



**Gitu aka Joseph Gatwa Gitu v Family Bank Limited & another (Civil Appeal E079 of 2022) [2024] KEHC 12956 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12956 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E079 OF 2022  
SM MOHOCHI, J  
OCTOBER 24, 2024**

**BETWEEN**

**JOSEPH GATUA GITU AKA JOSEPH GATWA GITU ..... APPELLANT**

**AND**

**FAMILY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE KINUTHIA NJUGUNA AKA GEORGE NJUGUNA**

**KINUTHIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgements and Decree of Hon. D Mosse (Senior Resident Magistrate) delivered on 18th February, 2022 in Nakuru CMCC No. 92 of 2020.)*

**JUDGMENT**

1. By Plaintiff dated February 6, 2021 the Appellant sought special damages as well as general damages for pain, suffering and loss of amenities for physical injuries sustained as a result of an accident that occurred on 10<sup>th</sup> December, 2019. He also sought special damages and general damages for loss of user and inconvenience for material damages on motor vehicle registration number KBQ 482L Nissan AD arising from the said accident as well as costs and interest of the suit.
2. It was the Appellant's claim that on 10<sup>th</sup> December, 2019 while driving motor vehicle registration number KBQ 482L along the Dundori-Nakuru road, near 3KA army barracks areas, motor vehicle registration KCC-772S Mitsubishi Lorry collided and hit his motor vehicle wherein the Appellant sustained serious bodily injuries and his motor vehicle was extensively damaged.
3. The Respondent in his statement of Defence dated 20<sup>th</sup> February, 2021 denied the claim or that he was the driver of motor vehicle registration KCC-772S and also denied the allegations of negligence thereto. On a without prejudice basis, he blamed the Appellant for the accident.



4. By consent entered on 13<sup>th</sup> July, 2021 judgment on liability was entered for the Appellant at 20% as against the Respondent for 80%. Appellant produced PExh- 1-14.
5. The Court proceeded to determine the issue of quantum as the issue of liability was already determined. By judgement delivered on 18<sup>th</sup> February 2022, the Court awarded general damages of Kshs. 250,000, special damages at Kshs. 38,550 and liability was apportioned at the ration of 20:80 in favour of the Appellant. The costs were awarded subject to liability.
6. By Memorandum of Appeal dated 21<sup>st</sup> June, 2022 the Appellant sought to appeal the Trial Court's decision on the following grounds:-
  - i. That the Learned Trial Magistrate erred in law and in fact by not properly, dutifully and/or exhaustively analyzing and or considering the materials/evidence on the record, applicable law and principles for award of damages while arriving at her decisions/judgement on quantum or damages awardable;
  - ii. That the Learned Trial Magistrate erred in law and in fact by not awarding the Appellant herein costs of repair/restitution of his motor vehicle and damages for loss of user/inconvenience.
7. The Appellant thus seeks that the Appeal be allowed and Part of the judgement or decree of the Trial Court be reversed, reviewed and or set aside. The Appellant further sought a revisit on the award of cost of repair of the Appellant's motor vehicle and damages for loss of user or inconvenience.
8. By directions issued on 30<sup>th</sup> January, 2024 the appeal was heard on the basis of the parties' rival written submissions.

### **Appellant's Submissions**

9. The Appellant's submissions dated 5<sup>th</sup> April, 2024 and filed on 6<sup>th</sup> April, 2024 submitted mainly on why he was dissatisfied with the Trial Court's decision. For starters on the Trial Courts failure to award damages for loss of the Appellant's motor vehicle the Appellant submitted that the Court did not consider all the materials placed on record which was an error in principle. It was argued that the assessors report was provided and contrary to what the Trial Court had observed in its judgement. Failure to note that denied the Appellant the award of damages for loss of motor vehicle. Reliance was placed in *Kinnock Trading Limited v Evan Mangi Dogo & 131 Others* [2021] KECA 247 (KLR) where the Court of Appeal lowed an appeal where the Court failed consider material placed before court.
10. Further that since the report was produced and marked as evidence by consent with no contrary evidence produced, the same was uncontroverted and ought to have been considered. Reliance was placed in *Nick Omondi Ndiewo T/A Ditech Engineering Service v Cell Care Electronics* [2015] eKLR, *Eldoret Express Company Limited v Nandabelwa* [2022] KEHC 3226 (KLR) and *Acceler Global v Gladys Nasambu Waswa & Another* [2020] eKLR.

