Francis v Mash East Africa Limited (Civil Appeal E34 of 2020)
[2023] KEHC 2106 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E34 OF 2020

F WANGARI, J

MARCH 17, 2023

BETWEEN

CARLOS MUEMA FRANCIS ..... APPELLANT

AND

MASH EAST AFRICA LIMITED ..... RESPONDENT

(Being an Appeal on the Judgement and Decree of Mombasa Resident Magistrate Honourable E. Muchoki delivered on 16th November, 2020 in Mombasa Chief Magistrate Civil Case No. 4 of 2018)

JUDGMENT

1. This is an appeal against the judgement delivered by Honourable E Muchoki, Resident Magistrate on November 16, 2020. The Appellant (who was the Plaintiff in the Lower Court) being dissatisfied with the said judgement has preferred this appeal. The Appellant preferred one (1) ground of appeal in urging this court to set aside the judgement delivered on November 16, 2020 being that the Learned Trial Magistrate erred in law and in fact in holding that the Appellant had not proved his claim for loss of income due to loss of user of motor vehicle registration number KTWB 720P of Kshs 67,700/=.

2. Directions were taken and the appeal was disposed of by way of written submissions where both the Appellant and the Respondent duly complied and relied on various decisions in support of their rival positions.

3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano vs Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in

reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).

4. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, the ground of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise I will carefully revisit the record.

5. The Respondent vide a plaint dated December 19, 2018 and filed on January 7, 2019 sought for judgement against the Appellant for a sum of Kshs 152,320/= in the nature of special damages, general damages for pain, suffering and loss of amenities/= plus costs and interests. The suit was defended and the Trial Court have considered the pleadings, evidence tendered, submissions and the law rendered its judgement on November 16, 2020. The Appellant was awarded a total sum of Kshs 272,820/= as general and special damages. He was equally awarded costs and interests of the suit. The prayer for loss of user for a sum of Kshs 67,500/= was disallowed and the Appellant being dissatisfied with the Trial Court's failure to award the amount prayed for loss of user has preferred this appeal. From the memorandum of appeal, the Appellant seems to have been satisfied with all the other awards save for loss of user and thus the appeal is only on the issue of loss of user.

Appellant's Submissions

6. The Appellant submitted that all his evidence on loss of user of the motor vehicle remained uncontroverted hence was capable of proving the issue on a balance of probability. The case of *Mitchell Cotts (K) Ltd v Musa Freighters* [2011] eKLR was cited for the above proposition. The Appellant further submitted that in dealing with the claim for loss of user, the Learned Magistrate erred in principle in treating it as a special damage claim that required specific pleadings with particularity and strict proof other than a general damage. The Appellant contended that the Trial Magistrate's reliance on the case of *Linus Fredrick Msaky v Lazarus Thuran Richoro & Another* [2016] eKLR was not alive to the fact that the ratio decidendi in the said case was not good law has it had been rendered per – incurium.

7. The case of *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR was cited for the proposition that the loss of use of a profit making chattel such as a lorry or matatu through accident is similarly a claim in general damages and thus the standard of proof in such claims is on a balance of probabilities and the principle of restitutio in integrum is applied in such cases. The Appellant stated that his uncontroverted evidence was that his vehicle was operating as a tuktuk which the court can take judicial notice of use for business of transportation of goods and people.

8. There was oral evidence that it was involved in a road traffic accident and was damaged. It was off the road for forty-five (45) days losing an average of Kshs 1,500/= per day making a cumulative total of Kshs 67,500/=. In totality, he prayed that the order dismissing the claim for loss of income due to loss of user of motor vehicle registration number KTWB 720P be set aside and be replaced by an order allowing the claim of Kshs 67,500/= for loss of user with costs and interest.

