports Complex & 2 others v Chabari M'Ingaruni Civil Appeal No. 293 of 1998, Peter Njuguna Joseph & another v Anna Moraa Civil Appeal No. 23 of 1991 and Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR and urged the Court to allow this aspect of his claim as well.

11 The respondent relied on its written submissions dated 12th February 2025. The respondent also proposed a single issue for determination, namely, whether the learned magistrate erred in law and in fact by failing to award loss of user of Motor Vehicle Registration No. KCY 427 of Kshs. 5,500.00 per day for 6 months. The respondent defended the decision of the lower court and submitted that where a motor vehicle is written off, loss of earnings is not payable upon the pre-accident value being provided for. It relied on Permuga Auto Spares & another v Margaret Korir Tagi [2015] eKLR and Raymond Muindi Simo v Takaful Insurance Africa [2019] eKLR.

12 Further to the foregoing, the respondent submitted that, should the Court be convinced that loss of user was payable, given the nature of the claim, the appellant ought to have proved the same to the requisite standard. On the authority of Linus Fredrick Msaky v Lazaro Thuram Richoro & another [2016] eKLR, the respondent posited that the burden of proof was not discharged by the appellant; and therefore his allegation that he used to earn Kshs. 5,500.00 per day from the subject motor vehicle was not demonstrated. In the premises, the respondent prayed for the dismissal of the appeal.

13 This is a first appeal. It is therefore the duty of this Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

14 Accordingly, I have perused and considered the record of the lower court and noted that the appellant testified before the lower court on 17th August 2022. He adopted his witness statement dated 15th December 2021. He stated that he owned Motor Vehicle Registration No. KCY 427P which he was using as a Matatu to earn income; and that, on the 14th October 2020, he received a call that the motor vehicle had been involved in a road traffic accident at Kadongo. Upon obtaining the Police Abstract, he instructed his Advocate to file a suit against the respondent for compensation.

15 As the motor vehicle was declared a write-off, the appellant sued for the pre-accident value, taking into account the salvage value of Kshs. 400,000.00. He also testified that he used to earn a minimum of Kshs. 5,000.00 per day and therefore urged to be awarded General Damages, including compensation for loss of user at Kshs. 5,500.00 for 6 months.

16 The parties adopted the evidence of PW3 in Oyugis MCCC No. E0068 of 2020 as PW1 before the lower court. The witness, a police officer, produced the Police Abstract as the Plaintiff's Exhibit No. 1. PW3 was Simon Ogima. He was one of the passengers in the appellant's Matatu and was on his way to Kisumu before the accident happened. His evidence was that he witnessed the occurrence and blamed the driver of Motor Vehicle Registration No. KCG 050G contending that the said motor vehicle was being driven at a high speed before it swerved of its lane and hit the appellant's motor vehicle head on. PW3 further stated that the appellant's motor vehicle was damaged beyond repair.

17 The appellant's last witness before the lower court was Caleb Ochieng Oyugi PW4. He testified that he works as a Motor Vehicle Assessor for Regent Automobile Assessor; and that in that capacity he was requested by the appellant to assess his Motor Vehicle Registration No. KCY 427P. He proceeded to where the motor vehicle was and noted that it was in an accident state. He assessed it and later prepared his report dated 27th October 2020, which report was signed by the Valuation Manager, Mr. Charles Kiongo on the 9th November 2020. PW4 pointed out that the motor vehicle was extensively damaged and was therefore recommended as a total loss. It was given a pre-accident value of Kshs. 2,500,000.00 with a salvage value of Kshs. 400,000.00.

18 The respondent opted to adduce no evidence in defence. Therefore, the lower court called for written submissions before rendering the impugned Judgment dated 12th April 2023. On loss of user, he held:

> "I have perused the submissions of the defendant and that of the plaintiff. I have further considered the authorities this court is furnished with on this aspect. I agree with the defendant that this claim cannot stand as I will be awarding twice. Nevertheless, I also find that the plaintiff has not demonstrated that indeed he was making Kshs. 5,000/= daily from the said m/v."

19 In the light of the foregoing, only one issue arises for determination, namely, whether the learned magistrate erred in not awarding the appellant General Damages for loss of user for 6 months at the rate of Kshs. 5,500.00 per day.

20. The appellant made heavy weather of the fact that no rebuttal evidence was presented before the lower court by the respondent; and therefore, he submitted that the lower court erred by not accepting and relying on his uncontroverted evidence. In this regard, Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:

1 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2 When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

21 Likewise, Section 108 of the *Evidence Act* provides that:

The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

22 Thus, the Court of Appeal in the case of Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, held:

> "...As a general proposition under section 1071 of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act..."

23 It was therefore incumbent upon the appellant to prove his assertion that he was earning Kshs. 5,500.00 per day from the subject chattel, notwithstanding that no rebuttal evidence was not availed. The Supreme Court made this clear in Wamwere & 5 others v *Attorney General Petition 26, 34 & 35 of 2019* Consolidated [2023] KESC 3 KLR Constitutional and Human Rights 27 January 2023 Judgment as follows:

67. ...the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act* on the burden of proof. The provision stipulates:

107.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In addition, section 109 of the *Evidence Act* elaborates on the onus of proof by stipulating that:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24 The Supreme Court further pointed out that:

> 69. ...even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegations in issue occurred. See Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others, SC Petition No 12 of 2019; [2020] eKLR.

25 As was explicated in Jackson Mwabili v Peterson Mateli [2020] eKLR loss of user is in the nature of general damages and is proved on a balance of probabilities. Authorities abound to show that loss of user is claimable in respect of damaged commercial vehicles. The decisions further show that in quantifying the damages payable under this head, the courts have, in the main, been liberal in their approach. The question to pose, therefore, is whether the appellant discharged the legal burden of proof in connection with his claim for loss of user.

26 According to the record of the lower court, the appellant stated simply stated that he was making a minimum of Kshs. 5,000.00 per day from the subject motor vehicle. On cross-examination, he reiterated that stance that he was making Kshs. 5,000.00 per day. He nevertheless conceded that:

> "I did not adduce any evidence that I was making Kshs. 5000/=. Yes. I had daily collection book. I did not produce it as an exhibit. Yes. I do file returns on my income yearly. However, I have not file the income returns. I have not shown any evidence of the loss of user..."

27 That notwithstanding, the general position is that that loss of user is awardable even where no proof is availed so long as there is proof that the motor vehicle was being used for commercial purposes. For instance, in Team for Kenya National Sports Complex & 2 others v. Chabari M'Ingaruni supra loss of user was allowed for 6 months in respect of a damaged Matatu that had similarly been written off. The award was made, notwithstanding that no supporting documentary proof by way of books of accounts had been produced, upon the court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff.

28 It is therefore my finding that the lower court erred in principle in failing to make an award under the head of loss of user, simply because the appellant had not proved that he was earning Kshs. 5,500.00 per day from the subject motor vehicle. Nevertheless, since there was no proof that the appellant used to earn Kshs. 5,500.00 per day from the chattel, I would award of Kshs. 2,000/= per day for loss of user for a period of 6 months. A comparable authority to support this award is Nyaga v Attorney General On Behalf of the Ministry of Environment, Water and Natural Resources Civil Appeal E019 of 2023 [2023] KEHC 26484 KLR 13 December 2023 Judgment.

29 I therefore find merit in the appeal. The same is allowed and orders made as hereunder:

a That the judgment in Oyugis MCCC/204/2021 be and is hereby set aside in part, in relation to the claim for loss of user.

b That the same be substituted with an award of Kshs. 2,000.00 per day as General Damages for loss of user of Motor Vehicle Registration No. KCY 427Y for a period of 6 months.

c That costs of the appeal be and are hereby awarded to the appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF MAY 2025.

OLGA SEWE

JUDGE