Munyi alias Munyi Ruita Stephen alias Stephen RGM v Tezo Querries & 2 others (Civil Suit E247 of 2023) [2025] KEHC 13031 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL SUIT E247 OF 2023

RC RUTTO, J

SEPTEMBER 19, 2025

BETWEEN

STEPHEN RGG MUNYI ALIAS MUNYI RUITA STEPHEN ALIAS STEPHEN RGM ..... APPELLANT

AND

TEZO QUERRIES ..... 1ST RESPONDENT

STANLEY KAGUMBA KAMANDE ..... 2ND RESPONDENT

TESO QUARRY ..... 3RD RESPONDENT

(Being an appeal from the judgment of Hon O. M. Wanyaga (Senior Resident Magistrate), delivered at Thika on 31st January 2023 in Thika CMCC NO.502 of 2021)

JUDGMENT

Background

1. The appellant is challenging the judgment delivered on 31st January 2023 by Hon. O.M. Wanyaga in Thika CMCC No.502 of 2021.

2. In a plaint dated 16th September 2021, the appellant sought special damages amounting to Ksh 2,234,590, interest on the special damages, costs of the suit and any other appropriate relief.

3. The appellant claimed that on 22nd January 2020 his motor vehicle, registration number, KCH 210Z was involved in a road traffic accident. He averred that at the time, the motor vehicle was being driven by his authorized driver, one Marenye Kamau, along the Thika - Nairobi Superhighway - Juja service lane around Kareme Area. He alleged that another Motor vehicle registration number KCD 577X, owned by the 1st and 2nd respondents and driven by the 3rd respondent lost control and violently collided with his vehicle causing it to be extensively damaged resulting financial loss and damage.

4. The appellant's case was that he used the motor vehicle as a Public Service Vehicle and earned a net profit of approximately Kshs. 7,000 per day. Due to the accident, the vehicle was out of service for a period of 45 days. He therefore claimed compensation for loss of use.

5. In a statement of defence dated 31st January 2022, the 1st respondent denied the appellant's claims. Specifically, it denied that the 2nd respondent was the beneficial owner, user, possessor controller or insured party of motor vehicle registration number KCD 577X. It denied that the 3rd respondent was its employee, servant, agent and/or authorized driver of motor vehicle registration number KCD 577K. It also averred that if any accident did occur resulting in damage of the appellant's vehicle, it was either caused or contributed by the negligence of the appellant's driver.

6. In its judgment dated 31st January 2023, the trial court was found that the accident was solely caused by the driver of KCD 577X. The court also held that the 3rd respondent was the authorized driver of the vehicle at the time of the accident. Accordingly, the court apportioned liability at 100% in favour of the appellant.

7. However, regarding the claim for loss of user, the trial court held that the evidence presented was contradictory and did not support the claim of earnings of Kshs. 7,000 per day. As a result, the court declined to award damages for loss of user. It then awarded Ksh 1,919,590 as special damages, Interest on the special damages at court rates from date of judgment till payment in full, and costs of the suit.

The appeal

8. Aggrieved by the decision the appellant lodged this appeal through a Memorandum of Appeal dated 28th February 2023 raising the following (5) grounds reproduced verbatim as follows:

    1. That the learned magistrate misdirected himself in law and in fact by failing to make an award for loss of use.

    2. That the learned magistrate misdirected himself in law and in fact by failing to consider the uncontroverted evidence on the loss of use.

    3. That the learned magistrate erred in law and in fact by failing to consider the totality of the evidence adduced that gave rise to an inference that the appellant was entitled to an award for loss of use.

    4. That the learned magistrate misdirected himself in law and in fact by finding the appellant's evidence on loss of use contradictory, without pointing out the contradictions.

    5. That the learned magistrate erred in law and in fact by failing to consider the appellant's submissions and authorities on awards made in similar cases.

9. Consequently, the appellant prays for this appeal to be allowed,the court makes an award for loss of use, and that the costs of both this appeal and of the original suit, Thika CMCC NO.502 of 2021 be borne by the respondents.

10. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 10th September 2024 in support of the appeal. The 1st respondent filed written submissions dated 3rd December 2024 in rebuttal. I have summarised these submissions below.

Appellant's submissions

11. The appellant submits that, as this is a first appeal, the role of the court is to re-evaluate, re-assess, and re-analyze the extracts on the record and then determine whether the conclusions reached by the trial court should stand. This principle was succinctly stated by the Court of Appeal in Selle v Associated Motor Boat Company Limited 1986 E.A.123.

12. It is submitted that the appeal concerns quantum, thus, the court should be guided by its duty as outlined by the Court of Appeal in Kemfro Africa LTD & Another v Lubia & Another (1982 - 88) KLR and Catholic Diocese Of Kisumu v Sophia Achieng Tete, Kisumu Civil Appeal No. 284 OF 2001.

13. The appellant urges that the learned magistrate misapprehended the totality of evidence, thereby leading to an erroneous decision. It contended that the learned magistrate failed to identify any specific contradictions in the appellant's evidence, and that any inconsistencies were immaterial given the largely uncontroverted nature of the testimony.

14. The appellant submits that had the learned magistrate considered the entirety of the evidence, it would have concluded that the appellant was entitled to an award for loss of use.

15. It is argued that the variation in daily income does not imply that the vehicle was not generating income. Rather it reflects the natural fluctuations of a business. To this end the appellant relies on the decisions in Solomon Mwangi Karara v Rift Valley Bottlers Ltd & Another [2017] eKLR, Richard Munene v Republic [2018] eKLR, and Karanja & Another (appealing as legal representatives of the estate of Ernest Awaura Ndung'u) v Bunyu (Civil Appeal E057 of 2022) [2023] KEHC 22903 (KLR) to support this position. He maintains that a reevaluation of the confirms that he suffered loss of use of his motor vehicle.

16. It is the appellant's case that whereas it is settled that special damages must be strictly pleaded and proved, there is no law, whether case law or statutory, requiring proof of special damages solely by documentary evidence. The Court of Appeal decision in Hahn v Singh 1985 KLR 716 and the persuasive decisions in Associated Motors co. Ltd v Blue Sea services Ltd [2019] eKLR and Martin Gicimu Kamanga v Board of Governors, St Anne's Junior School, Lubao [2021] eKLR are relied on to buttress this contention.

17. It is urged that the respondents did not present any evidence to controvert the testimony led by the appellant and on such basis, the appellant's testimony should be accepted as credible in line with the persuasive decisions in Unleek Electrical Company Limited v Joseph Fanuel Alela NBI CCC APPEAL No. 676 Of 2002 and Jamal Ramadhan Yusuf & Another v Ruth Achieng & Another [2010] eKLR.

18. The appellant reiterates that it is a settled principle of law that documentary evidence is not the only way to prove earnings he relies on the Court of Appeal decision in Jacob Aviga Maruja & Francis Karani v Simeon Obayo [2005] eKLR .

19. The appellant argues that even if the trial court found the kshs 7,000 daily income unproven, it should have awarded a reasonable sum based on the available evidence. He cites the Court of appeal decision in Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR and the decisions in Dahman v Faham Transporters Limited & Another (Civil Appeal E173 of 2022) /20241 KEHC 2215 (KLR) (4 March 2024) and Martin Gicimu Kamanga v Board of Governors, St Anne's Junior School, Lubao [2021] eKLR to support this position.

20. It is the appellant contends that the trial court was bound by the precedent set in Joseph Mwangi Gitundu v Gateway Insurance Co Ltd [2015] eKLR. If the court intended to depart from the decision, it was duty bound to explain why the decision was not binding, a position firmly established in law as stated by Justice Mrima in William Omari Owino v South Nyanza Sugar Co Ltd [2019] eKLR.

21. In conclusion, the appellant submits that upon re-evaluation of the evidence, this court should find that he successfully proved loss of use and is entitled to the award Kshs. 315, 000 as pleaded and proved.

Respondent's Submissions

22. The respondent submits that there are four issues for determination, i) whether the learned magistrate misdirected himself in law and in fact by failing to make an award for loss of use, ii) whether the learned magistrate erred in law and in fact by failing to consider the totality of the evidence adduced that gave rise to an inference that the appellant was entitled to an award for loss of use, iii) whether the learned magistrate erred in law and fact in making assessment of damages for loss of use of motor vehicle, and iv) whether the learned magistrate erred in law and in fact by failing to consider the appellant's submissions and authorities on awards made in similar cases.

23. On the first issue, the respondent submits that the appellant was required to prove the alleged loss through documentary evidence detailing the nature of business and the income he used to get from the business. Since the appellant failed to provide such proof, the trial court was justified in declining to award damages for loss of use and did not misdirect itself.

24. Regarding the second issue, the 1st respondent maintains that the appellant did not present sufficient evidence to prove that he was earning a net profit of Kshs. 7,000 per day. The respondent relies on the decision in Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa [2018] eKLR to support this argument.

25. On the third issue, it is submitted that the appellant did not substantiate the costs associated with the alleged loss of use. The decision in Progressive Credit Ltd & another v Mutiso (Civil Appeal E090 of 2021) [2022] KEHC 16633 (KLR) (21 December 2022) (Judgment) is cited to reinforce this position.

26. Concerning the fourth issue, the 1st respondent's case is that the appellant did not provide sufficient documentary evidence of expenses incurred due to loss of use. The decision in David Bagine V Martin Bundi (Civil Appeal 283 of 1996) [1997] KECA 54 (KLR) (21 November 1997) is relied on to reinforce this contention. He urged the court to dismiss the appeal with costs.

Analysis and Determination

27. I have considered the grounds of appeal, reviewed the record of appeal and the parties' submissions. From this, the sole issue that emerges for determination is whether the trial court erred in failing to award damages for loss of use to the appellant.

28. This being a first appeal, the duty of this court is to re-evaluate, re-assess and re-analyse the evidence on record and draw conclusions as enunciated by the Court of Appeal in Selle v. Associated Motor Boat Co. Ltd [1968] EA. Thus, this court must conduct a fresh and exhaustive scrutiny of the evidence, while bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand.

29. I also note thaton quantum of damages, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2 KLR 55 outlined the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "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."

30. Guided by this principle, I now turn to the issue whether the trial court erred in failing to award damages for loss of use.

31. The appellant contends that he was entitled to compensation for loss of use, as his vehicle generated daily income. He argues that the variation in daily earnings reflects the realities of business and does not negate the fact that the vehicle was profit generating. He further submits that documentary evidence is not the only acceptable form of proof for special damages and maintains that his evidence on loss of use was uncontroverted. The respondent, however, disputes these contentions and asserts that the appellant failed to provide sufficient evidence in his claim for loss of earnings.

32. The trial court dismissed the claim for loss of use, finding that the evidence presented was contradictory and failed to substantiate the alleged daily earnings of kshs 7,000. The court also noted that there would be days that the bus would have been grounded or the crew went on off duty.

33. The Court of Appeal has addressed similar claims in various decisions. In Samuel Kariuki Nyangoti v Johaan Distelberger [2017] KECA 691 (KLR), the Court of Appeal considered an issue where the High Court had dismissed the appellant's claim of Kshs.1,032,000 for loss of user of the motor vehicle for one year. I find it necessary to reproduce the relevant excerpts. The Court observed at paragraph 12:

> "..The claim for loss of user of the motor vehicle was dismissed on the ground that the appellant did not produce documents – books of accounts and tax returns relating to the income from the vehicle."
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> 16 "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. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases.
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> (17) In Wambua v Patel & Another [1986] KLR 336, the High Court (Apaloo, J. as he then was), was faced with the problem of quantification of loss of earnings of a cattle trader who had been severely injured in a road traffic accident. Although the court in that case found that the evidence of the plaintiff's earnings to be very poor and that he had kept no books of account nor business books and had never paid any tax, the court said at p.346 para 25:
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> "Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied

his earnings because he did not develop more sophisticated business method" ....and added at p. 347 para 1 "But a victim does not lose his remedy in damages because the quantification is difficult."

