



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO. 33 OF 2018**

**MOHAMMED ALI**

**NURMOHAMED YUNUS.....APPELLANTS**

**VERSUS**

**AVENUE CARGO ENTERPRISES LTD.....RESPONDENT**

**(An appeal from the Judgment and Decree in Original Webuye PMCC 72 of 2016 delivered on 14.5.2018 by HON. N. Baraza Senior Resident Magistrate.)**

**JUDGMENT**

By Plaintiff dated 14.4.2016 the respondent/plaintiff Avenue Cargo Enterprises Ltd sued the appellant/defendant Muhammed Ali (1<sup>st</sup> defendant) and Nurmohamed Yunus (2<sup>nd</sup> defendant) seeking.

**a. 49,343.35 U\$ dollar equivalent to Kshs 5,033,021.70**

**b. Interest on (a) and (b) above**

**c. Cost of this suit.**

The claim arose from an accident involving motor vehicle registration NO. UAT 321E/UAT 317E owned by the respondent and motor vehicle registration KBL 553 F/ZE 0940 owned by the appellant whereby the respondent's vehicle sustained extensive damage. The plaintiff/respondent blamed the accident on the negligence of appellant driver who was charged for the traffic accident and convicted on his own plea of guilty.

The appellants/defendants denied the claim and any negligence on their driver's part and averred that if an accident occurred the same was wholly or substantially contributed to be the negligence of the driver of the respondent.

After the hearing where the plaintiff/respondent gave evidence and the appellant/defendant did not call any witness, the trial magistrate in his judgment delivered on 14.5.2018 found the appellant liable and stated.

**In summary, the plaintiff is warded as follows:**

**a. Value of new trailer head 37,583 USD**

**b. Repair cost 5216 USD**

**c. 138.75 USD**

**d. Towing charges 2950.40 USD**

**e. New tyres 1950 USD**

**f. Copy of records 5 USD**

Total award thus is 47843,15 USD.

The plaintiff is further awarded costs and interest.

Aggrieved by the judgment the Appellant filed this appeal on the following grounds.

1. That having held correctly in her judgment that the respondent's claim was to special damages and that the finding principle when courts are determining, the issue of special damages is that the same have to be specifically pleaded and strictly proved the learned trial magistrate erred both in law and fact in allowing the respondent's claim to item (b) titled "repair cost to trailer", when the evidence adduced by the respondent did not prove the loss and did not support the award at all;
2. That the learned trial magistrate erred in law and fact in awarding special damages of 1,950US dollars as the cost of tyres when the evidence adduced by the respondent failed to create any link between the said purchase, the tyres and the vehicle in question when the law necessitated strict proof thereof.
3. That the learned trial magistrate erred in law and fact by going by the respondent's mere allegations and her own presumptions as opposed to evidence and by not at all analyzing the evidence adduced in court in respect to the alleged cost of repairs and new tyres when the said evidence did not at all support the respondent's claim nor her award.
4. That the learned trial magistrate findings were against the weight of the evidence on record, against the law and constituted a miscarriage of justice having resulted in an award higher than that the respondent sought to recover.

By consent the appeal was canvassed by way of written submissions. The firm of E.K Owinj for appellant filed their submissions so did Mr. Ajaa Olubayi for the respondent. The appellant counsel submitted that the respondent claim being in nature of special damages not only needed to be pleaded but also specifically proved. Counsel submitted that the respondent did not produce receipts as proof of payment but only produced invoices sent by a 3<sup>rd</sup> party. He submitted that an invoice is not a proof of payment and only a receipt meets that test. He urged the court to be guided by the decision in **Total Kenya Ltd –vs- Janevams Limited (2015) eKLR and Zacharia Waweru Thumbi – vs- Samuel Njoroge Thuku (2016) eKLR**

On ground 1 of the appeal, counsel submits that the assessor who gave evidence testified that he assessed the vehicle while it was at Bweyogerere, the Plaintiffs premises at Kampala but the report indicated that the tractor was at Mukoya Industrial Fabricators, Busia Uganda. He points out that this was a contradiction in the respondent's evidence. On ground 2 he submits that the claim of costs of tyres as the documents of purchase did not indicate the registration number of the vehicle they were bought for and therefore no link established with the said motor vehicle. Finally the appellant submitted that the plaintiff pleaded his claim in US dollars yet the documents which he relied upon in court were either in Ugandan shillings and some in Kenya shillings. The value of the various currencies varies and we pray that the exact currency of what was proved be adopted. Translating all the items in US dollars will result in huge awards which the Respondent is not entitled to.

Furthermore, the claim of trailer head was exaggerated. Whereas the plaintiff claimed for 37,783.20 US dollars for the trailer head, he did not produce any receipts to support the value of 37,783.20 US dollars. What he relied upon were invoices and courts have held that invoices are not proof of payment.

Mr. Olubayi for the respondents submitted that every special claim by the respondent was pleaded and specifically proved by tendering of evidence and production of the documents which were not controverted.

