REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 356 OF 2019

ANN WAITHERA NJENGA.....APPELLANT

= VERSUS =

CUBE MOVERS LIMITED.....RESPONDENT

(An Appeal from the Judgement and Decree of Honourable Orenge K.I (Mr.) Senior Resident Magistrate delivered on the 18/06/2019 in Milimani CMCC No. 6533 of 2019)

JUDGEMENT

This is an appeal by Ann Waithera Njenga against the judgement and decree of the Honourable Orenge K.I. (Mr.), Senior Resident Magistrate in Milimani Cmcc No. 6533 of 2019 delivered on 18th June, 2019. The Appellant was the plaintiff while the Respondent was the defendant before the trial court. The firm of Nyambura Munyua & Co. Advocates represents the Appellant whilst the firm of G.N. Mugo & Co. Advocates represents the Respondent.

The appellant instituted a suit through a plaint that was amended on 26th June 2018 against the respondent herein for damages and loss occasioned to her Motor Vehicle KAQ 312B as a result of a collision with the Respondent's motor vehicle KBD 459N. The appellant pleaded that the respondent was the registered owner of Motor Vehicle Registration No. KBD 459N. The facts are that on or about 14/06/2012, Motor Vehicle KBD 459N was negligently and carelessly driven by the defendant causing it collide with Motor Vehicle KAQ 312B and as a result, Motor Vehicle KAQ 312B was extensively damaged.

The trial court found the respondent 100% liable for the accident and went ahead to dismiss the suit with costs to the respondent for failure on the ground that the appellant had failed to prove her case on a balance of probabilities. Being dissatisfied with the judgement and decree of the subordinate court the appellant has preferred this appeal by way of a Memorandum of Appeal dated 25th June, 2019, and filed in court on 26th June, 2019. The grounds of appeal are that: -

1. The learned Magistrate erred in law and fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence.

2. The learned magistrate erred in law and in fact in holding that the evidence adduced by the plaintiff was variance with the documents and the pleadings.

3. The learned magistrate erred in law and in fact when he held that the plaintiff's testimony was at variance with the pleadings in that the testimony had no foundation in the amended plaint given this was an accident matter that had very clear facts.

4. The learned magistrate erred in fact and in law in failing to appreciate the evidence filed and adduced by the plaintiff vide the list of documents dated 15th October, 2012 and a further list of documents dated 26th June 2018, given the plaintiff produced the same during the hearing.

5. The learned magistrate misdirected himself when he held that the pleadings on record did not inform, the other party and the court, with sufficient clarity what their case is, so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear. The evidence presented before him demonstrated evidence adduced by the plaintiff in person during the hearing, which had been filed in court before the hearing date and confirmed during the pre-trial mention.

6. The magistrate failed to appreciate that the list of documents filed by the plaintiff clearly demonstrated the plaintiff's case and the plaintiff in person at the dock explained in details the content of the documents and the loss she suffered due to the

said accident.

On 14th July, 2021 Hon. Mbogholi Msagha J. admitted the appeal for hearing and directed that the appeal be canvassed by way of written submissions. The appellant filed her submissions dated 17th August, 2020 while the respondent's submissions are dated 11th September, 2020.

Appellant's Submissions:

The sole issue for determination as outlined by the appellant is whether the court's decision dismissing her claim was merited despite finding the respondent 100% liable for the accident.

The appellant submits that this court is bound to revist the evidence on record, evaluate it and reach its own conclusion in the matter and that the court will not ordinarily interfere with findings of fact by the trial court unless it was based on misrepresentation or the court acted on wrong principles. To buttress this position, reliance was placed on the case of **Mwanasokoni Vs Kenya Bus Service Ltd.(1982-88) 1 KAR 278 and Kiruga vs Kiruga & Another (1988) KLR 348.**

The appellant submitted that the evidence adduced on the material damage to her Motor vehicle registration No. KAQ 312B before the trial court was uncontroverted. The appellant further contends that the cogent evidence included the assessment report and the payment receipts for repair charges and other documents that were contained in her lists of documents dated 15th October, 2012 and 26th June 2018. The trial court ought to have considered those documents. She further contends that the fact that her motor vehicle was a matatu on transport business was never in dispute as this was clearly evidenced by the Mavoko Traffic Case No. 395 of 2012 proceedings adduced in court. Consequently, it is her submission that failure to call the driver and or conductor to prove that the vehicle was a matatu was not fatal to her claim against the respondent.

