



REPUBLIC OF KENYA



**Ogise v Corban Construction Limited & another (Civil Appeal E450 of 2023)  
[2024] KEHC 14417 (KLR) (Civ) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14417 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E450 OF 2023**

**H NAMISI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**JACKSON ONSARE OGISE ..... APPELLANT**

**AND**

**CORBAN CONSTRUCTION LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgement of Hon. E. Wanjala (Ms) Principal Magistrate delivered on 13 May 2022 in Milimani Civil Case No. E4579 of 2020)*

**JUDGMENT**

1. The appeal arises out of a suit filed by the Appellant against the Respondents seeking the following reliefs:
  - i. Special damages as pleaded in the sum of Kshs 355,750/=;
  - ii. Loss of User;
  - iii. Costs of the suit
  - iv. Interest on (i), (ii), (iii) at court rates from the date of filing the suit till payment in full;
  - v. Such further or other reliefs as this Honourable Court may deem fit to grant
2. The Appellant's claim was that on 14 March 2020, while driving along Argwings Kodhek Road in Nairobi County, the Appellant's motor vehicle registration number KBL 475D collided with the 1st Respondent's motor vehicle registration number KBP 006Q, which was driven by the 2nd



- Respondent. As a result of the accident, the Appellant's motor vehicle was extensively damaged and consequently written off.
3. In addition to the special damages of Kshs 355,750/=, the Appellant also claimed loss of user in the sum of Kshs 3,000/- per day for the period of time that his motor vehicle was grounded and subsequently written off.
  4. The Respondents entered appearance and filed Statement of Defence dated 18 December 2020, denying all liability.
  5. Parties recorded consent on liability in terms of 85:15 in favour of the Appellant. They also agreed to produce the Appellant's List of Documents by consent. The matter then proceeded by way of written submissions.
  6. In its judgement, the trial court awarded the Appellant special damages in the sum of Kshs 355,550/=, subject to the apportionment of liability as agreed. The Court also awarded interest at court rates from the date of filing the suit until payment in full, as well as costs of the suit. In declining to award loss of user, the trial court noted that the Appellant did not file any documents to prove his claim.
  7. Aggrieved by the judgement, the Appellant lodged an appeal on the following grounds:
    - i. That the learned Magistrate misdirected herself on the evidence and the applicable law;
    - ii. That the learned trial Magistrate failed to take into consideration all germane factors in assessing damages to be awarded;
    - iii. That the learned trial Magistrate erred in awarding general damages which were manifestly low as a result to miscarriage of justice given the loss incurred;
    - iv. That the learned trial Magistrate erred in not considering the submissions made by the Appellant's counsel on quantum payable;
    - v. That the learned Magistrate erred in failing to make an award for loss of user despite the evidence adduced in court by the Appellate;
    - vi. That the learned Magistrate erred in refusing to award the loss of user damages whereas the evidence and proof thereof was tendered in court;
    - vii. That the learned Magistrate erred in not taking judicial notice on loss of user for commercial vehicles;
    - viii. That the learned Magistrate failed to considered and appreciate the nature of the material damage claimed under loss of user;
    - ix. That the learned Magistrate erred in failing to take into account the precedents on similar claims for loss of user as pronounced by the superior courts;
    - x. That the learned trial Magistrate erred in not taking into account the cited authorities in the submissions filed by the Appellant
  8. Parties were directed to canvass the appeal by way of submissions. The Appellant filed submissions dated 21 August 2024. The Respondents did not file any submissions despite being accorded ample opportunity to do so.



## Analysis & Determination

9. The Court of Appeal for East Africa set out the duty of the first appellate court in the case of *Selle – Vs- Associated Motor Boat Co.* [1968] EA 123 as follows -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”

10. An appeal to the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. This Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did.
11. I have keenly read the Record of Appeal and submissions by the Appellant. The Appellant takes issue with the impugned judgement on the basis of the damages for loss of user. In the submissions filed in the trial court, the Appellant relied on the cases of *Wambua -vs- Patel & Another* [1986] KLR 336 and *David Maina -vs- Mary Wanjiku Wanjie & Another* [2020] eKLR in submitting for loss of user in the sum of Kshs 1,872,000/= calculated as follows:

Kshs 3,000/= X 52 weeks X 6 days X 2 years = Kshs 1,872,000/=

12. On their part, in the trial court, the Respondents relied on the case of *Permuga Auto Spares & Another -vs- Margaret Korir Tagi* [2015] eKLR, and urged the court to dismiss the prayer for loss of user. In dismissing the prayer for loss of user, the trial court noted that the Appellant had the opportunity to file supplementary documents to prove his claim but did not.
13. In his submissions herein, the Appellant contended that loss of user is in the nature of general damages and is proved on a balance of probabilities. The Appellant relied on the cases of *David Maina -vs- Mary Wanjiku Wanie & Another* (supra), *Team of Kenya National Sports Complex -vs- Chambai M. Ingaruni*, Civil Appeal NO. 293 of 1998 and *Peter Njuguna Joseph & Another -vs- Anna Moraa, Civil Appeal No. 23 of 2021*.
14. In the case of *Mitchell Cotts (K) Ltd -vs- Musa Freighters* [2011] eKLR, the Appellant specifically pleaded an amount of Kshs 29,000/-, which amount was admitted by the Respondent. The Court of Appeal stated thus:

“...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...”

15. In *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR, 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. 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...”

16. Further, the Court of Appeal in *David Bagine v Martin Bundi* [1997] eKLR (Gicheru, Shah & Pall, JJ A), 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...”

17. Looking at the *Plaint*, the Appellant, at paragraph 7, pleaded as follows:

“And the Plaintiff claims damages for loss of user pegged at Kshs 3,000/= per day for the period that the subject motor vehicle was grounded and subsequently written off.”

18. In his submissions, the Appellant prays for damages for loss of user calculated as follows:

Kshs 3,000 x 52 weeks x 6 days x 2 years = Kshs 1,872,000/=

19. In his documents, the Appellant attached the Assessors Report dated 25 March 2020, in which the Assessor noted that it would not be cost effective to repair the motor vehicle. No documents were presented by the Appellant showing the date when the motor vehicle was actually written off and the salvage transferred to the Insurance Company. For this reason, I agree with the trial court’s judgement that on the ground of loss of user. The Appellant failed to demonstrate the “period that the motor vehicle was grounded and subsequently written off” as contained in his own pleadings. Further, even if the Appellant had proved loss of user, he was only entitled to 10 days as per the Assessment Report produced. In the case of *Samuel Kariuki Nyangoti* (supra), it was held that the Appellant was required to mitigate his losses.

20. The upshot is that the appeal fails. The same is dismissed. Since the Respondents did not participate in these proceedings, no costs shall be awarded.

**DATED AND DELIVERED AT NAIROBI THIS 21 DAY OF NOVEMBER 2024.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

.Ombuna ..... for the Appellant

Ms. Mshila ..... for the Respondents

