Kenya Commercial Insurance Corporation v Achoke (Civil Appeal E001 of 2021) [2023] KEHC 4026 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4026 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CIVIL APPEAL E001 OF 2021

AC MRIMA, J

MAY 5, 2023

BETWEEN

KENYA COMMERCIAL INSURANCE CORPORATION ..... APPELLANT

AND

FRED POWON ACHOKE ..... RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. S. K. Mutai (Senior Principal Magistrate) in Kapenguria Senior Principal Magistrate's Court Civil Case No. 20 of 2020 delivered on 23/03/2021)

JUDGMENT

Introduction and Background:

1. This judgment is on an appeal against a successful material damage claim. The Appellant herein, Kenya Commercial Insurance Corporation, was the Defendant in Kapenguria SPMCC No. 20 of 2020; Fred Powon Achoke vs. Kenya Commercial Insurance Corporation (hereinafter referred to as 'the suit') whereas the Respondent herein, Fred Powon Achoke, was the Plaintiff.

2. In his Plaint dated 20th July, 2020, the Respondent averred that on 23rd February, 2020, his motor vehicle registration number KCS 351F make Toyota Matatu (hereinafter referred to as 'the Matatu') was lawfully driven along the Makutano-Lodwar Road. During the course of its journey, the Matatu was violently, and as a result of the negligence of the Appellant and its driver in managing and driving the motor vehicle registration number KBG 526R (hereinafter referred to as 'the Lorry'), hit and that the Respondent suffered loss and material damage to the tune of Kshs. 750,840.00 further to loss of user at a daily rate of Kshs. 8,500/= for one year.

3. The suit was heard. The Respondent testified and called a police officer in support of his case. Documents were produced by consent. The Appellant closed its case without calling any witness to testify on its behalf.

4. In its judgment rendered on 23rd March, 2021, the trial Magistrate found the Appellant 100% liable for the accident. The Appellant was also condemned to pay special damages of Kshs. 3,852,500.00 plus costs and interest.

5. Subsequently, the Appellant lodged the appeal which is subject of this judgement.

The Appeal:

6. The Appellant, being dissatisfied with that trial Court's decision filed a Memorandum of Appeal dated 19th April, 2021 on 20th April, 2021. The Appellant has raised 9 grounds of appeal in disputing the findings and orders of the trial Court.

7. It was the Appellant's position, and so faulted the trial Court, for finding that the Respondent had proved his case on a balance of probabilities thereby apportioning liability at 100% in his favor against the Appellant. It also found error in the trial Court's award of Kshs. 642,640.00 for costs of repair, Kshs. 102,000.00 for breakdown costs and Kshs. 3,102,500.00 for loss of user without proof.

8. The Appellant observed that since loss of user was never pleaded, it ought not to have been awarded. Seeing bias in its findings, it prayed that the Appeal be allowed by setting aside the trial Court's judgment and substituting with an order dismissing the suit in its entirety.

9. Alternatively, the Appellant urged this Court to assess damages afresh. He also prayed for costs of the appeal and those at trial.

10. On directions of this Court, the appeal was to be disposed of by way of written submissions. The Appellant filed its submissions dated 30th May, 2022 whereas the Respondent's submissions were dated 22nd November, 2022.

The Appellant's submissions:

11. The Appellant argued that since no sketch maps and findings of the Occurrence Book were furnished before the trial Court, no eye witnesses testified as to the occurrence of the accident and no one was blamed for the accident, liability could not be determined. The trial court was faulted for finding the Appellant liable purely on account of the fact that the Respondent's evidence was uncontroverted.

12. On quantum of damages, the Appellant submitted that even if liability was found in favor of the Respondent, the Appellant failed to prove the same on a balance of probabilities. For instance, the Respondent did not particularize the costs of the repairs as pleaded in the sum of Kshs. 642,640.00. It was erroneous, in its view, for the Respondent to rely on the Accident Assessment Report assessing the cost of repairs as pleaded.

13. On proof of breakdown costs to the tune of Kshs. 102,000.00, the Appellant lamented that the receipts in support were in breach of Section 19 of the *Stamp Duty Act*. As such, the claim was unsupported. On loss of user to the tune of Kshs. 3,102,500.00, the Appellant submitted that the Respondent failed to furnish conclusive proof in support. Computing the days taken to repair the suit vehicle, the Appellant submitted that the suit vehicle was only out of business for 10 and not 365 days. On assessment fee and inspection charges, it submitted that those were also not proved in evidence.