The appellant further submitted that her claim against the respondent was well particularized within reasonable degree of precision in her amended plaint dated 26th June, 2018 and called acceptable evidence to prove the same. She has relied on the case of **Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya [2010]eKLR** where the Court of Appeal held that;

> **"However, since they did not call any evidence either to prove their averments or to rebut the evidence the respondent adduced to establish his claim, a bare assertion that the respondent did not adduce sufficient evidence to prove his case will not do."**

The appellant further submits that special damages were specifically pleaded and strictly proved by way of payment receipts and that the same ought to have been allowed. To buttress her submission, she made made reference to the court of appeal decision in **Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya (Supra)** where the court held that;

> **"In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damages complained of. "**

On the claim for loss of user, the appellant maintains that the PSV daily worksheet records produced showed the number of trips made daily by the matatu, the income generated and the expenditure she incurred in her business. This she submits are prima facie evidence of her daily income considering the informal nature of the matatu business. Further that the average income of Kshs. 4,000 was never controverted by the respondent and therefore the court ought not to have rejected the same. She has relied on the case of **MATUNDA FRUITS BUS SERVICE LTD VS MOSES WANGILA WANGILA & ANOTHER [2018] EKLR** where the court relied on the travel manifest which contained a summary of all the revenue generated by the bus per trip as well as all the expenditures for that trip including fuel, salaries for the personnel and commissions to calculate damages for the loss of user. The appellant has further sought to rely on the case of **JEBROCK SUGARCANE GROWERS CO. LTD V. JACKSON CHEGE BUSI, KISUMU CIVIL APPEAL NO. 10 OF 1999 (unreported)** cited by the Court of Appeal in **SAMUEL KARIUKI NYANGOTI VS JOHAAN DISTELBERGER [2017] eKLR** where the court stated as follows:

> **"The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages".**
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> **"Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess…"**

It is the appellant further submissions that by towing the vehicle to her brother's compound she was mitigating her loss by avoiding storage charges. Further that being aware of her meagre earnings she opted to repair the vehicle in bits as evidenced by the payment receipts. To buttress this argument, she made reference to the case of **SAMUEL KARIUKI NYANGOTI (Supra)**

In conclusion, the appellant prays that this court finds that the trial court misapprehended the evidence and acted on wrong principles which warrants this court's interference and consequently allows the appeal as prayed in the Memorandum of Appeal.

Respondent's submissions;

In opposition to the appeal, the respondent highlighted three issues for determination by this court namely whether the trial magistrate erred in law and fact in finding that the evidence adduced by the appellant was at variance with her documents and pleadings; whether the appellant is entitled to any damages and if so how much; and who should bear the costs of this appeal.

On the first issue, the respondent submits that the appellant's pleadings on particulars of damage particularized under Paragraph 5 of her amended plaint and the judgment sought is contradictory hence making her pleadings bad in law. It is the respondent's further submission that pleadings ought to be precise because it gives rise to the issues for determination as provided for under Order 15 Rule 2 of the Civil Procedure Rules. The respondent contends that parties are bound by their pleadings and that any evidence which tends to be at variance with a party's pleadings ought to be disregarded regardless how strong a party perceives it to be. The respondent also relies on its submissions before the trial court and the case of **DAKIANGA DISTRIBUTORS (K) LTD VS KENYA SEED COMPANY LIMITED [2015] eKLR** cited by Odunga J. in **MARY WANJIRU MAINA (SUING AS ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE JANE WANJIRU MAINA V LILIAN W. MACHARIA & ANOTHER [2019]eKLR** where the Court of Appeal held that;

> **"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-**
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> > **The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."**

The respondent has also placed reliance on the case of **KENYA COMMERCIAL BANK LTD. VS SHEIKH OSMAN MOHAMMED, CA NO. 179 OF 2010** which was also cited with approval in the case of **MARY WANJIRU MAINA (SUING AS ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE JANE WANJIRU MAINA V LILIAN W. MACHARIA & ANOTHER [2019] eKLR** where the court stated;

> **"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."**

Further in the case of ***DANIEL OTIENO MIGORE V SOUTH NYANZA SUGAR CO. LTD [2018]eKLR*** where Mrima J. held that;

> **"It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."**

The same principle was also re-affirmed by the Court of Appeal in the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER VS STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR** in which it cited the decision of the Supreme Court of Nigeria in **ADETOUN OLADEJI (NIG) VS NIGERIA BREWERIES PLC SC 91/ 2002** where Adereji, JSC expressed the importance and place of pleadings and stated;

