



REPUBLIC OF KENYA



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**Kinuthia v Metrotrans East Africa Ltd (Civil Appeal 190 of 2019)
[2023] KEHC 27428 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 190 OF 2019
DO CHEPKWONY, J
SEPTEMBER 21, 2023**

BETWEEN

SAMUEL KAMAU KINUTHIA APPELLANT

AND

METROTRANS EAST AFRICA LTD DEFENDANT

(Being an Appeal against the whole judgment and Decree of Hon. T. B. Nyangena (SPM) delivered in Kiambu Chief Magistrate Court Case No. 327 of 2017 on 6th November 2019)

JUDGMENT

1. This Appeal stems from the Judgment of the trial court which awarded the Appellant Kshs 15,550/= in Kiambu Chief Magistrate's Civil Case No.327 of 2017 as special damages on 6th November, 2019.
2. By way of Background, the Appellant brought the suit against the Respondent by way of a Plaint dated 5th July, 2017 following a road traffic accident that occurred on 19th March, /2017 along Thika-Nairobi Super Highway seeking for general damages, special damages plus costs and interest.
3. It was the Appellant's case that he was driving his Motor Vehicle Registration Number KBU 386D when the Respondent's driver, servant and or agent reversed Motor Vehicle Registration Number KBU 262P at a forbidden spot thereby crashing onto the Appellant's vehicle on the front right hand that the said vehicle suffered material damage.
4. The Appellant stated that he suffered loss and damages as a result of the accident and sought material damage and repairs of Kshs 120,000/= and loss of user of the motor vehicle for a period of 6 days at Kshs 18,000/=. The Appellant sought also for Kshs 1,000/= for motor vehicle search and assessment fees of Kshs 5,000/= together with general damages, costs and interest of the suit.
5. On 3rd June, 2019, Judgment was entered against the 1st Defendant in default by appearance and on 11th September, 2019, the Appellant's case proceeded by way of formal proof hearing and in the judgement,



the trial court held that the Appellant had proved having incurred Kshs. 550 and Kshs 5,000 for motor vehicle search and assessment fees by way of receipts respectively. On the issue of repairs, the trial court held that the Appellant did not provide sufficient proof other than the assessment report which did not show the actual expenses incurred. On loss of user, the trial court awarded Kshs 2,000 for 6 days bringing the total cost to be Kshs 12,000/= and held that the Appellant did not prove the claim as he did not disclose the nature of the work and the period it took to have the motor vehicle repaired.

6. Being aggrieved, the Appellant has filed the present appeal and raised four (4) grounds of Appeal in the Memorandum of Appeal dated 3rd December, 2019 that: -
 - a. That the learned Magistrate erred in law and fact in awarding the Plaintiff the sum of Kshs.17,550/= as special damages as the said award is manifestly inadequate in the circumstances considering the damages sustained.
 - b. That the learned Magistrate erred in law and fact by not awarding special damages as evidenced by the requisite documents and proved.
 - c. That the learned Magistrate erred in law and fact in failing to consider the evidence on record.
 - d. That the learned Magistrate erred in law and fact in failing to award general damages despite the weight of evidence adduced.
7. The appeal was admitted for hearing on 8th July, 2020 and on 5th May, 2022, parties were directed to canvass the appeal by way of written submissions which the appellant filed on 2nd December, 2022 but the Respondent had not filed theirs at the time of writing this Judgment.

Analysis and Determination

8. This being a first appeal, this court is reminded of its duty to re-evaluate and reanalyse the evidence on record as was held by the court in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, wherein it was stated:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
9. Having read through and analysed the original record, it is evident that the matter was undefended, the court found liability to be 100 % as per the police abstract. And from the grounds of appeal, the question for determination is whether special damages awarded were inordinately and manifestly low in view of the documents adduced.
10. It is trite law that special damages must be pleaded and proven and this was the position held by the Court of Appeal in the case of *n V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, that:

“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.”



11. In the case of *Mbogo & Another v Shah* [1968] EA 93, where the Court, (Sir Newbold, P.) stated at page 96:

“A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

12. In this particular case, the Plaintiff's list of documents was produced during trial. There were two sets of lists of documents being the one dated 5th July, 2017 and the supplementary list of documents dated 10th September, 2019 which was filed a day before the formal proof hearing. According to the trial Magistrate in her Judgment, the Plaintiff majorly relied on the assessment report which she found was insufficient proof of repairs having been carried out. She then declined to award the same and only found that the motor vehicle search and assessment fee which had also been pleaded had been proved at Kshs. 100/= and Kshs.5000/= respectively. Having read through the records, it has been established that the Plaintiff produced receipts for Kshs.92,800/= and Kshs.27,000/= respectively as costs for the repairs dated 24th March, 2017 and 12th April, 2017 for Watuku auto Spares, vide the Plaintiff's supplementary list of documents dated 10th September, 2017. The same were not controverted. This court believes that there might have been factored in the first Judgment.

13. In this case, the Appellant pleaded loss of use at Kshs.18,000/= for six (6) days. In her Judgment, the trial Magistrate found that the Appellant had over proved loss of user as he failed to disclose the nature of his work/business and in the period it took to have the vehicle repaired. She however, went on to find that since liability had been proved as per the police abstract, the Applicant was granted the benefit of doubt and awarded loss of user at Kshs.200/= per day for six (6) days.

14. It is trite that a claim on loss of user is a special damage that must be pleaded and proved.

15. It is also trite that an appellate court can only interfere with a decision if a trial court if it is established that the same was based on a wrong principle. This was the finding in the case of *Ndugu Transport Company Limited & Another v Daniel Mwangi Waitihaka Leteipa* [2018] eKLR where the court held that:

“a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, “do the best it can” and make an award on a claim that was neither pleaded nor proved-see *David Bagaine v Martin Bundi* [1997] eKLR.

16. In view of the finding in the above cited case, for the trial court to have awarded the Appellant Kshs.2000/= per day for six (6) days based on an assumption and without any form of proof of such loss of user this court finds it clearly an error in principle and proceeds to set the award aside.

17. In the end, the Appeal is hereby allowed and the Judgment of the trial court set aside and substituted in the following terms:

- a. Motor Vehicle Search Kshs 1,000/=
- b. Cost of repairs Kshs 119,800/=



- c. Assessment fees Kshs 5,000/=
- d. Loss of user nil
Total Kshs 125,800/=
- e. The Appellant is awarded costs for both the trial court and the Appeal.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

MR. Tumu holding brief for Mr. Njuguna

Court Assistant - Martin

