Gowi v UAP Holdings Limited (Civil Appeal 7 of 2023)
[2024] KEHC 13839 (KLR) (Civ) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13839 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 7 OF 2023

JM OMIDO, J

NOVEMBER 8, 2024

BETWEEN

SHEM PETER GOWI ..... APPELLANT

AND

UAP HOLDINGS LIMITED ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. I.K. Rono, Resident Magistrate delivered on 21st July, 2023 in Nairobi CMCC No. E4145 of 2020)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. I.K. Rono, Resident Magistrate delivered on 21st July, 2023 in Nairobi CMCC No. E4145 of 2020, which was a material damage claim.

2. The appeal, preferred by Shem Peter Gowi hereinafter referred to as "the Appellant") against UAP Holdings Limited (hereinafter referred to as "the Respondent") is on both liability and quantum.

3. In the matter before the lower court, the Appellant was the Plaintiff while the Respondent was the Defendant. The Appellant pleaded that his motor vehicle registration number KBJ 424Q Mercedes Benz was involved in two accidents for which he held the Respondent liable. In its judgement, the trial court apportioned liability at 30% against the Appellant and 70% against the Respondent in respect of the first accident. The court absolved the Respondent of liability in respect of the second accident.

4. The court went ahead and assessed and awarded the Appellant special damages of Ksh.437,099.50/-, which when subjected to the Appellant's 30% contribution resulted in a net amount of Ksh.305,969.65/-.

5. The trial court also awarded interest on the above amount at court rates from the date of filing suit. Costs of the suit and interest thereon at court rates were also awarded to the Applicant.

6. Being aggrieved with the judgement of the lower court, the Appellant presented the following grounds of appeal vide a Memorandum of Appeal dated 18th August, 2023:

    1. That the learned Magistrate erred in law and fact in apportioning liability on the part of the Appellant without any basis and/or evidence of any contributory negligence by the Appellant.

    2. That the learned Magistrate erred in law and fact in failing to make a finding that the Respondent had not discharged its evidential burden to demonstrate any negligence on the part of the Appellant to warrant the finding of contributory negligence on the Appellant's part.

    3. That the learned Magistrate erred in law and fact in failing to make a finding that the Respondent was liable for the second accident whereas the Appellant's evidence was overwhelming and uncontroverted.

    4. That the learned Magistrate erred in law and fact in awarding an amount in damages that was inordinately low in the circumstances and not commensurate to the actual loss sustained by the Appellant.

    5. That the learned Magistrate erred in law and fact in refusing to award damages for loss of user which were sufficiently pleaded and evidence and proof thereof tendered in court by the Appellant.

    6. That the learned Magistrate erred in law and fact in not taking judicial notice that the Appellant suffered a great personal inconvenience for the period of time he did not use the suit motor vehicle due to the damage caused by the Respondent's negligence.

    7. That the learned Magistrate erred in law and fact in failing to award a sum of Ksh.770,000/- despite the said amount having been specifically pleaded and strictly proved as is required by law.

    8. That the learned Magistrate erred by making findings of fact that were not supported by any evidence at the trial.

    9. That the learned Magistrate erred in making a finding that the Appellant had been asked to and refused to exit his vehicle for a security check despite there being no direct evidence tendered in court to that effect.

    10. That the learned Magistrate misdirected himself on the evidence and the applicable law in making the determination for liability and quantum of damages.

    11. That the learned Magistrate erred in not considering the submissions made and authorities cited by the Appellant's Counsel.

7. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

8. In Selle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

9. Going to the trial court's record, the Appellant (the Plaintiff in the lower court), presented the suit vide a plaint dated 3rd August, 2020, seeking judgement against the Respondent (the Defendant in the lower court) for the following:Special damages of Ksh.437,099.50/-, being cost of repairs to his motor vehicle registration number KBJ 424Q Mercedes Benz, following an accident that is said to have occurred on 8th April, 2020 when the Respondent's agents and/or servants allegedly negligently released bollards at a security check at the Respondent's premises, as consequence of which the same damaged the Appellant's vehicle.Special damages of Ksh.770,000/-, being the difference between the amount of Ksh.1,500,000/- which the Appellant had expended in purchasing the vehicle and the amount of Ksh.730,000/- which the Appellant's insurers paid the Appellant after the vehicle was involved in another accident on 14th April, 2020 when the Appellant drove it to DT Dobie & Company (K) Limited for repairs on the understanding that the Respondent had allegedly agreed to pay to the said repairers a down payment of 50% of the total assessed repair cost of Ksh.437,099.50/- but was informed that the Respondent had not paid the deposit.The Appellant explained in the plaint that he was turned away by DT Dobie as the deposit had not been made and as he was driving the vehicle away, the already damaged suspension totally collapsed and he lost control, resulting in more damage to the vehicle that rendered it uneconomical to repair.Damages for loss of user at the rate of Ksh.5,000/- per day until the date of judgement or such other date as the court may determine.General damages for inconvenience and loss of business.Costs of the suit and interest thereon.

10. In its statement of defence dated 29th October, 2020 and filed in court on 3rd November, 2020, the Respondent wholly resisted the Appellant's claim and sought that the suit be dismissed with costs.

11. The Appellant testified as PW1 and adopted the contents of his statement dated 26th June, 2021 as his evidence in chief.

12. In his statement, the Appellant stated that on 8th April, 2020, he visited the Respondent's premises while driving his motor vehicle registration number KBJ 424Q Mercedes Benz and after security checks had been conducted at the entrance, he was allowed into the building. As he was driving in, the security guards released the bollards prematurely and the same damaged the Appellant's car.

13. That the Respondent's agents advised the Appellant to make a formal complaint, which he subsequently did. The Respondent's agents then asked the Appellant to take the vehicle to DT Dobie for assessment. The repair cost was assessed at Ksh.437,099.50/- and the assessment fee was paid by the Respondent's agent. The Respondent informed the Appellant that they would pay a deposit of 50% of the assessed repair cost but asked for time to arrange the payment.

14. The Appellant stated further in his statement that on 14th April, 2020, he decided to drive the vehicle to DT Dobie to find out if the deposit of the repair cost had been paid. On learning that the same had not been paid, he had to drive the car away. Unfortunately, while he was driving home, the already damaged suspension of the vehicle completely collapsed causing him to lose control as a result of which the vehicle was involved in another accident and further damaged. The Appellant blamed the Respondent for the damage stating that had the deposit been made, he would not have driven the vehicle out of DT Dobie.

15. The Appellant stated that the second accident rendered the vehicle unroadworthy and uneconomical to repair. His insurers assessed the damage and paid him Ksh.730,000/- which was way below the

purchase price of the vehicle, which he stated was Ksh.1,500,000/-. The Appellant stated that as a consequence, he lost the difference between the purchase price and the amount recovered from his insurers and attributed the loss to the Respondent.

16. The Appellant stated that before the accidents, he used the vehicle as a means of transport for his family and thus claimed for loss of user at the rate of Ksh.5,000/- per day.

17. The Appellant produced the following documents in support of his case:Sale agreement dated 11th October, 2019.Images of the damage to motor vehicle KBJ 424Q.Estimate cost of parts for repair by DT Dobie & Company (K) Limited.Correspondences.CCTV video footage dated 8th April, 2020.Police abstract dated 16th April, 2020.Motor claim form dated 15th April, 2020.Letter dated 8th May, 2020.Receipt dated 6th May, 2020.Receipt dated 8th June, 2020.Receipt dated 5th July, 2020.Invoice for medical treatment dated 21st April, 2020.

18. The first defence witness (DW1) was Musembi Maluki, a security guard who worked at the Respondents premises, UAP Old Mutual Building. The witness adopted the contents of his witness statement dated 24th June, 2021 as his evidence in chief.

19. In his statement, DW1 stated that on 8th April, 2020, the Appellant drove his motor vehicle to the Respondent's premises whereat he was stopped at the entrance for security checks. That the Appellant was requested to alight from the vehicle but declined. As there were other motorists being cleared at the entrance, DW1 and other guards were forced to allow in the cooperating drivers through the exit.

20. DW1 stated further in the statement that after the security checks were completed at the exit, the officer who was operating the bollards reflexively lowered the entrance lane bollards instead of the exit lane bollards. Upon realizing that he had lowered the wrong bollards, he quickly lowered the exit bollards as well to allow the drivers who had been cleared to enter the premises to drive in.

21. Suddenly, without clearance, the Appellant recklessly drove into the premises while the security officers were closing the bollards and barrier to the entrance gate as a result of which the Appellant's vehicle came into contact with the bollards that were being raised resulting in the vehicle being damaged.

22. The witness blamed the Appellant for the accident and stated that the accident was caused when the Appellant attempted to gain ingress into the premises without clearance.

23. The Respondent's witness produced the following document in support of his case:CCTV footage for 8th April, 2020.

24. The other witness that the Respondent was called was Zachary Nyamweya Mogaka, who produced the certificate of electronic evidence and CCTV footage of the scene – the entrance to the Respondent's premises.

25. There is no dispute that the two accidents occurred on the dates that the Appellant stated. From the evidence on record, the Appellant blamed the Respondent for causing the first accident. He stated that the second accident occurred when he was driving the vehicle from DT Dobie to his home and blamed the Respondent stating that the accident would not have occurred had the Respondent paid the 50% repair costs to DT Dobie.

26. I have perused the Memorandum of Appeal, the Record of Appeal, the submissions by the parties and the record of the lower court. I deduce the following to be the issues for determination:

    i. Whether the learned trial Magistrate erred in finding that the Appellant was partially to blame for the first accident, hence apportioning liability against the Appellant at 30%.

ii. Whether the learned trial Magistrate fell into error in holding that the Respondent was not in any way liable for the second accident.

iii. Whether the learned trial Magistrate fell into error in dismissing the Appellant's claim for loss of user.

27. The first issue for this court to determine is whether the trial court erred in finding that the Appellant was partially to blame for the first accident, hence apportioning liability against the Appellant at 30%. On this issue, the learned trial Magistrate had the advantage of watching the CCTV footage (which is not available to me at this appellate stage), and observed as follows:

> "I have carefully considered the explanation by the defence and keenly watched the CCTV footage. It is clear that the Plaintiff was stopped at the entrance for a search to be conducted by the guard manning the gate. There is a visible discussion between the Plaintiff and the Defendant's guard for approximately 14 seconds before the second vehicle comes and stops at the exit barrier. The discussion goes on for a further 33 or so seconds before both the exit and entrance lanes were open. Before the entry and exit lanes are open, the guard is seen coming to the front of the Plaintiff's vehicle to check the number plate and returns to converse with the Plaintiff. It should also be noted that after the second vehicle stops at the exit, another guard approaches it and the driver to that vehicle stops, alights and opens doors and the boot on instruction of the guard, before the driver goes back into his vehicle and the barrier is open and bollards lowered.
>
> From the above events, it is clear to me that the Plaintiff must have indeed declined to get out of the vehicle for the search to be conducted, as was done on the second vehicle that drove in.
>
> However, the Defendant's guard manning the barrier was also in error to open the barrier and lower the bollard since the security clearance had not been given to the Plaintiff. Granted, it may have been an error by the Defendant's guard to open the barrier and lower the bollard, as it took approximately 12 seconds for the guard to reverse his action and close the barrier. Be that as it may, the error portrayed a permission for the Plaintiff to drive in, which he did, the alleged argument with the Defendant's guard notwithstanding.
>
> In the end, I find that it would be just and reasonable for the Defendant to shoulder 70% of the blame for opening the barrier despite their position that the security clearance had not been granted for the Plaintiff to drive in. On the other hand, the Plaintiff should himself shoulder 30% of the blame as it has been proved, on a balance of probability, that he was asked to step out of the vehicle for a search, which he declined."

28. As I have stated above, I have not had the advantage of viewing the CCTV footage but as the trial court's narration on the contents thereof is not challenged, I will take the same to be accurate.

29. In his analysis of the CCTV footage, the learned trial Magistrate reached the conclusion that the Appellant refused to get out of his vehicle, based on the fact that there seemed to be an argument between the Appellant and the guards and on the further premises that the driver of the other vehicle captured in the footage got out of his vehicle, opened the boot and doors following which a search was conducted and a clearance given.

30. The learned Magistrate's conclusion was in my view logical considering that the images of the CCTV footage depicted the second driver alighting from his car and allowing the same to be searched, consistent with the evidence of DW1 that all drivers ingressing the premises were required to get out of the cars for security checks to be conducted.

31. This position is further supported by the fact that despite the other driver arriving at the entrance of the building after the Appellant, he was cleared to proceed before the Appellant, apparent evidence in my view that he complied with the security checks and that the Appellant did not, hence the delay in the Appellant's security clearance.

32. Civil cases are to be determined on a balance of probabilities and my persuasion is that the CCTV footage as analyzed by the trial court was sufficient to prove on a balance of probabilities that the Appellant did not get out of his car upon being asked to do so as per the security procedures.

33. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J. (as he then was) in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 in an explanatory manner, as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

34. With regard to apportioning liability at 30% against the Appellant and 70% against the Respondent, I cannot fault the learned trial Magistrate as he properly reached the finding that the Respondent was liable to a larger extent as the guard that was operating the bollards opened the barrier despite the position that the security clearance had not been granted for the Appellant to drive in. As we have seen above, the Appellant was to partially blame for failing to comply with the security procedures and apportionment of liability at 30% as against the Appellant was apt in the circumstances.