> **"... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..."**

On the second issue, the respondent submits that the appellant is not entitled to any damages, loss of user and mitigation of damages to her motor vehicle. The reasons advanced by the appellant are that her pleadings are contradictory, vague and not supported by the evidence. Secondly, the respondent submit that the evidence adduced before the trial court did not support her claim for relief i.e she claimed for Kshs. 810,450 but adduced evidence supporting a claim of Kshs. 280,500(P.Exh 6) made up as below;

i. Two ETR receipts dated 20/8/2013 from Symoo Auto Spares Company Limited for Kshs. 140,000

ii. Receipt from Benking Autogarage Breakdown Services dated 14/06/2012 for Kshs. 9,000

iii. Receipt from Faith Breakdown Services dated 10/09/2012 for Kshs. 15,000

iv. Receipt from Bahati Breakdown Services dated 19/08/2013 for Kshs. 10,000

v. Insurance excess Kshs. 15,000

vi. Two receipts from Economy Autospares both dated 21/08/2013 for a cooling radiator, sliding door and front door for Kshs. 14,000 and Kshs. 28,000/= respectively.

vii. Receipt from Landpoint Auto Spares dated 29/08/2013 for several parts totaling to Kshs.37,050

viii. Receipts from Apex Autospares for frame and mirror dated 21/08/2013 for Kshs. 4,000.

ix. Receipt from Shyam Auto Spares Ltd for two side mirrors dated 10/09/2013 for Kshs.2,900

x. Receipt from Autorec Assessors dated 24/08/2012 for Kshs. 5,000 being the assessment fee

xi. Kshs. 550/= for obtaining a copy of records for motor vehicle registration number KBD 459N.

The respondent also raised issue with two invoices from Charo Motors dated 28/08/2013 for Kshs. 28,500 and another one dated 30/08/2013 for Kshs. 55,000 which were not produced in court and submits that the two should be disregarded. Further, counsel for the repondent argues that since the appellant acknowledged in her testimony before the trial court that she took the receipts way after the purchase for the purposes of instituting the present suit, this court should decline admitting the receipts which are likely cooked or exagerrated.

It is the respondent's submission that the claim for loss of user was misplaced since the appellant's vehicle was declared a write off by the assessor and therefore it was uneconomical for the her to repair it. The respondent further submits that the appellant ought to have taken into consideration the factors that affect her matatu business for example the wear and tear and the lack of business in arriving at the daily average earning of Kshs. 4,000 and that she should have called her driver or conductor to collaborate the PSV Daily Worksheets. The claim of mitigation of loss by the appellant is disputed by the respondent who mantains that the she was a person of means and therefore the storage of salvage for over one year is not satisfactorily explained.

In conclusion, the respondent submits that in law, the appellant is only entitled for compensation of the diferrential amount between the vehicle's pre-accident value and the salvage value which claim the appellant failed to make. The respondent has relied on the case of **PERMUGA AUTO SPARES & ANOTHER V MARGARET KORIR TAGI [2015] eKLR** where Mulwa J. held that**;**

> **"It is the courts view that once a vehicle has been written off the only compensation is the pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation, The claim for loss of user is disallowed. "**

Analysis and Determination;

This being a first appeal, it is indeed the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123***, this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 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..."**

The only issue for determination in this appeal is on the award of damages. It is an established principle that an appellate court should not interfere with the assessment of damages by a trial court unless it can be shown that such an assessment is contrary to the well established guidelines. In the case of ***BUTT –V- KHAN (1981-88) KLR 349*** the court held as follows:-

> ***"The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates."***

The appellant case is that she is the registered owner of Motor Vehicle Registration No. KAQ 312B which was extensively damaged following a collision with Motor Vehicle Registration No. KBD 459N on 14/06/2012. That the trial court finding was based on misapprehension of the evidence and the priciples of law hence it warrants this court's inteference. The respondent has urged this court to uphold the decision of the trial court and dismiss the present appeal on the ground that the evidence adduced by the appellant was at variance with the documents and pleadings. According to the respondent, the appellant's amended plaint dated 26th June, 2018 set out the particulars of damage/loss at Kshs. 2,153,450 which is at variance with the judgment sought of Kshs. 810,450 hence bad in law. The appellant maintains that the particulars of negligence and loss and damages were well laid down under Paragraph 4 and Paragraph 5 of the amended plaint with a reasonable degree of precision.

