Chumba & another v Kwick Servess Shuttle Ltd (Civil Appeal E137 of 2023) [2024] KEHC 4532 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E137 OF 2023

RN NYAKUNDI, J

MARCH 11, 2024

BETWEEN

WILLIAM KIPKORIR CHUMBA ..... 1ST APPELLANT

ALPHA GARIN MILLERS LTD ..... 2ND APPELLANT

AND

KWICK SERVESS SHUTTLE LTD ..... RESPONDENT

(Being an appeal from the judgement of Hon. R. Otieno (RM) in Eldoret SCCC No. E322 of 2023, delivered on 29/6/2023)

JUDGMENT

Representation:

J.M. Kimani & Co Advocate

Onyinkwa & Advocates

1. The appeal herein is mainly on quantum. By a Statement of Claim dated 14/4/2023, the Respondent instituted a material damage claim against the Appellants for compensation for special damages of Kshs. 940,000/= plus costs and interests of the suit. The Court also awarded Kshs. 50,000/= as damages for loss of user.

2. The accident was stated to have occurred on 12/6/2022, along Eldoret-Kitale Road at Lengut area. It is claimed that the Respondent's motor vehicle registration number KDG 489U was being driven along the aforementioned road when the Appellants' motor vehicles registration numbers KCY 403W and KCG 086F/ZF 72 83 were negligently driven causing them to ram into the Respondent's motor vehicle thereby causing it extensive damage.

3. The Appellants filed their response to the Statement of Claim dated 11/5/2023, denying the occurrence of the accident. Alternatively, he blamed the Respondent's driver for causing and or contributing to the said accident.

4. Liability was agreed by consent at 20% to 80% in favour of the Respondent.

   After trial Judgment was delivered on 29/6/2023 in the following terms

   a. Liability at 80% :20% in favour of the Respondent as against the Appellants as agreed.

   b. Special damages .....Kshs. 940,000/=

   c. Loss of user .....Kshs. 50,000/=

   d. Sub-total .....Kshs. 990,000/=

   e. Less 20% contribution.....Kshs. 198,000/=

   f. Total .....Ksh. 792,000/=

   g. Plus, costs and interest of the suit.

   Aggrieved by the Judgment, the Appellants on 24/7/2023, filed a Memorandum of Appeal dated 13/7/2023 raising the following grounds: -

   1. That the learned trial Magistrate erred in law and fact in awarding damages to the Respondent which were excessive in view of the evidence adduced.

   2. That the learned trial Magistrate erred in law and fact in adopting the wrong principles in assessment of the damages awarded and or payable to the Respondent.

   3. That the learned trial Magistrate erred in law and fact by awarding the Respondent Kshs. 934,500 as special damages for material damage when the same was not strictly proved by way of production of receipts thereby arriving at an erroneous decision.

   4. That the learned trial Magistrate erred in law and fact by awarding the Respondent Kshs. 50,000/= for loss of user when the same was not proved and contrary to the well laid down principles of law.

   5. That the learned trial Magistrate erred in law and fact by failing to take into account the totality of the evidence on record and the submissions by the Appellant hence arriving at an erroneous decision on the issue of quantum.

5. The appeal was canvassed vide written submissions. The Appellants filed submissions on 7/12/2023 while the Respondent filed on 12/1/2024.

The Appellants' Submissions

6. On whether the trial Magistrate erred in law and fact in awarding damages for material loss when the same was not strictly proved. Counsel for the Appellant's submitted that a material damage claim is a special claim in nature and that it is trite law that special damages must not only be specifically pleaded but also strictly proved for the same to be awarded. Counsel cited the case of Jackson Mwabili v Peterson Mateli [2020] eKLR in that regard. Counsel further submitted that the Respondent herein pleaded Kshs. 934,000/=as material loss and only evidence that was adduced to prove the same was an assessment report which estimated the cost of repairs to be Kshs. 934,000/=. Counsel argued that during the hearing, the Respondent's director testified that the subject motor vehicle was repaired

at Kshs. 934,000/=and was operational, he also stated that he did not have receipts to show that the motor vehicle was repaired at the said amount. Counsel faulted the trial Magistrate for considering the assessment report as sufficient proof of material loss and proceeded to award the amount pleaded without production of receipts. According to Counsel an assessment report is not sufficient to prove material loss, the Respondent ought to have produced receipts to prove that he indeed spent Kshs. 934,000/=to repair the motor vehicle. Counsel cited the case of Total Kenya Limited v Janevams Limited [2015] eKLR and the case of Jackson Mwabili v Peterson Mateli [2021] eKLR is support of his arguments. According to Counsel the amount of repair costs relied upon were in respect of the assessors' estimates, and not the actual expended amount, as no receipts were produced in evidence to prove payment of the pleaded amount, that trial Magistrate disregarded the general principle that special damages must be specifically pleaded and strictly proved. Counsel argued that in absence of strict proof of the repairs, we urge this honourable Court to find that no repairs were undertaken and proceed to set aside the award of Kshs. 934,000/= in its entirety.

7. On whether the learned trial Magistrate erred in law and fact in awarding damages for loss of user when the same was not proved. Counsel submitted that a claim for loss of user equally falls under special damages and it must be strictly proved for it to be awarded. Counsel relied on the case of Grace Anyona Mbinda v Jubilee Insurance Company Limited [2021] eKLR. Counsel further submitted that the Respondent pleaded loss of user of Kshs. 60,000/=, that the Respondent claimed that it lost an income of Kshs. 3,000/= per day for 20 days when the motor vehicle was under repair. However, Counsel argued that the Respondent did not avail a schedule showing that it lost Kshs. 3,000/= daily for 20 days as alleged. Additionally, the Respondent did not produce any evidence to show that the motor vehicle was repaired for 20 days. Counsel submitted that the trial Magistrate awarded Kshs. 50,000/= for loss of user. According to Counsel, the trial Magistrate having concluded that no evidence was adduced to show that the Respondent lost Kshs. 3,000/=daily, ought to have dismissed the Respondent's claim for loss of user. Counsel faulted the trial Magistrate for assuming that the Respondent lost Kshs. 2,500/= for 20 days and proceeding to award the same despite the fact that the same was not proved. Counsel maintained that an award for loss of user cannot be made based on assumptions. Counsel reiterated that a claim for loss of user being a special claim cannot be awarded based on assumptions and that the trial Magistrate's award of Kshs. 50,000/=for loss of user was not justified at all. Counsel urged the Court to set aside the award of loss of user entirely.

The Respondent's Submissions

8. Counsel for the Respondent submitted that the appeal emanates from Small Claims Court which is governed by the *Small Claims Court Act* No. 2 of 2016 and Section 38 (1). Counsel submitted that a plain reading of the underpinned Section reveals that in as far as the appeal challenges factual issues, it does not fall for consideration at all by this Honourable Court.

9. On whether the claim for material damage was proved to the required standard, Counsel argued that in a material damage claim, the claimant is only required to show the extent of damage and the cost of restoration to its pre-accident condition. Counsel cited the Court of Appeal in the case of Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya [2010] eKLR and the case of Mohammed Ali & another v Sagoo Radiators Limited [2013] eKLR is support of his submissions. Counsel argued that the Respondent in support of its claim produced an assessment report which clearly showed estimated cost to restore the vehicle to its pre-accident condition is Kshs. 934,000/=and that no rival report was produced. According to Counsel, therefore there is no basis for upsetting the award for material damage. Counsel maintained that the Adjudicator is his judgment at page 97 of the record was satisfied that the Respondent had proved the cost of repair of Kshs. 934,000/= as per assessment report and the cost of assessment as per the receipt of Kshs. 6,000/=. Counsel relied on the

findings in the case of Bash Hauliers Ltd & another v Jotham Njami Mwariri [2019] eKLR. According to Counsel, they have said enough to demonstrate that the appeal in as far as it relates to material damage claim and cost of assessment is unmerited, is moot and there is no basis for upsetting the award of Kshs. 940,000/=.

10. With regard to whether the claim for loss of user was proved. Counsel submitted that Respondent had sought Kshs. 3,000/= per day, for 20 days as loss of user and in his judgment, the Adjudicator rightly observed that the Respondent vehicle was a matatu which was generating income and proceeded to award Kshs. 2,500/= per day for 20 days being the expected duration of repair as per the assessment report bringing the total to Kshs. According to Counsel, loss of user for a profit making chattel like the Respondent's matatu is in the nature of general damages which ought to be proved only on the balance of probabilities. Counsel cited the case of Samuel Kariuki Nyangoti V Johaan Distelberger [2017] eKLR in support of his arguments. According to Counsel, the Adjudicator was thus satisfied that the Respondent's vehicle was generating income as a matatu and thus came to the correct conclusion in awarding loss of user even in absence of documents as informed by wisdom from the Court of Appeal in the foregoing decision.

Analysis and Determination

11. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

12. In that regard, an appellate Court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

13. As assessment of damages is at the discretion of the trial Court, this Court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another as follows: -

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. In the present case, it is not in dispute the Respondent suffered damage to its car due to the wrongful acts of the Appellants agreed between the parties and apportioned at 80%: 20%.

In Nkuene Dairy Farmers Co-operative Society & Anor v Ngacha Ndeiya (2010) eKLR, the Court of Appeal held-:

> "In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

15. The same Court of Appeal likewise in David Bagine v Martin Bundi (1996) eKLR, in asserting the probative value of an assessor's report reiterated that:

> " The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim"

16. The Respondent herein in support of its claim produced an assessment report which clearly showed the estimated cost to restore its damaged motor vehicle to its pre-accident state was Kshs. 934,000/=. The Respondent also produced a receipt of Kshs. 6,000/=. It was therefore not necessary to demonstrate that indeed the costs of repairs were incurred, because the report was sufficient proof on a balance of probabilities. The appellant was not legally required or obligated to specifically prove the claim by production of receipts like in the case of special damages.

17. On loss of user, the Respondent claimed Kshs.3000/= per day and the Court awarded Kshs. 50,000/= at the rate of Kshs.2, 500/= daily. The Appellants faulted the trial Magistrate for awarding the said amount having concluded that no evidence was adduce to show that the Respondent lost Kshs. 3,000/= daily. According to the Appellants the trial Court ought to have dismissed the Respondent's claim for loss of user.

18. Under English Common Law, loss of user or profits is strictly a special claim.

The Court of Appeal in Civil Appeal No. 283 of 1996, (David Bagine versus Martin Bundi) stated that damages which are claimed under the title "loss of user" are special damages which must be proved. The Court stated as follows:-

> "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". These damages as pointed out earlier by us must be strictly proved."

19. The Court of Appeal in Ryce Motors Limited & Another versus Elias Muroki (1996) eKLR stated that a claim for loss of user must be supported by acceptable evidence. The Court stated as follows:-

> " The learned judge had before him by way of plaintiff's evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act. 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, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to 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 Kshs.4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety."

20. Samuel Kariuki Nyangoti v Johaan Distelberger (supra), where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

> "(16) 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 in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases." (emphasis)

21. The Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in Wambua v Patel & Another [1986] KLR 336, where the court had found the plaintiff had not kept proper records of what he earned but stated:

> " 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" .... But a victim does not lose his remedy in damages because the quantification is difficult."

22. It would seem, from the judicial authorities above, that the law is not settled on the matter. There however seems to be a change in jurisprudence in view 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. 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.

23. An appellate Court would not readily interfere with the trial Court's exercise of discretion unless it is shown that the court applied wrong principles of law; took into account irrelevant factors; failed to take into account a relevant factor or the award is inordinately high or low as to represent an erroneous estimate.

In Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal No. 23 of 1991), the Court of Appeal 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. (See also Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi, (Civil Appeal No. 10 of 1991). The trial Magistrate while observing that there was no evidence that the Respondent earned Kshs. 3,000/= daily appreciated that the Certificates of Insurance produced, proved that the Claimant's motor vehicle was a PSV matatu and must have been earning him some income before awarding the Respondent Kshs. 50,000/= as loss of user at the rate of Kshs. 2,500/= daily. I thus find no reason to disturb the award under this heading.

24. In the premises, the appeal is unmeritorious and the same is dismissed with costs.

25. It is so ordered.

26. Interim stay of 15 days is granted. Each party to be at liberty to apply

DELIVERED, DATED AND SIGNED AT ELDORET THIS 11TH DAY OF MARCH 2024.

In the Presence of

Mr. Kinyanjui for the Respondent

M/s . Kemboi for the Appellant

.....

R. NYAKUNDI

JUDGE

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