This is a first appeal. The duty of the first appellate court is to consider the whole evidence and make its own conclusion but bearing in mind that it did not have all opportunity of seeing or hearing the witnesses. This is the principles stated in *Sielle & Another –vs- Associated motors Ltd 1968 E.A* where the court stated:

**“ I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below.**

**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it, itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A 270)”**

The appellant in this appeal is not challenging liability. This appeal is in respect of the award of damages to the respondents. The appellant is inviting this court to interfere with the award of damages by the trial court.

The principles upon which this court can interfere with an award made by the trial court was well settled in ***Kemfro Africa Ltd T/a “Meru Express Services 1976” & Gathogo Kanini –vs- A.M Lubia & Olive Lubia (1982-1988) IKAR 727*** where Kneller J A said:

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either**

**the judge in assessing the damage took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.**

The main grounds of appeal from the submissions is whether the respondent proved its case on damages. The appellant submits that this being special damages claim, it should not only be pleaded but also be specifically proved. Counsel submitted that proof in special damages must be production of evidence of actual costs incurred which must be by way of receipts and not invoices. He referred this court to the decision in Total Kenya Ltd formerly Caltex Oil (K) Ltd –vs- Janevams Ltd (2015) eKLR where the court stated in the case of Great Lakes Transport Co (U) Ltd –vs- Kenya Revenue Authority (2000) eKLR 720 on the production of proforma invoices, the court stated thus”

**“What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word “paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case non of the two documents would amount to a receipt.”**

On the issue of whether what the respondent’s witness PW2 Angura Olupot Dennis produced was receipts or invoices, the record shows that in his evidence he stated; “that the abstract indicated that driver of motor vehicle KBV 553Z was charged and fined 120,000/-. I have documents of proceeding of court to that effect. Through Tr 1744/2013 accused person is Mohammed Ali defendant herein. The proceedings are duly certified. I paid for towing fees also known as carriage fees of USH 7,376,000/- equivalent to Kshs 2,950,04 USD. I paid assessment of fees of Kshs 350,000/- USH 138.75 USD. I also have receipts for repair of trailer. I have receipts for Kshs 13,40,000/- USH that amount to 5216USD. I also have proforma invoice for repairs indicating same value. I have the original documents being the insurance certificate that covered vehicle while operating in EA Cargo Sudan. I paid for it 460,000/- UGSH which translates 248 USD. I have original documents of transit goods here which is a requirement. It cost 516, 182UGSH which translates to 137 USD. I have receipts for tyres for USH 6,538,200/- which translated 1,900 USD. They were 4 tyres. I wish to produce documents before court as exhibits in this case. I wish to produce documents as exhibits 2(1) –(16). I have documents of purchase of vehicles. I can avail them in the next date.

He further stated ”I have documents regarding value of tractor. I have proforma invoice from supplier of motor vehicle dated 14.1.2013. It indicated particulars of motor vehicle, bank details of supplier and value of motor vehicle which is 13000 pounds. The documents are from export vehicles and sales. 13000 pounds translated at time of acquisition of supplier he did not expect costs in certificate of conformity. He was thus charged additional 135 pounds. Total amount of value plus certificate of conformity 22,149,20 USD.

Documents – MF1 3(a)

I also incurred extension of axle of motor vehicle which was done by trans trailer Ltd. I have invoice of 4500 USD. Invoice – MF1 3 (b).

I have a receipt of transfer of 1800 USD dated 25.3.2013 – MF1 3 (c) . I also have a receipt of purchase of tyres fitted on vehicle upon arrival dated 18.7.2013 for 2564 USD. I also have a copy of Uganda revenue authority. We paid taxes. I have documents dated 2.5.2013. Value 13,83429 UGS which translates 5,137 USD- MF1 3(e) of clearing agents dated 3.5.2013. I paid 250,000/- UGS translated to 98USD- MF13 (f)”

The appellant contention is that the respondent in respect to the value of the vehicle only produced proforma invoice from Export vehicle sales Ltd dated 14.1.2013 which bore the description of the vehicle to be purchased. Appellant contend that as the respondents did not produce a receipt that expense was not proved. However annexed to the proforma invoice is Money Remittance (send) form dated 21.1.203 showing transfer of 11,635.00 GBP to Export Vehicle Sales Ltd, to their Bank NAT WEST BANK East Wood Nottingham Branch in respect to proforma invoice issued in respect of the chasis number. Named in the Proforma invoice. This is a receipt voucher showing the transfer of the money to the originator of the proforma invoice and particulars given therein. Where a person in response to a proforma invoice makes payment by bank transfer to the originator of the invoice to the account indicated in the invoice, that in my view constitute payment and confirmation of receipt of the same by the supplier.

I am therefore satisfied that the documents produced by the respondent confirmed they had paid the sum for purchase of the motor vehicle and amounted to proof of payment.

I have subjected the whole evidence before the trial court to re-evaluation and to fresh analysis. I however do not find that the trial magistrate made any error is arriving at the conclusion that the Respondent had proved the claim of special damages. I therefore find no merit in this appeal which is hereby dismissed with costs.

**Dated and Delivered at Bungoma this 3<sup>rd</sup> day of February, 2021**

**S.N. RIECHI**

**JUDGE**