35. The second issue for this court to determine is whether the learned trial Magistrate fell into error in holding that the Respondent was not in any way liable for the second accident. On this issue, the Appellant's own testimony was that he drove the damaged car to DT Dobie to find out if the deposit of the repair cost had been paid. On learning that the same had not been paid, he had to drive the car away.

36. On the issue, the trial court, upon considering the circumstances under which the two accidents occurred, found in precis that the fault of the first accident was too remote to be attributed to the second accident and absolved the Respondent of liability in respect of the second accident.

37. In my considered view of the Appellant's evidence, what he told the trial court is that he took his damaged car to DT Dobie without first confirming that the Respondent had paid the deposit that the Appellant alleged that the Respondent had committed to pay.

38. It is also to be noted that the Appellant admitted to driving a vehicle that was faulty or damaged following the first accident. The Appellant did not tender any evidence to prove that the same was roadworthy or safe to drive after the first accident.

39. It is then apparent that the second accident occurred when the Appellant was driving the motor vehicle which had already been damaged in the first accident and was therefore defective. In his evidence as adopted from his statement, the Appellant admitted that upon being assessed at DT Dobie after the first accident, it was noted that serious damage had been occasioned on the rear suspension of his vehicle.

40. The conclusion I reach then is that despite having the knowledge that the vehicle had serious defects or damage to its suspension, the Appellant opted to take the risk of driving it without proper repairs

being first done. He had the safe option of having it towed away. He cannot then be heard to blame the Respondent for the second accident. Such driving, in any event, was in clear contravention of Section 55 of the *Traffic Act* which relates to the condition of vehicles on the road and provides as follows:

> " 55(1). No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.
>
> (2).....".
>
> (Underlined emphasis).

41. It is then the finding of this court that the trial court, albeit for different reasons, reached the correct finding that no liability was proved against the Respondent on the second accident.

42. I now turn to the third question for determination by this court, which is whether the learned trial Magistrate fell into error in dismissing the Appellant's claim for loss of user. The answer to this question is to be found, happily, in the Court of Appeal authority of David Bagine v Martin Bundi [1997] eKLR in which the following holding was made:

> " 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 cannot in the 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. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs. The learned judge quite erroneously proceeded to award general damages at the rate of Kshs.500/= per day from the date of accident until date of judgment."
>
> (Underlined emphasis mine).

43. There is also the case of Equity Bank Limited & 2 others v Perpetua Muthoni Nduma [2019] eKLR in which this court (Ngaah, J.) observed as follows on a claim for loss of user:

> " If I have to say anything more on this issue, particularly on the claim for loss of user, I can only reiterate that any amount due to a claimant under the head of loss of user is ascertainable and quantifiable; it is in the nature of special damages which must be specifically pleaded and proved. It is not an award that is left for conjecture and neither can the court assume the award as the learned magistrate purported to do. In his own words, he stated "it would be reasonable to assume the net earnings in a day would be Shs. 2000/=." This was obviously wrong and untenable in law, and, in any event, assuming the learned magistrate was right, it is not clear how he ended up with a figure of Kshs. 80,000/= as the monthly income if the daily income was Kshs. 2000/=."

44. The jurisprudence that the decisions above avail is that a claim for loss of user is one for special damages, which, as the rules dictate, must be specifically pleaded and proved (see also Equity Bank Limited v Gerald Wang'ombe Thuni [2015] eKLR.

45. The Appellant pleaded Kshs.5,000/- per day under this head from the date of the first accident until the date of judgement, which date could not be ascertained.

46. Although the Appellant produced some receipts as exhibits, he did not in his evidence explain what those receipts were for and their evidentiary value, if any and it is not available to the court to speculate. It is not enough for a party to merely produce documents but the party must go on to satisfactorily explain their import and relevance.

47. As such, no material was therefore presented to support the claim and the same was thus not proved. The learned trial Magistrate was right in disallowing the claim.

48. Consequently, having analyzed the evidence adduced in the lower court as above, and having determined the issues pertinent to this appeal, I reach the result, that the appeal lacks merit.I proceed to dismiss it.

49. In line with Section 27 of the *Civil Procedure Act*, the Appellant shall bear the Respondent's costs of the appeal, which I hereby assess at Ksh.35,000/-.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 8TH DAY OF NOVEMBER, 2024.

JOE M. OMIDO

JUDGE

For the Appellant: Ms. Micah for Mr. Mbaabu.

For the Respondent: No appearance.

Court Assistant: Ms. Njoroge.