14. For the above reasons, the Appellant prayed that the appeal be allowed as prayed.

The Respondent's submissions:

15. The Respondent supported the trial Court's findings. He submitted that he had proved his case on a balance of probabilities since his evidence was undisputed.

16. On quantum of damages, the Respondent argued that costs of repairs in the sum of Kshs. 642,640.00 was sufficiently proved by the assessment report. On breakdown charges, the Respondent relied on the waybill and receipt of Kshs. 72,000.00 and Kshs. 30,000.00 respectively to prove the sum of Kshs. 102,000.00 had been expended.

17. On loss of user, the Respondent justified the trial Court's findings as one following current jurisprudential pronouncements. The award of Kshs. 3,102,500.00 was thus justifiable.

18. Ultimately, the Respondent prayed that the appeal be dismissed with costs.

Analysis:

19. This Court has duly considered the entire record and the parties' submissions as well as the decisions referred to.

20. The High Court, as the first appellate Court, is enjoined 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).

21. This Court, nevertheless, appreciates the settled principle 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 v Kenya Bus Service Ltd. [1982-88] 1 KAR 278 and Kiruga –versus- Kiruga & Another [1988] KLR 348).

22. Bearing the above in mind, this Court finds that there are mainly two issues for determination. They are on the aspect of liability and quantum of damages.

23. This Court will now deal with the issues in seriatim, and as under.

Liability:

24. From the record, it is not in dispute that on 23rd February, 2020, an accident occurred along Makutano-Lodwar road at Karas area between the Matatu and the Lorry.

25. In establishing liability, the Respondent called 2 witnesses. They were the Respondent and the Police Officer (as PW2 whose evidence was adopted from Kapenguria SPM Civil Case No. 12 of 2020). I have called for and perused the said Kapenguria SPM Civil Case No. 12 of 2020.

26. The accident was reported at Kapenguria Police station where investigations were undertaken. The Respondent was issued with a Police Abstract.

27. On conclusion of the investigations, PW2 found the driver of the Lorry on the wrong having failed to keep within its lane thereby moving unto the path of travel of the Matatu and causing the accident. None of the Defendants in theKapenguria SPM Civil Case No. 12 of 2020 adduced any evidence on liability or quantum. The trial Court, in its judgement rendered on 3rd December, 2020, found the Defendant wholly culpable for causing the accident.

28. This Court has, as well, considered the evidence in this matter alongside that of PW2 in Kapenguria SPM Civil Case No. 12 of 2020 and has come to the like finding as the Learned trial Magistrate that the Appellant be held fully vicariously liable for the accident.

29. The appeal against liability is, therefore, unsuccessful.

Quantum:

30. The Respondent in his Plaint prayed for special damages of Kshs. 750,840/= together with interest at Court rates and the costs of the suit. He also prayed for Loss of user at the rate of Kshs. 8,500/= for 365 days.

31. Perhaps it is important to restate the longstanding legal principle that special damages must only be pleaded, but strictly proved. However, the degree of particularity depends on the circumstances of a case. The reason is that such are sums already incurred in which the Claimant seeks for a refund. They are pegged on amount already spent and not on expected or estimated amounts.

32. At one time, the above was emphasized by the Learned Judges of the Court of Appeal (Kneller, Nyarangi JJA, and Chesoni Ag. J.A.) in Hahn vs. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where my Lordships rendered themselves as follows:

Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

33. The Court of Appeal, differently constituted, in David Bagine vs. Martin Bundi (283 of 1996) [1997] eKLR, referring to the judgment by Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177) held thus: -

> It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the Court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.

34. This Court will now re-evaluate the assessment of damages as particularized in the Plaint.

Cost of repair:

35. The Respondent sought a sum of Kshs. 642,640/- as costs expended in repairing the Matatu. In cross-examination, and also in re-examination, the Respondent, however, revealed that he was yet to carry out any repairs on the Matatu as he did not have the funds to undertake such an exercise. That explained why the Respondent did not have any receipts for the repair costs.

36. The Respondent stated that the claimed sum of Kshs. 642,640/- was based on estimates of the repairs formulated by Messrs. Regent Automobile Valuers & Assessors Ltd, and as captured in their Report which was produced in evidence.

