Wiseways Limited v Muchai (Civil Appeal 12 of 2020)
[2023] KEHC 17247 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 12 OF 2020

AC MRIMA, J

MAY 11, 2023

BETWEEN

WISEWAYS LIMITED ..... APPELLANT

AND

JAMES MUCHAI ..... RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. Nyang'ara Ososro (Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 757 of 2010 delivered on 14/04/2020)

JUDGMENT

Introduction and Background:

1. The appeal herein arises from the judgment Kitale CMCC No. 757 of 2010; Wiseways Limited vs. James Muchai (hereinafter referred to as 'the suit'). The suit was instituted by the Appellant herein as against the Respondent.

2. The suit was a material damage claim involving two motor vehicles each owned by the parties. The aspect of liability was agreed at 50% on each of the parties.

3. The issue of quantum was heard by the trial Court and judgment rendered on 14th April, 2020. The suit was dismissed thereby prompting the appeal subject of this judgment.

The Appeal:

4. The Appellant, being dissatisfied with that trial Court's decision filed a Memorandum of Appeal dated 12th May, 2020 on 13th May, 2020. The Appellant raised only one ground of appeal in disputing the findings and orders of the trial Court. The ground was that the trial Court erred in dismissing then suit against the weight of the evidence.

5. On the directions of this Court, the appeal was to be heard by way of written submissions. The Appellant filed its submissions, but the Respondent seemed not to have filed any such submissions.

6. In its submissions, the Appellant argued that the Court erred in disallowing the claim since there was evidence to the contrary. It referred to several decisions and urged this Court to allow the appeal.

Analysis:

7. This Court has duly considered the entire record and the Appellant's submissions as well as the decisions referred to.

8. 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).

9. 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 – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348).

10. Bearing the above in mind, this Court finds that there is only one issue for determination. The issue is whether the trial Court correctly handled the aspect of quantum of damages.

11. The Appellant in its Amended Plaint prayed for inter alia special damages of Kshs. 490,420/= together with the sum of Kshs. 150,000/= on loss of user. It is those sums that were declined.

12. 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.

13. 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.

14. 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.

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

Cost of repair:

16. The Appellant sought a sum of Kshs. 469,220/- as costs expended in repairing its motor vehicle registration number KBC 154G make Toyota Matatu (hereinafter referred to as 'the Matatu').

17. Two witnesses testified on the aspect. They were PW1 (Benedetta Naliaka) and PW3 (George Mathu) a Motor Vehicles Loss Assessor based in Eldoret.

18. PW1 testified that the Matatu was repaired at a total of Kshs. 469,420/= and resumed operations. She did not, however, tender any evidence to support having incurred the said cost. PW3 confirmed that he assessed the Matatu and came up with a report which he produced un evidence. According to the report, the cost of the damaged parts was assessed at Kshs. 469,420/=, but the actual prices would go up or down by around 10%.

19. It is, therefore, the position that despite pleading the sums allegedly expended on the repair works, such were not proved in evidence.

20. Without much ado, since no evidence was tendered to prove that the sum of Kshs. 469,420/= was expended on repairing the Matatu, the claim fails.

21. As a result, the entire sum of Kshs. 469,420/= is declined.

Towing charges:

22. The Appellant sought for towing costs assessed at Kshs. 10,000/=. Again, no evidence of this expense was produced.

23. With such a finding, then the pleaded towing costs were not proved and, hence, not recoverable.

Assessment fee:

24. An assessment fee of Kshs. 10,000/= was pleaded. The amount was likely expended in preparing the Report by Messrs. Kaka Automobile Works and Assessors. The report was dated 13th November, 2010 and was produced in evidence. A receipt for Kshs. 10,000/= as the cost of the preparing the report was also produced in evidence.

25. Being a special damage claim, which was pleaded and proved, then the sum of Kshs. 10,000/= was due and recoverable.

Loss of user:

26. The Appellant computed loss of user at the rate Kshs. 5000/= for 30 days thereby claiming the sum of Kshs. 150,000/=.

27. In a bid to establish that it suffered loss of user as computed, the Appellant estimated a daily income in the sum of Kshs. 5,000/=. PW1 testified that the Matatu was repaired and resumed operations. No evidence on the income was produced.

28. 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 vs. 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.

29. 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.

30. 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."

31. 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)

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. A s stated above, there was no evidence on the income from the Matatu. However, the Appellant proposed a daily income of Kshs. 5,000/=. There is also on record evidence that the repair works were to take a period of 30 days. Whereas PW1 testified that the Matatu had been fully repaired and resumed operations, she did not indicate how long the actual repairs took.

38. PW1 did not indicate the route the Matatu used to ply. Such evidence would have given a direction on the estimated daily income. Given that lacuna coupled with the failure to disclose the actual earnings, this Court finds the proposed daily income of Kshs. 5,000/= to be on the higher side. The Court instead settles for the daily sum of Kshs. 3,000/=.

39. Turning to the period the repairs were to take, there is evidence that the works were to take 30 days. As said, the actual days taken for the repairs were not given. Be that as it may, the Court settles for the said period.

40. Having adopted the figure of Kshs. 3,000/= as the daily net income, then the loss of user for the 30 days would be Kshs. 90,000/=.

41. This Court, therefore, finds that the sum of Kshs. 90,000/= is payable on the limb of loss of user.

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

Disposition:

43. 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.

44. 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.

    b. The Appellant shall be entitled to the following sums:

        i. Assessment costs - Kshs. 10,000/=

        ii. Loss of user - Kshs. 90,000/=

    c. Judgment is hereby entered for the Appellant against the Respondent in the sum of Kshs. 100,000/=. The sums are, however, subject to the agreed contribution.

    d. The sums shall attract interest at Court rate from the judgment date in the lower Court.

    e. The Appellant shall be entitled to the entire costs in the lower Court case as well as on appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF MAY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Mulama, Learned Counsel for the Appellant.

Mr. Omaya, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.