



REPUBLIC OF KENYA



**KENYA LAW**  
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**Salaad v Motrext Limited (Civil Appeal 47 of 2018)  
[2024] KEHC 4547 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 47 OF 2018**

**REA OUGO, J**

**APRIL 5, 2024**

**BETWEEN**

**OSMAN HAJI SALAAD ..... APPELLANT**

**AND**

**MOTREXT LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J. Kingori Chief Magistrate  
in Bungoma CMCC No. 413 of 2013 delivered on 17th day of July 2018)*

**JUDGMENT**

1. This appeal is solely challenging the finding of the trial magistrate on the award of damages. A brief background to the appeal is that the appellant in the subordinate court filed a plaint following an accident that occurred on 2/5/2013 between the respondent's vehicle reg. no. KAW 404R/ZB 7309 Mercedes and the respondent's vehicle reg. no. KAE 591Q/ZC 4915. The appellant blamed the respondent's driver for causing the accident and that as a result his vehicle was extensively damaged.
2. According to the appellant, prior to the accident, his vehicle was being used in the business of transporting goods from Kenya to South Sudan earning him a monthly income of Kshs 560,000/- which income was lost. The appellant sought special damages of Kshs 5,122,744/- loss of user (560,000 x12), general damages, costs and interest of the suit.
3. The trial magistrate found the respondent 100% liable for the accident. The trial magistrate in his judgment found that the claim for loss of user was unmerited. He made an award of Kshs 1,310,000/- as special damages on the pre-accident value of the appellant's motor vehicle.
4. The appellant aggrieved by the judgment of the trial court has now filed this instant appeal on the following grounds:



1. That the Learned trial Magistrate erred in law and in fact in disallowing the appellant's claim on the quantum of damages when the said claim had been proved on a balance of probability.
  2. That the Learned trial Magistrate erred in law and in fact by adopting the respondent's quantification of a sum of Kshs 1,350,000/- as the pre-accident value of the appellants Motor Vehicle KAE 591Q ZC 4915 Mercedes Benz.
  3. That the Learned trial Magistrate erred in law and in fact by disregarding the weight of the applicant's evidence on quantum.
  4. That the Learned trial Magistrate erred in law in applying wrong principles in arriving at his decision on quantum.
  5. That the Learned trial Magistrate erred in law and in fact in failing to grant the appellants claim for loss of user when there was sufficient evidence adduced in court to prove the same.
  6. That the Learned trial Magistrate erred in law and in fact in ever relying on the respondents evidence in arriving at his decision on quantum.
  7. That the Learned trial Magistrate erred in law and in fact in failing to make a finding that the appellants overwhelming evidence on quantum had not been rebutted or controverted by the respondents during cross examination.
  8. That the Learned trial Magistrate erred in law and in fact in disregarding the submissions by the appellant.
  9. That the Learned trial Magistrate erred in law and fact by accepting of the evidence the respondent witness as gospel truth and failing to find that the same was laced with contradictions and inconsistencies.
  10. That the Learned trial Magistrate erred in law and fact by failing to appreciate the totality if the appellant's evidence on quantum in arriving at his decision.
  11. That the Learned trial Magistrate erred in law and fact by making a finding on the pre accident value of the appellants Motor Vehicle KAE 591Q ZC 4915 Mercedes Benz Lorry based on untested and untried formula.
  12. That the Learned trial Magistrate erred in law and in fact in arriving at his decision and quantum by considering extraneous issues or matters.
5. The appellant seeks that the judgment of the trial court on quantum be set aside and the appellant's claim to wit the pre-accident value and the loss of user be allowed in its entirety.

### **Analysis And Determination**

6. I have carefully considered the appeal, the rival submissions by parties and the evidence on record. The only issue challenged in the appeal is the award of damages by the trial court. I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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”



7. The appellant in the subordinate court relied on the evidence of Osman Haji Salad (Pw1) who testified that the vehicle belonged to him. On the material day it was taking oil to South Sudan, Juba when it was involved in the accident. Pw1 produced a copy of records, Pexh1, Certificate of Examination for KAE 519Q as Pexh3, Receipts Pexh5, photos (Pexh6 (a) (b) (c) (d) (e) and (f)), two deposit slips marked 7 (a) and (b), Copy of KAE 591 Q, demand notice, statutory notice marked Pexh 8,9 and 10 respectively. He testified that he was making Kshs 560,000/- per month. Hassan Mohammed Safila (Pw2) testified that he was the driver of the appellant's vehicle and blamed the respondent's driver for causing the accident. PCW Evaline Cherono produced the police abstract, Pexh2. She testified that the scene was visited by P.C. Ogalo who made the following remarks "No pre-accident defects". The assessors report by Wareng Auto Assessors as Pexh 4 (b).
8. John Kiplangat Chesang (Pw4) testified that he is a motor assessor with Wareng Auto Assessors and Motor Valuers and that he carried out the assessment. He listed down the 29 motor components that were damaged in the accident and the cost of repair would be Kshs 5,022,544.80/-. The pre-accident value was Kshs 5,000,000/- without considering the fuel tank. On cross examination he testified that the vehicle was a complete write off and that it was not economical to repair it. On cross-examination he conceded that depreciation was not captured.
9. The respondent relied on the testimony of Zaddock Mambo (Dw1) who testified that he is motor vehicle assessor with Bright Assessors. He testified that the estimates for the spare parts came to Kshs 3, 516,340/-. They considered the pre-accident value and noted that the cost was over 70%. They estimated the pre-accident value at Kshs 1,350,000/- as the vehicle was a 1984 vehicle. He explained that the age of the vehicle is supposed to knock off 5% depreciation per year and that a new unit was Kshs 10,000,000/- in that year.
10. The appellant in his submissions submits that loss of user is a special damage claim that must not only be specifically proved but must also be pleaded. It was submitted that they made submissions on the issue of loss of user before the subordinate court and they also provided documentary evidence such as the statement of the truck and date report for KAE 951A/ZC 4915. The trial court disregarded the appellant's evidence and dismissed to claim without providing any reason contrary to provisions of Order 21 Rule 4.
11. The respondent in his submissions argues that the claim for loss of user was dismissed on the grounds that the vehicle was declared a write-off. He also pointed out that there was no sufficient evidence adduced by the appellant to show that he earned Kshs 560,000/- from his business. The statements appearing on pages 32 -35 of the record of appeal are not authentic since the same were prepared by the appellant purposely for the suit.
12. The report produced by the appellant noted that the total repair cost of Kshs 5,022,544.80/- was far beyond the purchase price of Kshs 5,000,000/- and declared the vehicle a complete write-off at salvage value of Kshs 50,000/-. The wording of the report of Wareng Auto Assessors and Motor Value seems to suggest that the cost of the vehicle is Kshs 5,000,000/- as opposed to giving the vehicle's pre-accident value.
13. The question before the court is whether the appellant is entitled to damages for loss of user. The trial magistrate in dismissing the appellant's claim for loss of user relied on the High Court decision of *Permuge Auto Spares & Barclays Bank of Kenya Ltd v Margaret Korir Gati* (2015) eKLR where the court held that once a vehicle has been written off, the only compensation is the pre-accident value, less salvage value as assessed but not loss of user. The court explained that payment of pre-accident value is made to bring the owner as near as possible to the state he would have been if not for the accident and



that courts take the view that the award of damages for loss of user as well as the pre-accident value and other consequential loss would be to award double compensation.

14. However, in *Mombasa Maize Millers Limited v Kipkosgei* (Civil Appeal 61 of 2020) [2022] KEHC 15429 (KLR) (18 November 2022) (Judgment) the court was of the contrary opinion. The court held that:

“ 15. It is evident that the respondent did not have use of the vehicle from the date of the accident to the time of filing the suit which was unconscionable. Whereas the position on whether loss of user is awarded as special damages or general damages has varied, it is undisputed that the same are damages nonetheless. Further, the principle that the award of loss of user after the insurance has indemnified the respondent amounts to double compensation does not bode well with this court as despite replacing the vehicle, what then happens to the income that the respondent would have earned in the period from the date of the accident to today? I find that he is entitled to compensation for loss of user as well in the spirit of the doctrine of restitution ad integrum.

16. The Court of Appeal 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.”

17. Therefore, the failure of the respondent to provide consistent receipts as proof of income from the vehicle does not invalidate the fact that he was generating an income from the motor vehicle. Further, to claim that the respondent was not entitled to loss of user due to the vehicle being a write-off is ironic as it is evident that the loss emanated from the very fact that the vehicle is a write off, resulting from actions that the appellant was liable for.”

15. I am inclined to agree with the court’s finding in *Mombasa Maize Millers Limited v Kipkosgei*. The appellant in my view is entitled to compensation for loss of user.

16. However, the respondent in his submissions argued that the appellant failed to provide sufficient evidence to prove their claim for loss of user. I note that through the consent of the parties, the statement of account of motor vehicle KAE 951Q/ZC 4915 was produced as Pexh11, the trip statement by Bakasal Transporters was produced as Pexh 2 (a) and the trip statement by Azhar Hauliers Ltd produced as Pexh 13. Pw1 testified that he was earning Kshs 560,000/- per month when he transported goods from Kenya to South Sudan. The appellant’s audited financial statements as Pexh10 prepared by Wangombe & Associates reveal that he was earning net profits of Kshs 3,810,926/- per year. This would translate to a net monthly income of Kshs 317,577/-. Therefore, in my view the appellant proved that he was earning Kshs 317,577/- from his transport business.

17. In this case, the appellant seeks loss of user for a duration of 12 months but has not given any reason for the 12-month duration nor has he informed the court of the steps he took to mitigate his loss. The



Court of Appeal in *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR when faced with a similar situation held as follows:

“There are no reasons given for claiming loss of use for one year or the steps the appellant took to mitigate the damages. In Chinese Technical Team for Kenya National Sports Complex, a period of 6 months was considered as a reasonable period for computing loss of user of a matatu which we also consider to be reasonable for this case.”

18. Therefore, the appellant on the head of loss of user shall be entitled to Kshs 1,905,462 (317,577/- x 6).
19. The appellant in his submissions did not tackle the issue surrounding the trial court’s finding that the pre-accident value of the appellant’s motor vehicle was Kshs 1,350,000/-. Pw4 testified that the vehicle’s pre-accident value was Kshs 5,000,000/-. In his report, he notes that the purchase price for the vehicle is Kshs 5,000,000. This in my view could not have been the pre-accident value for the vehicle but simply the amount the appellant used to purchase it. No further explanation was also offered by Pw1 on how he arrived at the said pre-accident value. On the other hand, Dw1 estimated pre-accident value at Kshs 1,350,000/-. Dw1 in his computation took into account that the vehicle was a 1984 model vehicle and that the vehicle is supposed to knock off 5% depreciation per year. I agree with the finding of the trial magistrate that the report by the respondent appeared more accurate and plausible, and therefore find no reason to interfere with his finding.
20. Consequently, I find that the appeal succeeds partially. I hereby set aside the judgment of the trial court and enter judgment in favour of the appellant in the following terms:
  - a. Pre- accident Value of Motor vehicle Kshs 1,300,000/- (1,350,000 less Kshs 50,000/- being the salvage value).
  - b. Loss of user Kshs 1,905,462/-
  - c. The Appellant shall have half the costs of the appeal.
  - d. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 5<sup>TH</sup> DAY OF APRIL 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Simiyu -For the Appellant

Miss Mugasia -For the Respondent

Wilkister - C/A