37. Without much ado, the sum of Kshs. 642,640/- was not proved. Further, the Respondent failed to prove having expended any amount of money on the repairs of the Matatu or at all.

38. As a result, the entire sum of Kshs. 642,640/- is declined.

Breakdown costs:

39. The Respondent sought breakdown costs assessed at Kshs. 102,000/=. In support thereof, the Respondent relied on Exhibits 1 and 2.

40. Exhibit 1 is a receipt for breakdown services from Karas (the scene of accident) to Kapenguria Police station. It is for Kshs. 30,000/-. Exhibit 2 is a Waybill receipt for towing services on the Matatu from Kapenguria to Thika. It is for Kshs. 72,000/=. The two receipts make a total of Kshs. 102,000/=.

41. On the contention that the receipts lack stamp duty stamps thereon and the lack of ETR receipts and as such are receipts were not admissible in evidence, this Court finds that, in the unique circumstances of this case, the receipts are acceptable in evidence for three reasons. First, the duty to pay for any taxes in the context of this matter is on the service provider and not the Client (the Respondent). Exhibit 2 shows that the service provider was paid an all-inclusive sum of Kshs, 72,000/= being the amount claimed under that receipt. Exhibit 1 also confirms provision of the service after payment of the sum of Kshs. 30,000/= all inclusive.

42. Therefore, compelling the Respondent to ensure that the receipts had stamp duty adhesive stamps thereon or to produce ETR receipts, and not the service providers, amounts to unconstitutionally and unlawfully so, shifting of the burden to prove payment of any taxes from the service provider to the Client. It also means that a single service will be open to double taxation since the tax collector has ways in place to still collect the due tax from the service provider, the lack of the adhesive stamp in the receipt or the ETR Receipt notwithstanding. It is, hence, for the tax collector to put in measures to ensure that the service providers do issue receipts affixed with the adhesive stamps as well as ETR receipts.

43. Second, even if the service provider failed to pay for the duty stamps, still Section 20 of the *Stamp Duty Act* provides for late payment with penalties.

44. Third, the service providers are required in law to file their respective tax returns on their businesses based on their incomes. Exhibits 1 and 2 shows some of the income. Therefore, the service providers are required to disclose and ensure payment of taxes for such services provided is made. The upshot is, hence, that the Government is not likely to lose any tax income in this case unless for other reasons.

45. It is for these reasons that this Court finds that Exhibits 1 and 2 are admissible in evidence.

46. With such a finding, then the pleaded breakdown costs are proved and are payable.

Assessment fee:

47. An assessment fee of Kshs. 5,000/= was pleaded. The amount was likely expended in preparing the Report by Messrs. Regent Automobile Valuers & Assessors Ltd.

48. The report did not contain any evidence on its cost of preparation. Further, there was no evidence of payment of any sums of money for the preparation of the report.

49. Being a special damage claim, which was pleaded, but not proved, then it fails the test of recovery. The sum of Kshs. 5,000/= is not due and payable and the claim on it is dismissed.

Loss of user:

50. The Respondent computed loss of user at the rate Kshs. 8,500/= for 365 days. The trial Court allowed the entire claim at Kshs. 3,102,500/=.

51. In a bid to establish that he suffered loss of user as computed, the Respondent claimed loss of user for 365 days which is equivalent to one year. He estimated his gross daily income to be in the sum of Kshs. 13,000/=. From this figure, he applied a base income of Kshs. 8,500/= as the multiplicand. The Respondent relied on a weekly income record prepared for his business to support the claim.

52. Before this Court renders itself on this issue, its legal mind has been brought to the attention of several pronouncements by the Court of Appeal on the matter. One of them isDavid Bagine v Martin Bundi case (supra) where the Court expressed itself thus: -

> 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.

53. Further, in Ryce Motors Limited & Another vs. Elias Muroki (1996) eKLR the Court of Appeal guided on how claims on loss of user ought to be handled.

54. 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 Shs. 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."

55. The other one is in Samwel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR where the Court in a claim on loss of user on a Matatu which had been involved in an accident stated as follows: -

> (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)

56. The Court of Appeal also cited with approval the decision by 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 as follows: -

> 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.

57. And, in Team for Kenya National Sports Complex & 2 others v. Chabari M'Ingaruni (Civil Appeal No. 293 of 1998), a claim for loss of use of a vehicle, a matatu, which had apparently been written off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts had been produced upon the Court being satisfied that the vehicle was used as a means of earning income for the Deceased Plaintiff.

58. There is also Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal No. 23 of 1991), where 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, among others.

59. From the above decisions, it is apparent that the manner in which Courts are to deal with the issue of the loss of user is not settled. The legal position in the Court of Appeal is divided. One school of thought regards the loss of user as a general damage claim proved on a balance of probabilities whereas another school of thought regard the same as a special damage claim and to be specifically proved.

60. With such a state of affairs, this Court will adopt the less demanding standard on the Claimant, which is to regard the loss of user claim as a general damage claim. The Court will, however, use the Respondent's records in this endeavor.

61. The records tendered by the Respondent were in respect of the Matatu only. They are headed as much. They also disclosed the weeks, months and years in issue. Further, they included incomes, expenses and net weekly incomes.

62. The records were produced in evidence without any objection from the Appellant. However, the records did not indicate any expenses on the cost of fuel as well as any wages on the driver and conductor. There was also no explanation on the lack of it.

63. It can only be the case that the Matatu was propelled by fuel and was always in the control of the driver and a conductor who drew wages. Those expenses were daily running costs. It was, hence, imperative on the part of the Respondent to include such expenses in his records or to, alternatively, give an account for the lack thereof in Court. The Respondent did neither.

64. There is a further issue with the records. This Court notes that the records run from 4th November, 2019 to 22nd February, 2020. It appears that there was no single day the Matatu was off the road for the period for 4 months covered by the records. One, therefore, wonders whether the Matatu ever used to be serviced or at all. There is no explanation on it either.

65. The Respondent having failed to capture at least the issues of fuel costs, wages and days the Matatu was reasonably expected to be off the road in the records or to render appropriate explanations thereto, rendered the records as a highly doubtful reflection of the average income from the Matatu before the accident in this case.

66. However, given the approach which this Court has settled for, by treating the loss of user as a claim on general damages, the alleged daily income of Kshs. 8,500/= can only be exaggerated. The Court adopts a modest figure of Kshs. 4,000/= as the daily net income.

67. There is also on record evidence that the repair works in Thika were to take a period of 10 days. The accident occurred on 23rd February, 2020 and the Matatu was towed to Thika on 1st March, 2020. The assessment by Messrs. Regent Automobile Valuers and Assessors was on 20th March, 2020. Since it is fairly reasonable that the repairs on the Matatu would have been undertaken after the assessment, then for purposes of this case, the period of loss of user shall be from the date of accident to 10 days after the assessment date, that is 30th March, 2020. That is a period of 37 days.

68. Having adopted the figure of Kshs. 4,000/= as the daily net income, then the loss of user for the 37 days would be Kshs. 148,000/=.

69. This Court, therefore, finds that the sum of Kshs. 148,000/= is payable on the limb of loss of user.

70. With the above, the appeal on quantum is allowed.

Disposition

71. As this Court comes to the end of this judgment, it hereby apologizes for the late delivery of this decision. The delay has been caused by heavy workload precipitated by the fact that the undersigned is handling matters from the Constitutional and Human Rights Division in Nairobi and is the sole Judge at the High Court of Kenya at Kitale. The Judge only visits this Court station for one week in a month.

72. Having said so and drawing from the foregoing, this Court hereby makes the following final orders in this appeal: -

    a. The appeal in this matter is partly successful. The appeal on liability is dismissed whereas the appeal on quantum is allowed.

    b. The Respondent shall be entitled to the following sums: -

        i. Breakdown costs- Kshs. 102,000/=

        ii. Loss of user - Kshs. 148,000/=

    c. Judgment is hereby entered for the Respondent against the Appellant in the sum of Kshs. 250,000/=

    d. The sum of Kshs. 102,000/= shall attract interest at Court rate from the judgment date in the lower Court case whereas the sum of Kshs. 148,000/= shall attract interest at Court rate from the date of this judgment.

    e. The Respondent shall be entitled to the entire costs in the lower Court case whereas each party shall bear its own costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 5TH DAY OF MAY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

No appearance for Learned Counsel for the Appellant.

No appearance for Learned Counsel for the Respondent.

Juma – Court Assistant.