### **Respondent's Submissions**

11. In the submissions dated 9<sup>th</sup> July, 2024 and filed on 26<sup>th</sup> July, 2024, in opposing the Appeal, the Respondent submitted that the Trial Court correctly directed itself while relying on the prevailing comparable authorities with regard to the award given.
12. As regards the costs of repair/restitution of the Appellant's motor vehicle and the damages for loss of user it was submitted that the Appellant was awarded what was pleaded and proven. Reliance was placed on *Sukari Insutries Limited vs Lensa Awuor Nyagumba & Another* [2019] eKLR.



## Analysis and Determination

13. I have carefully considered the submissions of the learned counsel and perused the materials placed on record. As a first appeal, this Court is obligated to re-appraise the evidence adduced in the Trial Court on law as well as on fact in order to arrive at its own independent conclusion bearing in mind it did not have the advantage of seeing and hearing the witnesses as they testified as such give due regard to it. see *Selle vs. Associated Motor Boat Company Ltd* [1968] EA 123.
14. Keeping in mind the above principles, as stated above and observed by the Trial Court, parties having entered a consent on liability, for the most part the Trial Court had to make a decision on the quantum of damages. The Appeal will not be different.
15. The issues for determination in this appeal is as follows:-
  - a. Whether the Appeal is merited
  - b. Who bears the costs of this appeal?
16. In his Complaint, the Appellant sought:-
  - a. General damages for Pain, suffering and loss of amenities;
  - b. Kshs. 210,000 being net loss for damage of the said motor vehicle;
  - c. General damages for loss of user and inconvenience arising from damage of the said motor vehicle;
  - d. Special damages of Kshs. 38,550;
  - e. Costs of the suit;
  - f. Interests on all the above at Court rates; and
  - g. Any other remedy that this Honourable Court might deem fit to grant.
17. In its judgement, the Trial Court awarded the Appellant: -
  - a. General damages of Kshs. 250,000
  - b. Special damages granted at Kshs. 38,550
  - c. Liability is apportioned in the ratio 20:80 in favour of the Plaintiff
  - d. Costs awarded to the Plaintiff Subject to Liability
18. The Appellant faults the Trial Court for not: -
  - a. considering the evidence on the record, applicable law and principles in awarding quantum of general damages
  - b. awarding him costs of repair/restitution of his motor vehicle and damages for loss of user/ inconvenience
19. On general damages the Court of Appeal in *Ken Odondi & 2 others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR held that:

“We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it



would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.”

20. The Court went on further to state that:-

“This principle was adopted with approval by this Court in *Butt v Khan* [1981] KLR 349 where it was held per Law, JA:“...

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...”

### **General Damages for Pain, Suffering and Loss of Amenities**

21. The Appellant submitted in the Trial Court that Kshs. 250,000 would be adequate to compensate him under this limb. He even relied on authorities that gave awards for amounts ranging from Kshs 120,000 to Kshs 200,000. The Court awarded what was proposed and considered authorities that had similar awards with comparable injuries to as well as inflation. I find that the Court did not base the award 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 award remains.

### **Kshs. 210,000 being net loss for damage of the said motor vehicle**

22. This in nature would be a material damage and as such a special damage claim. The general rule is that special damages have to be specifically pleaded and specifically proven.

23. *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177

“Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the trial court failed to award special damages that were pleaded and proved”

24. There was no dispute that there was an accident and as a result of the accident, the Appellant vehicle was damaged. As proof, the Appellant herein was required to show the extent of the damage on his motor vehicle and what it would have cost to restore the motor vehicle. Unfortunately, the vehicle was written off therefore the Appellant had to show the extent of the write off.