Counsel for the respondent has made reference to the case of **DAKIANGA DISTRIBUTORS (K) LTD V KENYA SEED COMPANY LIMITED [2015] eKLR** where the Court of Appeal discussed the importance of pleadings which I find distinguishable from the present suit. In the present suit, the appellant particularized the loss and damages which was supported by evidence but failed to indicate the amount in her prayers while in the DAKIANGA DISTRIBUTORS Case, the appellant failed to plead that it had issued three cheques in replacement of dishonoured cheques in its defence. Having looked at the amended plaint and the particulars of negligence outlined under Paragraph 4 and the particulars of damage/loss under Paragraph 5, I am convinced this ommission does not go to the root of the suit as the case against the respondent has already been set out. Article 159 (2) (d) allows courts to administer justice without deploying technicalities as the basis for their decisions.

On liquidated damages, I note that the Appellant pleaded Kshs. 309,450 for repair costs of the motor vehicle and produced receipts of the same. The respondent has objected to the receipts which it argues are exaggerated and or cooked for the reason that they were taken way after the day of actual purchase and only for purposes of instituting the suit. The amount of damages sought also differs from the evidence submitted as the receipts amount to Kshs. 280,500 as opposed to Kshs. 309, 450 pleaded. This court confirms that indeed the receipts were dated at different dates and that the difference in the receipted amount for repair less the other claim amounts to Kshs. 225,950 which is still at variance with the pleaded amount.

The Court of Appeal however has held that an accident damage assessment report is sufficient evidence of the extent of damage incurred.This was addressed by the court in the of **NKUENE DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED VS. NGACHA NDEIYA [2010] eKLR** where the court stated:

> **"In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged items to as near possible condition as it was before the damage complained of. An accident assessor gave details of the parts of the respondents' vehicle which were damaged. Against each of them, he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."**

In the present case, the assessor's report together with photographs dated 24/8/2012 produced in court confirmed the damage to the motor vehicle and recommended that the vehicle be treated as salvage since the estimated cost of repairs exceeded 50% of the pre-accident market value. The vehicle pre-accident value was placed at Kshs. 350,000 while the salvage value was at Kshs. 120,000 which meant that the motor vehicle was written off.

The insurance law of restitution which seeks to put the plaintiff in the same position as though the damage never happened comes into play. To award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation. The *only compensation in such a scenario is the pre-accident value, less salvage value as assessed. This position was advanced in the case of* **CONCORD INSURANCE COMPANY LIMITED V DAVID OTIENO ALINYO & ANOTHER [2005] eKLR** where the Court of Appeal while discussing the measure of damage to chattels agreed with the principles laid down by Herman LJ in **Darbishire v Warran [1963] 1 WLR 1067** at page 1070 thus:

> **"The principle is that of restitution integrum, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general the measure of damages is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimise his damages …".**
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> **More recently in Burdis v Livsey [2002] 3 WLR 702, the English Court of Appeal stated at page 792 paragraph 84:**
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> **"When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre–accident condition".**

Towing charges are equally special damages which must be proved. The appellant pleaded the same in her amended plaint and submitted that she towed the vehicle to her brother's compound and she proved the same via a receipts dated 14/06/2012 and 10/09/2012 hence the same is allowed. Similarly, the amount paid for Insurance and motor vehicle assessment is payable as pleaded and proved via receipts dated 06/08/2012 and 24/08/2012 respectively. It is not mandatory that in a claim for material damage the claimant has to prove all what is contained in the plaint for the court to award him anything. It is for the court to evaluate the evidence and award is proved. There was a claim for loss of user in the Amended plaint totaling Kshs.1.8million. This claim was not awarded and is the main cause of the difference between what was claimed and what the court could award after evaluating the evidence.

Consequently, the appeal succeeds, the judgment of the lower court on damages is set aside and I enter judgment in favour of the appellant in the following terms;

i) Pre-Accident Value	(Kshs. 350,000)	
Less Salvage Value	(Kshs. 120,000)	
	=	Kshs. 230,000
ii) Insurance		Kshs. 15,000
iii) Towing Charges		Kshs. 24,000
iv) Assessor's Fees		Kshs. 5,000
v) Loss of User		NIL
Total		Kshs. 274,000

The appellant shall have the costs of this appeal and those in the lower court together with interest.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE