



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 163 OF 2018

MUGENGA HOLDINGS LTD.....APPELLANT

VERSUS

BUNDA CAKE & FEEDS LTD.....1ST RESPONDENT

MIDLAND HAULIERS LTD2ND RESPONDENT

BETWEEN

BUNDA CAKE & FEEDS LTDPLAINTIFF

VERSUS

MUGENGA HOLDINGS LTD.....1ST DEFENDANT

MIDLAND HAULIERS LTD2ND DEFENDANT

(Being an appeal from the judgment of Hon. M. N Morora (RM) delivered on 26th August, 2018 in Nakuru

CMCC No. 1165 of 2013 between Bunda Cake & Feeds Ltd Vs Mugenga holdings

Ltd and Midland Haulier Ltd).

JUDGMENT

1. This appeal arises from claim by the 1st respondent herein through plaint filed on 10th December 2013 against the appellants/defendants in Nakuru CMCC No. 1165 of 2013 seeking general damages for the loss incurred to the tune of Kshs. 174,610 plus costs and interests of the suit following an accident which occurred on or about 25th October 2011 at Salгаа along Eldoret – Nakuru Road involving 1st respondent Motor Vehicle KAT 689Y and vehicle KBM 029B/ZC9232 registered in the name of the appellant and 2nd respondent being beneficial owner; which resulted in the 1st respondent Motor Vehicle being damaged. The particulars of negligence were pleaded on part of the appellant's driver was pleaded.

2. In Defence, the appellant and the 2nd respondent denied liability of the accident, and sought to have the suit dismissed.

3. The court in its judgment found in favor of the 1st respondent and held that: -

a) Liability at 100% against the defendant.

b) Motivated loss of Kshs.174,610/=

c) General damages Kshs.50,000/=

d) Costs

e) Interest on Kshs. 174,610/= from date of filing/interest on general damages from the time of this judgment until payment in full.

4. Aggrieved by the said judgment the appellant now appeals to this court on the following grounds: -

- a) *That the learned trial magistrate erred fact and law in awarding damages which were manifestly excessive in the circumstances.*
- b) *That the learned trial magistrate erred in law and fact in awarding general damages under a claim whose only damages awardable are the special damages specifically pleaded and proved*
- c) *That the learned trial magistrate erred in law and fact in failing to hold that the receipts were not conclusive evidence of the extent of the damage caused to the 1st Respondent's Motor Vehicle since no assessment report was tendered in court to indicate the state of the said /motor Vehicle before the accident and after.*
- d) *That the learned trial magistrate erred in law and fact in failing to hold that the amounts pleaded for loss of user were manifestly excessive since the respondent failed to tender evidence in support of the alleged car hire and amount spent on alternative transportation.*
- e) *That the learned trial magistrate erred in law and fact in failing to hold the Respondent did not generally prove his case on a balance of probability.*

5. The Appeal was canvassed by way of written submissions.

APPELLANT'S SUBMISSIONS

6. the appellant submitted that the nature of the claim involved a material damage claim, which needs to be specifically pleaded and proved. And the learned magistrate erred in awarding damages of Kshs.50, 000/=; that the magistrate failed to demonstrate how the award of Kshs. 50,000/= was arrived at and submitted that the award was based on a figure randomly picked by the Magistrate without any legal basis; that she failed to infer what she made her reference to arrive at the said award; that the magistrate failed to elaborate on how the figure was arrived at and prayed that the same be set aside. The Appellant relied on the case of **Jackson Kiprotich Kipngeno & Another vs Daniel Kiplimo Kimeto (2008) eKLR** where the court set aside a similar award of Kshs. 50,000/= made in a material damage claim as general damages could not be sustained because of the nature of the claim.

7. The appellant further submitted that from the testimony of PW2, the 1st respondent did not suffer any disruption of business as the 1st respondent was still making deliveries from the 25th, 26th, and 27th as it managed to hire other vehicles to make deliveries of the goods; that the 1st respondent mitigated his loss by hiring services of other motor vehicles and only an award of loss of user is tenable.

8. The appellant further submitted that in the absence of a motor vehicle assessment report, the 1st respondent failed to prove on a balance of probability the damage occasioned to its vehicle.

9. In respect to award of damages, the appellant submitted that the receipt produced as an exhibit showing a total of Kshs 39,610/= did not prove damages to the 1st respondent. The Appellant cited the case of **Linus Fredrick Nsaky vs Lazaro Thuram Richoro & Another (2016) eKLR**. Where the court observed that in the case of damages to a motor vehicle, it was critical that the specific damages or the nature of the damage itself be pleaded and strictly proven. The court could not assess damages that are not specifically proven.

10. Further that the 1st respondent is not entitled to any award of damages as no assessment report was submitted, neither was a motor vehicle assessor called to testify in court. The appellant relied on the case of **Gachanja Muhori & Sons Ltd & Another vs Catholic Diocese of Machakos (2014) eKLR**. Where the court held that **on the costs of the repairs carried out on the motor vehicle, the appellants have contended that without the motor vehicle assessment report, there was no proof of damage caused to the motor vehicle.**

11. On the issue of loss of user, the appellant submitted that no receipts were produced to show that the 1st respondent paid the said amount of Kshs. 135,000/= as pleaded and submitted that any special damage claim needs to be specifically pleaded and proved and failure to plead specific damages occasioned to the motor vehicle the material damage claim should fail.

12. In conclusion, the appellant submitted that the appeal is merited and the subordinate judgment be set aside, the award of Kshs. 50,000/= on general damages be set aside and the award of loss of user to be set aside as no evidence was produced.

RESPONDENT'S SUBMISSIONS

13. In opposing the appeal, the 1st respondent submitted that it is settled law that the award of damages is at the discretion of the court, and thus the learned magistrate did not err in law and fact in awarding the general damages; and cited the case of **George Gichanja Karanja & Anor vs Mwangi Nderitu Ngatia (2018) eKLR** where the court observed that the **award of damages is always at the discretion of the court and that an appellate court should not interfere with the trial court's award on damages.**

14. the 1st respondent submitted that it could not run business normally for 3 days and suffered immensely and as such the award of damages was enough to compensate for the days it was unable to do business.

15. The 1st respondent further submitted that general damages were specifically pleaded and proved by evidence and the appellant chose to ignore the fact that companies run to make a profit and whenever there is a disruption of business activity, they incur an economic loss even

in hours a day; that 1st respondent's demand for loss of business was done in good faith and the 1st respondent proved the same.

16. The 1st respondent submitted that award of general damages is at the discretion of the trial court, which is based on what is considered adequate loss or inconvenience by a reasonable person and which flows naturally and the award by the court was based on evidence tendered which the court took into account and established the principle for awarding the damages based on uncontroverted evidence.

17. And further submitted that an award of damages must be fair to the party funding it; and the award of Kshs.50, 000/= by the trial magistrate was fair and modest to both parties. The 1st respondent cited the case of **John Kipkemboi & Anor v DS Morris Kedolo (2019) eKLR** which set out the parameters under which an appellate court will interfere with an award in general damages; that the court stated as follows: -

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which is either inordinately high or low.”

18. Further that in awarding the Kshs. 50,000/= as general damages the learned trial magistrate acted per the applicable principles of law. And thus no injustice will result If the appellate court does not interfere with it.

19. In respect to receipts being held as conclusive evidence, the 1st respondent submitted that the appellant failed to rebut nor contest the issue of the receipts during the trial and cited the case of **Abdi Ali Dere vs Firoz Hussein Tundal & 2 others (2013) eKLR** which quoted the case of Kenya **Industrial Industries Ltd vs Lee Enterprises Ltd (2009) KLR 135** where the Court addressed the compensation of damaged machinery which alleged to have been rendered obsolete and stated as follows: -

“Generally speaking, the normal measure of damages for damage of goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where however the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction.”

20. The 1st respondent submitted that Kshs. 39,610/= was specifically pleaded in the plaint as per **paragraph 64 of the record of appeal** and it mitigated the loss caused by the appellant using its own money and is entitled to compensation of the same. The 1st respondent submitted that the claim was proved on a balance of probability as it produced the receipts on the amount spent in repairing the vehicle plus mitigating the loss incurred by the company.

ANALYSIS AND DETERMINATION

21. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do knowing, that unlike the trial court, I did not get the benefit of taking the evidence adduced first hand and therefore was not able to observe demeanor of witnesses; for this I give the due allowance. This position was held in **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

22. In view of the above I have perused evidence adduced before the trial court and note that, the 1st respondent called 3 witnesses. **Benard Miso** who testified as PW1 confirmed he was the driver of Motor Vehicle No. KAT 689Y working for Bunda Cakes and Feeds, and on a fateful day, he was heading to Nakuru from Eldoret when at Salgaa, he was stopped by a police officer and he stopped on the left side when a lorry heading to Eldoret from Nakuru hit a bump and the 2 rear wheels of the trailer separated and left the trailer and hit the stationary vehicle thus causing damage. He proceeded to record the matter at the police station at Salgaa and later the vehicle was repaired as it could not move.

23. On cross examination he stated that the accident occurred during the day and motor vehicle registration No. KAT 689Y was hit when it was stationary.

24. PW2 was **John Githage Bola**, he testified that he worked for the 2nd plaintiff/1st respondent herein and was tasked with the task of arranging goods in the motor vehicle. He said he was present at the scene when the vehicle KBM 029 trailer ZC 923Z hit the bump and its tyres hit their stationary vehicle and the vehicle got damaged and the same was taken to the garage for repair and during the time the motor vehicle was in the garage, the 1st respondent did hire another motor vehicle to do the deliveries and a total sum of Kshs. 135,000/= was used to hire a vehicle.

25. On cross-examination, he testified that he was the driver at the time of the accident, the motor vehicle was hit when it was stationary. He had not testified in any traffic case. He stated that he was not issued with any receipt to show that as a company they hired other vehicles to do the delivery during the period in question.

26. PW3 was **P.C Joash Obai** who was stationed at Salgaa Traffic Base confirmed that he had an OB No. 7/26/10/11 which recorded a non-

injury involving two motor vehicles KAT 689Y and KBM 029BZC. He testified that the tyre of trailer registration No. ZC 923Z got off and hit motor vehicle KAT 689Y. KAT 689Y was stationary and on the side of the road. When the vehicle was hit the front part of the damaged vehicle was damaged.

27. On cross-examination, he stated that he was not the investigating officer, and he didn't visit the scene. The defendants did not avail any witnesses.

28. From the evidence above and submissions captured above, I find the following as issues for determination: -

- i. Whether the 1st respondent proved its case on a balance of probabilities
- ii. Whether the trial court acted on wrong principles of law in making the award of damages.

(i) Whether the 1st respondent proved its case on a balance of probabilities.

29. Evidence on occurrence of the accident show that the tyres of the trailer came out and hit the 1st respondent's vehicle which was stationary.

30. Evidence adduced by the plaintiff's witnesses PW1 and PW2 was confirmed by record produced by PW3 a traffic police officer. The 1st respondent's evidence was not rebutted by any other evidence. The 1st respondent's vehicle had stopped off the road after being stopped by traffic police. There is no evidence of negligence adduced in respect to the 1st respondent. The defendants/appellant did also rebut evidence of its driver driving at high speed and I cannot therefore fault the trial magistrates finding on liability.

ii. Whether the trial court acted on wrong principles of law in making the award of damages.

31. On whether the appellate court can interfere with award by trial court, the court of appeal in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held as follows: -

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

32. And in the case of **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** the Court of Appeal held that: -

‘We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257).’

33. The appellant's argument is that the award granted to the 1st respondent was not pleaded and damage was not proved. I however note from the evidence adduced that receipt for kshs 39,610 was produced.

34. Receipts for hire of motor vehicle to do deliveries were also produced as exhibits 4A-C. It is not therefore right to say that the magistrate in the judgment in assessing damages took into account irrelevant factors. The amount awarded is not inordinately too high or too low.

35. I find no reason to interfere with the discretion of the trial magistrate. The magistrate having properly considered the evidence arrived at the correct finding in liability and quantum of damages. The appeal is without merit and the same is dismissed with costs.

36. FINAL ORDERS

- 1) Appeal is hereby dismissed
- 2) Costs of Appeal to 1st respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10TH DAY OF JUNE, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Ms. Kimoriot holding brief for Onyeka Counsel for Appellant

Mr. Nyaseti holding brief for Mr. Mboga Counsel for Respondent