In Kimatu Mbuvi's case (supra), the Court of Appeal was grappling, inter alia, with a claim for loss of butchery business which the plaintiff closed after sustaining injuries in a road traffic accident. The claim was opposed on the grounds, amongst other things, that account books, income, tax returns or audited accounts were not produced. Nevertheless, the Court, guided by the previous decision including Wambua's case to which we have referred, computed the claim on the basis of the evidence available.

The case of Chinese Technical Team for Kenya National Sports Complex (supra), a claim for loss of use of a vehicle – a matatu, apparently written off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts was produced upon the court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff.

In Peter Njuguna Joseph & Another v Anna Moraa (supra), this Court assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.

(18) It is fair to refer to the case of Ryce Motors Limited & Another vs. Elias Muroki (supra) relied on by the respondent. There, an award of Kshs.2,830,500/- as special damages for loss of profits to the respondent whose 26-sitter omnibus used as a matatu which was written off in an accident, was set aside for the reason that he had not supported his claim by acceptable evidence, notwithstanding that the appellants had admitted liability for the accident and liability had been apportioned between the appellants. The court said:

"These pieces of paper do not show at all if the alleged accounts were in "respect of the matatu" or the two matatus owned by the plaintiff as shopkeeper. The two pieces of paper in our view do not prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/- a day. He did not support such claim by an acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2830500 for special damages."

(19) That decision is ex-facie inconsistent with the Court's previous decisions in so far as it implies that loss of profits from an income generating vehicle which is written off is strictly a claim for special damages and will fail unless specifically pleaded and strictly proved by documentary evidence. The term "special" and "general" damages have different meaning depending on the context in which the term is used – whether in the context of liability, proof of loss or pleadings (see McGregor on Damages 15th Ed. PP.13-17). The judgment does not disclose the state of pleadings but it seems from the judgment that the claim for loss of profits from the written-off matatu was pleaded as a claim for special damages and based on precise calculations. Whatever the case, from

> what we have already said particularly in the classification of a claim for loss of use of income generating chattel we prefer to be guided, and apply the said previous decisions of the Court."

34. From the jurisprudence discussed above, it is evident that the loss of use of a profit-making chattel such as matatu through an accident is a claim in general damages. The applicable standard of proof is on a balance of probabilities and the principle of restitutio in integrum guides the court in restoring the claimant to the position they would have been in had the accident not occurred.

35. Importantly, a claimant does not lose his remedy in damages because the quantification is difficult; the courts are empowered to assess and award damages on the basis of the evidence available.

36. In the instant case, it is not disputed that the appellant's motor vehicle was actively engaged in public transport operations and bringing in income as at the time of the accident. The appellant provided credible evidence that the motor vehicle was licensed to carry 51 passengers. He also produced daily worksheets reflecting the vehicle's operations showing that the motor vehicle used to make on average six trips from Nairobi to Thika. This evidence was not challenged or rebutted by the respondents.

37. Guided by the Court of Appeal decision cited earlier, and having painstakingly perused the daily worksheet to apprise myself on the earnings of this motor vehicle, and noting the fluctuations of the daily net income are consistent with the realities of public transport business, I am of the opinion that the approximate sum of Kshs.7,000 was not exaggerated or unfounded.

38. Accordingly, I find that the appellant sufficiently proved his claim for loss of use. I therefore allow the appeal with costs and award Ksh.315,000 as general damages for loss of use.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant