CIC Group also known as CIC General Insurance Limited v Mutitu (Civil Appeal 78 of 2022) [2024] KEHC 1435 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 78 OF 2022

FR OLEL, J

FEBRUARY 14, 2024

BETWEEN

CIC GROUP ALSO KNOWN AS CIC GENERAL INSURANCE LIMITED ..... APPELLANT

AND

DAVID MATHAI MUTITU ..... RESPONDENT

(Being An Appeal From The Judgement And Decree Of The Hon E.h. Keago, Chief Magistrate Issued On 13th April 2022 In Machakos Cmcc No E054 Of 2020)

JUDGMENT

A. Introduction

1. The Appellant was the Defendant in the Primary suit, where they had been sued by the respondent herein for failing to compensate him for the insured value of the motor vehicle KCC xxxD, Tata Lorry (hereinafter referred to as the suit motor vehicle), which vehicle was involved in an accident on 29.04.2019 at Thwake River along Machakos – Kitui Road. At the time of the said accident, it was the respondents' contention that he had insured the said suit motor vehicle comprehensively with the appellant herein, but after the accident the appellant refused, failed and/or neglected to settle his claim despite, it being properly lodged.

2. The Appellant did file their statement of defence admitting that indeed they had insured the suit motor vehicle, but denied knowledge of it being involved in an accident and put the Respondent to strict proof thereof. In the alternative, the Appellant denied the respondents allegation that they had refused to settle the his claim and reiterated that all along they had been willing to settle 50% of the claim because the risk had also been co-insured with Heritage Insurance company ltd, whose policy also covered material damages to the suit motor vehicle.

3. The primary suit was heard on merit, and the Trial Court finding was that the Appellant was liable to pay the Respondent a sum of Kenya shillings Three Million, One hundred thousand only (Kshs.3,100,000/=) being the assessed value of the motor vehicle , Kenya shillings Eighty thousand only (Kshs.80,000/=) as towing charges and Kenya shillings two million, five hundred and twenty thousand only (Kshs.2,520,000/=) being damages for loss of business together with costs and interest of the suit.

4. The Appellant being dissatisfied by this judgment, filed their Memorandum of Appeal dated 16.06.2022, which Appeal is premised on the grounds that;

    a. The Honourable Learned Magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing general damages on loss of business and thereby giving an inordinately high and manifestly excessive award unsupported by law so as to amount to an erroneous award in the circumstances of the case.

    b. The Honourable Learned Magistrate erred in law and in fact in awarding Kshs 2,5250.000 being damaged for loss of business.

    c. The Honourable Learned Magistrate erred in law and in fact in proceeding on the wrong principle's vis a vis the evidence before him and laid down principles of law thus arriving at a judgment that was erroneous in the circumstances.

    d. The Honourable Learned Magistrate erred in law and in fact by taking into account irrelevant considerations/ factors while awarding general damages for loss of business.

    e. The Honourable Learned Magistrate erred in law and in fact further erred in law and in fact by failing to appreciate, consider and take into account the Appellants submissions on loss of business in the circumstances.

    f. The Honourable Learned Magistrate erred by making a decision on quantum that was erroneous, without proper basis and against the weight of evidence.

B. Facts of the Case

5. At the trial, the Respondent testified that he was a businessman involved in transport business and was also a contractor. He owned the suit motor vehicle and took out an insurance cover with the Appellant Insurance company for the suit motor vehicle placing it's insured valued at Kshs.3,500,000/=. On 29.4.2019 his motor vehicle was involved in a road traffic accident along Machakos- Kitui road which accident was reported at Mwala Police Station, where he was issued with a police abstract. He informed the Appellant (his Insurers) who did their investigations and the indeed confirmed that the suit motor vehicle had been involved in an accident.

6. The Appellant after investigations and post-accident assessment valued the suit motor vehicle at Ksh.3,150,000/= but to his consternation they refused to pay the insured amount and offered to pay 50% after valuation yet he had insured the suit motor vehicle fully/comprehensively. The respondent further testified that he had received another letter from Stanbic Bank who had financed him to buy the said motor vehicle to the tune of Kshs.5,000,000/= and they had required him to cover the suit motor vehicle comprehensively. In their letter, they told him that they would be deducting the insurance loan balance. He reported this mater to Insurance Regulatory Authority (IRA) who did not reply to his letter. He was not able to use the suit motor vehicle after the accident, as it was written off, and it used to earn him Ksh. 15,000 per day. The respondent prayed to be compensated for the value of the

motor vehicle and loss of business. The respondent produced the policy document, police abstract and various letters exchanged as Exhibits to support his case.

7. In cross examination, he stated that the suit motor vehicle was assessed at Kshs.3,137,000/= after the accident and that the appellant had told him that the suit motor vehicle was also insured by Heritage insurance company ltd. He was given an offer to sign which he did, and returned but was not paid the amount offered. The suit motor vehicle was in his name and that of Stanbic bank. He later found out that there was another insurance policy running from 13.7.2018 to 12.7.2019 by Heritage Insurance company ltd, but he was never issued any certificate of insurance by Heritage insurance company ltd, and had only paid premium to the Appellant company.

8. Upon re-examination, the respondent said Heritage insurance company ltd, had insured the loan and that asset finance and motor vehicle insurance policies were different. Further the financer did not inform him that they had taken an Insurance cover and he was never handed any deductions to cover for premiums of the second insurance cover by Heritage Insurance Company Ltd.

9. The Appellant called one witness, James Kimani, their claims manager who adopted his witness statement filed on 01.12.2021 and produced all the documents in his list of documents as Exhibit D1 to D6.Upon cross examination, he stated that the respondent had a valid policy with the Appellant company which covered the suit motor vehicle and that they would have to compensate the appellant for value of the motor vehicle on the basis of valuation given. There was a second insurance cover taken by Heritage Insurance company ltd but he did not have any document/policy to show that the Appellant took a cover with Heritage insurance Company ltd. While making reference to the letter from Stanbic to the themselves (Exhibit 5), the witness testified that the cover was for a loan and security of an asset. While Exhibit D3 showed that the policy of Heritage Insurance Company was not a motor vehicle insurance policy.

10. The appellant witness further stated that the centralized motor vehicle insurance pool search showed that the suit motor vehicle had two Insurances, but the said data presented before court was not signed as it emanated from the Insurance Regulatory Authority (IRA) integrated system. If an Insurance policy is not cancelled then it would run full for its full term and it was possible that the policy could be cancelled without reflecting that in the Insurance Regulatory Authority (IRA) integrated system.

11. The respondent had signed the discharge vouchers, and they had not enjoined Heritage Insurance company ltd in the suit. The said company too, had not issued any certificate of insurance, but deployed a cover. He testified that the suit vehicle had been written off after the accident and further, their policy did not make provision for loss of income. He confirmed that they were issued with a demand letter but did not respond to the same.

12. In Re-examination, the witness stated that he had learnt that the suit motor vehicle had two Insurance policies when he did a search on the integrated motor insurance portal. They then wrote to Heritage insurance company ltd who confirmed that they had also insurance the suit motor vehicle. The witness further stated that the integrated motor insurance pool portal only showed motor insurance data base but he could not tell whether premiums were ever recovered from the respondent. Currently as a matter of procedure, they would carry out a search in the portal before issuing Insurance policy cover, though as regards the suit motor vehicle, none was done, but it was now a new directive that had been implemented. Heritage insurance company ltd, too issued an insurance cover for the suit motor vehicle, but they were not aware of the subsequent cover. Due to this new discovery, they had offered to pay the respondent 50% of the insured value. The compensation amount had not been released as the insured was yet to sign the discharge voucher.

C. Parties Submissions

i. Appellants submissions

13. The Appellant filed submissions on 18.08.2023 wherein it was submitted while relying on the case of *David Bagine v Martin Bundi* Civil Appeal no 283 of 1996, *Ryce Motors Limited Another v Elias Muroki* (1996) eKLR , *Summer Limited Meru v Moses Kithinji Nkanata* (2006) eKLR and that loss of user is a special damage that must be specifically proven. In the present suit, the Respondent had claimed loss of income of Kshs.15,000/= per day but did not produce any document to support this claim.