Respondent's Submissions

9. For the Respondent, it reiterated its submissions before the Lower Court together with the authorities cited and prayed that the appeal be dismissed with costs. I have duly considered the Respondent's submissions before the Lower Court. The case of *Cecilia W Mwangi & Another v Ruth W Mwangi* [1997] eKLR was cited where the Court of Appeal held that the manner in which the Appellant had sought to prove loss of earnings was not correct. The court was also referred to the case of *Idi Ayub Omari Shabani v City Council of Nairobi* [1995] eKLR. Making reference to the assessment report

which had been produced as an exhibit, the Respondent had pointed out that even if the claim was to be awarded, the same would only be for six (6) days and not forty-five (45) days.

Analysis and Determination

10. After considering the pleadings, evidence, submissions and the law, I find that there are two (2) issues for determination: -

    a. Whether the appeal is merited;

    b. What is the order as to costs?

11. On the first issue, a resolution of whether a claim under the head of loss of user is in the rubric of general damages or special damages is key. The Appellant has referred to two cases from the Court of Appeal which I find it important to consider. I note that in *Mitchell Cotts (K) Ltd v Musa Freighters* (supra), the amount of Kshs 29,000/= which was awarded had been specifically pleaded and the Respondent had admitted the same. This is the reason the Superior Court awarded it and the Court of Appeal upheld the award. The Court of Appeal stated as follows: "...The court did its best and it cannot be faulted. In addition, the loss was specifically pleaded at paragraph 4 of the plaint. In view of the admission by the Respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved..." (Emphasis added) Clearly, my understanding of this case is that loss of user is a special damage claim and it has to be specifically pleaded with particularity and strictly proved.

12. In *Samuel Kariuki Nyangoti v Johaan Distelberger*, though no documentation was produced, the Court of Appeal was satisfied that the Appellant gave evidence of the routes he was operating, the number of trips per day, the vehicle's earnings per trip, expenses incurred including cost of fuel and the fees he was paying for the stage. I note from the said decision that the Court observed that 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. The court observed thus: "...The judgement does not disclose the state of pleadings but it seems from the judgement 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..."

13. I have looked at the plaint dated December 19, 2018. At paragraph 5 (g), I note that there was a specific prayer for loss of income for forty – five (45) days. To this end, I hold that the figure of Kshs 67,500/= was specifically pleaded. Was it strictly proved? In his evidence in chief, the Appellant had the following to say: "...I was using the tuktuk for business to carry passengers. I used to earn about 1,500/= at the minimum. I earn a high amount of Kshs 2,000/=. I incurred losses for loss of use..." On cross examination, he stated as follows: "...I have no documents to show my income..." On re-examination, he stated as follows: "...The tuktuk was for business. I do not have an account. It is jua kali. The lack of bank or account does not mean I was not earning an income..."

14. Comparing this case with the case of *Samuel Kariuki Nyangoti* (supra), for the Lower Court to award this figure, the Appellant was required to demonstrate the number of trips (if any), expenses incurred and any other outgoings so that the court would make an informed decision on the figures pleaded. In the present case, though it was pleaded, I am afraid that the same was not strictly proved to the required standards.

15. As I have found as above, the claim for loss of user is a special damage claim. I am fortified in this finding by the reasoning of the Court of Appeal in *David Bagine v Martin Bundi* [1997] eKLR (Gicheru, Shah & Pall, JJ A). The Court held 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..." Thus on the first issue, I have no reason to impeach the Lower Court's judgement on the ground of loss of user. Even if the Appellant had proved loss of user, he was only entitled to six (6) days as per the assessment report produced as exhibit 7. In *Samuel Kariuki Nyangoti* (supra), it was held that the Appellant was required to mitigate his losses.

16. On the issue of costs, it is trite that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The Respondent having been the successful party herein is entitled to costs and I so hold.

17. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

    a. The Appeal has no merit and it is hereby dismissed.

    b. Costs are awarded to the Respondent.

18 Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Ajigo Adv. for the Respondent

Guyo, Court Assistant