25. In *Permuga Auto Spares & Another v Margaret Korir Tagi* [2015] eKLR Mulwa J. held that:

“It is the courts view that once a vehicle has been written off the only compensation is the pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation, The claim for loss of user is disallowed. ”



26. The Trial Court held that the Appellant had not provided an assessor's report on the same and the claim could not be ascertained and therefore failed. The 2<sup>nd</sup> Respondent has submitted that the Appellant had not specifically pleaded costs of repair and the same were not proven by way of an assessor's report and hence the Trial Court was justified not to allow the prayer.
27. On perusal of the record, it is noted that at Paragraph 7 of the Plaintiff, the Appellant pleaded:-
- “That by an assessors report by AA of Kenya dated or about 16<sup>th</sup> December, 2019 it was deemed uneconomical to repair the said motor vehicle taking into consideration the extent of damage, costs of damages parts, repair charges and other related expenses which were assessed/placed at about Kshs 280,256 and hence it was recommended that the said damage be treated as total loss/write off with pre accident value of the said motor vehicle being placed at Kshs 350,000 and salvage to realize Kshs. 140,000 and hence the net loss being Kshs 210,000 and which sum the Plaintiff claims.”
28. The rationale under which the Appellant based his figure on was explained at paragraph 7 of the Plaintiff and the extent of the damage which resulted into a write off was proven by way of an assessment report dated 16<sup>th</sup> December, 2019 by Automobile Association of Kenya PExh-11. The assessment report was produced in evidence and not contested by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent did not file any contrary report and therefore the Appellant's report was unchallenged.
29. The Appellant was entitled to compensation for damages on his vehicle as a result of the accident. It appears that the Trial Court did not take note of assessment report placed on record and that the prayer was specifically pleaded. As such made an erroneous conclusion regarding this issue.

**General damages for loss of user and inconvenience arising from damage of the said motor vehicle.**

30. As to Loss of User and Inconvenience the Appellant pleaded at paragraph 8 of his Plaintiff that he was using the said motor vehicle for personal/private transport and hence was occasioned loss of user as a result of the damage to which he sought general damages. The trial Court also disallowed this prayer for the reason that an assessor's report had not been provided.
31. The claim for loss of user in the present case is that the accident resulted in the writing off of his vehicle which in turn occasioned him inconvenience as he was not able to use it after the accident for a while. Mwita J in *Jackson Mwabili v Peterson Mateli* [2020] eKLR held that:-
- “ ... Loss of user in the context of the respondent's case, was the damage he suffered following the inconvenience of not having his vehicle available for use after it has been involved in an accident thus rendering it unfit for use temporarily for a period. A claim for loss of user in this case, refers to compensation for what the respondent suffered as a result of not being able to use his damaged vehicle.”
32. The accident occurred with the Appellant in the driver's seat as per the police abstract PExh-4 and the Appellant produced in evidence as PExh-7 copy of logbook as proof of ownership. The ownership and vehicle being used for personal use has not been challenged. Even without receipts, the Appellant had established to the required standards of proof that he was using the said motor vehicle prior to the accident and he lost use of it after the accident.
33. For the Court to award damages for loss of user one has to demonstrate the inconvenience occasioned with proof, it was necessary for the Appellant to ventilate the loss specifically suffered and to what extent and for how long. Whether he had to hire taxi for his daily commute or use public means and



how much was his daily inconvenience as opposed to when he had the use of his vehicle. It would have also been ideal for the Appellant to propose a figure as to the level of inconvenience.

34. Nonetheless, despite not making a profit from the vehicle or proving with specificity the inconvenience or loss of user through receipts or daily records, the Appellant cannot be condemned yet the accident resulted in him suffering some sort of inconvenience. He was unable to use his vehicle for his personal use. In *Jackson Mwabili v Peterson Mateli* (supra) further observed that:

“Where he used the vehicle for personal convenience, it is the view of this court that his claim for loss of user could succeed in the absence of authority to the contrary. The vehicle was for use and the respondent did not use it due to damage caused by the appellant’s negligence liability of which he admitted. The question then was how much.”

35. I have considered the inconvenience and the loss of use of the Appellant’s vehicle. The same cannot be categorized as extreme or minor. Since there are no figures proposed, the Appellant left to the Court. In my view, a global sum of Kshs 90,000 would be reasonable and ideal in the circumstances.

36. The upshot of the foregoing is that the appeal succeeds and I make the following orders in favour of the Appellant:

- a. Kshs. 210,000 being net loss for damage
- b. Loss of user at Kshs. 90,000
- c. Interest on a) and b) herein subject to liability
- d. There shall be no orders as to costs for this Appeal.

- 37 It is so ordered

**SIGNED DATED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**MOHOCHI S.M.**

**JUDGE**