14. The Appellant further submitted based on the authority of *Permuga Auto Spares & Another v Margaret Korir Tagi* (2015) eKLR, that once a motor vehicle had been written off, awarding loss of user and material loss in such circumstances would amount to double compensation. What would then be due was only compensation of the pre accident value, less salvage as assessed and other reasonable consequential expense's such as towing charges, assessment charges but not loss of user. They therefore submitted that the claim for loss of user ought to be disallowed.

ii. Respondent Submission

15. The Respondent counsel filed his submissions on 4.09.2023 and submitted that that the jest of this appeal was whether the respondents claim for loss of use of the suit lorry, which was pleaded and claimed from the date of the accident until date of settlement in full was rightly awarded by the trial Magistrate. It was not disputed that the suit motor vehicle was used for commercial purposes, carrying sand and that it was involved in an accident while so engaged. As a result of the accident the said suit motor vehicle was written off and hence could not be put to use again.

16. The respondent had suffered commercial loss as a result of the delay by the Appellant company, in compensating him for the value of the suit motor vehicle and as a result he suffered damages of Kshs.15,000/= per day as lost earning. The said claim was specifically pleaded and was not challenged by the Appellant during trial. The trial court did find that the dispute on restitution/indemnity caused the delay in settlement of the claim and the respondent was thus not able to mitigate his loss, as his business of transporting sand was paralyzed during the entire period.

17. The respondent further submitted that under the law of contract, and the doctrine of indemnity under *Insurance Act* the Appellant was obligated to indemnify the insured by reinstating the insured motor vehicle to its pre – accident state or for loss of accident damage on the motor vehicle. In this case the suit motor vehicle was comprehensively insured when it was involved in an accident on 29.04.2019. The offer to pay the insured half of the insured value was made eight (8) months later on 17.12.2019, in violation of the insurance contract. Reliance was placed on the case of *Concord Insurance Company Limited v David Otieno Alinyo & Another* Kisumu CA No. 163 of 2002.

18. Further while relying on the case of *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR, it was submitted that loss of user of profit is in the nature of general damages and was proved on a balance of probability. Thus, even without receipts, the respondent had established that he was using the said motor vehicle for business and the months it was in the garage before the appellant offered to pay half insured amount. Reliance was placed on the case of *Wambua v Patel & Another* [1986] KLR 336, *Team for Kenya National Sports Complex & 2 Others v Chambari M;Ingaruni* Civil Apeal No 293 of 1998, *Peter Njuguna Joseph & Another v Anna Moraa* , Civil Appeal 23 of 1991 and *George Onyangi Liewa v Madison Insurance Company Limited* [2017[eKLR.

19. The respondent summitted that the Appellant was bound to implement the insurance contract they had entered into, when they compressively insured the suit motor vehicle and should have promptly compensated the respondent once the accident was reported to them. The delay in indemnify him was caused solely by the Appellant and therefore they were liable to make good the loss suffered. The respondent thus urged this court to dismiss this Appeal.

D. Determination

20. I have considered the pleadings and proceedings in the primary suit, the Judgement of the trial court and the submissions of the parties hereto. I find that the issues for determination are as follows;

    a. Whether the Respondent was entitled to compensation for loss of use/business of Kshs.2,520,000.

    b. Who should be awarded costs of the Appeal.

21. As held in *Selle & Another v Associated Motor Boat Company Limited & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif v Ali Mohammed Sholan*(1955), 22 EACA 270.

22. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

> " The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

23. From the grounds of Appeal filed and the submissions made in support of this Appeal, the appellant is only aggrieved by the finding of the trial court as regards loss of user and the subsequent award of Kshs.2,520,000/= to the respondent under the said header. They have not challenged the award of the trial court on the award of; Assessed value of the suit motor vehicle at Kshs.3,100,000/= and towing charges of Kshs.80,000/=. That being the position the said awards are deemed to have been conceded to, and the award of the trial court under the said heading are upheld.

I. Whether the Respondent was entitled to compensation for loss of Business/user of Kshs.2,520,000/=.

24. On this issue, the Appellant argued that that this award ought not to have been made as it was in the nature of special damage that needed to have be specifically pleaded and proven. It was not enough for the respondent to "pluck figures from the air" and pose them as profits, which he had lost as a result of

the said Accident. The respondent had not presented any evidence before the trial court to prove his claim for loss of business and thus the trial court erred to award the same.

25. The respondent on the other hand submitted that the trial court was justified in awarding him damages for loss of business/user as it was the appellant who delayed in indemnifying him as expected under the insurance policy taken and therefore, he was entitled to be compensated. Loss of profit was in the nature of General damages and it was to be proved on a balance of probability. The trial court in its consideration of this issue upheld the respondent's contention and awarded the respondent loss of business for the period between 29.04.2019, when the accident occurred and 17.12. 2019, when the offer was made by the Appellant to pay half of the assessed amount. The court also further considered that the suit lorry would probable work for six (6) days a week for four weeks (Kshs.15,000 x 4 x 7 months) and thus arrived at Kshs.2,52o,000/= being damages for loss of business.

26. In the court of appeal decision in *Samuel Kariuki Nyangoti v Johaan Distelberger* (2017)eKLR, the court of appeal held that the claim for loss of use falls under general damages. Particularly, the court held that;

> " The appellant claimed both special and general damages. The special damages which did not include loss of user were particularized. The respondent in his defence denied that the vehicle was a public service vehicle that it warranted the appellant the alleged sum per day and that appellant was entitled to damages for loss of earnings. The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. 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 is such claims is on balance of probabilities and the principle of restitution in integrum is applied in such cases."

27. There are several other Court of Appeal decisions that are consistent with the decision in *Samuel Kariuki Nyangoti v Johaan Distelberger* (2017)eKLR. Justice W. Musyoka was faced with a similar predicament in *Martin Gicimu Kamanga v Board of governors, St. Anne's Juniro School, Lubao* (2021)eKLR. He had the rare but challenging opportunity of hearing the rival arguments presented by parties and making a decision thereon. From the outset, the honourable judge captured the conflicting legal positions thus;

> " There is court of Appeal authority which the High Court had followed to the effect that loss of user is in the nature of general damages, proved on a balance of probabilities. The position was pronounced in *Peter Njuguna joseph and another v Ann Mora* C.A No. 23 of 1991 (unreported) and *Samuel Kariuki Nyangoti v Johaan Distelberger* (2017) eKLR (Githinjui, Karanja and Kantai JJA). The appellant submits that based on those decisions, the trial court was in error in holding that loss of user was a claim in special damages and in failing to grant it. There is on the other hand, other authority from the Court of Appeal to the contrary. It was said in *David Bagine v Martin Bundi* (1997) eKLR (Gicheru, Shah and Pall), for example, that loss of user could only be special damage, for it is a loss which the claimant suffers specifically and which could not be equated to general damages. The High Court weighed in in such cased as in *Summer Limited Meru v Moses Kithinji Nkanata* (2006) eKLR (Lenaola J), where it was said that earnings from a matatu business were not

a matter that could be left to judicial discretion for it was related to special damage which had to be specifically proved."

28. Faced with the conflicting position, the court proceeded to trace the conflicting decisions based on their age and conclude that the current legal position is that a claim for loss of user is a claim for general damages. In arriving at this conclusion, the court observed that;

> "It would seem from the judicial authorities above that the law is settled on the matter. However, the decisions in *David Bagine v Martin Bundi* (1997) eKLR Gicheru, Shah and Pall) and *Summer Limited Meru v 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 v Patel and another* (1986) KLR 336 (Apaloo J) and *Jebroke Sugarcane Growers Co. Limited v Jackson Chege* Busia 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 v Johaan Distelberger* (2017) eKLR (Githinji Karanja and Kantai JJA) where the plaintiff did not keep books of account or records, given the nature of their business. The correct law, therefore appears to be that stated in *Samuel Kariuki Nyangotu v Johaan Distelberger* (2017)eKLR (Githinji, Karanja and Kantai JJA) and adopted by the High Court in such decision as *Jackson Mwabili v Peterson Mateli* (2020)eKLR (Mwita J) and *Mac master limited v Onesmus mutuku Muia* (2018) eKLR (DK Kemei J)."

29. While this position is a clear and a rare departure from the English Common Law, it is more progressive and appropriate in the Kenya circumstances. While previous cases have not provided a clear rationale for this departure, Justice Musyoka made a justification for this departure thus;

> "Of course, under English common Law, loss of user or profits is strictly a special claim, as stated in *David Bagine v Martin Bundi* (1997) eKLR (Gicheru, Shah and Pall) and *Summer Limited Meru v Moses Kithinji Nkanata* (2006) eKLR (Lenaola J). it would appear, however 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. The decisions in *Wambua v Patel and another* (1986)KLR 336(Apaloo J) and *Samuel Kariuki Nyangoti v Johaan Distelberger* (2017) eKLR (Githinji Karanja and Kantai JJA) took 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 is jurisprudence here, where what is strictly a special damage under English Common Law is now treated as general damage under Kenya Common Law."

30. The Respondent claimed damages or loss of use of the suit motor vehicle from 29.04.2019 until date of full payment. He pleaded that he lost Kshs.15,000/= per day and he also testified as much in his oral testimony. The appellant on the other hand argued that the respondent did not prove this claim and

therefore the trial court was at fault in awarding the same. The trial court did consider all the evidence presented and as a fact found that the Appellant company was at fault in not settling the claim on time or at all and eventually vide their letter dated 17.12. 2019 offered to settle half the amount.

31. Am award of general damage is not supposed to return the Respondent to the original position but is a form of compensation for loss suffered. The award is discretionary and can only be disturbed if the same is based on a wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it erroneous. The conditions for interference with general damages was discussed by the Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal held that –

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, JA that:
>
> > 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

32. The Trial court awarded Kshs.2,520,000/= being damages for loss of business calculated as follows (Kshs.15,000 X 6 days per week x 7 months x 4weeks). The accident herein as per the police abstract was self-involving and obviously the Appellant company was expected to undertake due diligence to determine their level of liability. I do find that reasonably it should take an average of about 60 days to process an insurance claim. During this period the insurance company is expected to undertake investigations and confirm the validity of the claim made before a determination is made. During this period, it would not be logical to penalize the insurance company with a claim for loss of profit.

33. The trial court did find that the accident occurred on 29.04.2019 and the letter of offer made to pay half the claim was made on 17.12. 2019.This was a period of about eight months from the date of the accident, and there was no justification provided for the delay in settling the claim. The court proceeded to awarded loss of profit for a period of seven months. I do find that it was an error for the trial court to compute the 60 days, which was needed to determine the claim as part of the months under which the respondent was entitled to be paid damages. Time would start to run from the time a determination is made to compensate the respondent, and this would necessitate to remove the initial 60 days period as determined herein. From 29.04.2019 to 17.12.2019, is a period of about seven and half months. I do therefore reduce the said period two months and find that a period of five months would have been the proper period for consideration, which period the respondent lost opportunity to carry on with his business.

34. Further the trial magistrate did find that it was not possible to have the suit motor vehicle operate on daily basis. He therefore awarded the respondent profit of six (6) days per week while considering that the motor vehicle needed to be serviced and had rest days. While this finding is reasonable, it too constitutes an error as and a more reasonable assessment would have reduced the working days to five

(5) days a week or 20 days a month, if the court had factored in the fact that on some days, there is no business and the suit lorry could remain idle.

E. Disposition

35. The upshot, is that this Appeal partly succeeds. The award of the trial Magistrate in the trial court is reduced to (Kshs 15,000 X 5 days per week x 5 months x 4weeks) = Kshs 1,500,000/=. The final award for which the Appellant is liable to pay the respondent shall be;

    a. The Assessed value of Motor vehicle Registration No KCC xxxD Tata Tipper.....Kshs 3,100,000/=.

    b. Towing Charges.....Kshs 80,000/=.

    c. Damage's for loss of Business.....Kshs 1,500,000/=.

    Total.....Kshs 4,680,000/=

36. The Appellant will have half costs of this Appeal and the same is assessed at Ksh.150,000/= all inclusive.

37. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 14TH DAY OF FEBRUARY, 2024

In the presence of:-

Mr. Muchumba Mutagi for Appellant

Respondent present in person

Sam - Court Assistant