



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 101 OF 2019

ABOUD ADULRAHAMAN.....APPELLANT

VERSUS

RADHESHYAM TRANSPORT LIMITED a.k.a

RADHESHYAM TRANSPORTERS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment delivered by the Senior Resident Magistrate Honorable S. K. Ngii

in the Senior Resident Magistrate's Court at Mariakani in Civil Suit No. 5 of 2017

delivered on 12th November 2019.)

Coram: Hon. Justice R. Nyakundi

Jengo Advocates for the appellant

C. B. Gor & Gor Advocates for the respondent

JUDGMENT

This is an appeal against the Judgment and decree of the Senior Resident Magistrate (**Hon. S. K. Ngii**) sitting at Mariakani in the broader sense on the dismissal of the claim for loss of user/loss of business of the subject motor vehicle and for loss of fuel on a balance of probability.

Background

The relevant facts which emerge are that on 12.1.2017 the appellant filed suit against the respondent seeking special damages being the cost of repair of motor vehicle assessed at Kshs.1,009,896.00/= value of 10,000 litres of fuel lost at Kshs.78/=, cost of hiring breakdown from Bonje to Mariakani to Mombasa – Kshs.52,200/= valuation report Kshs.15,000/=, loss of business with effect from 18.11.2016 to 17.12.2016 and from 18th December 2016 to January 2017, costs and interest. It is not in dispute that on 13.11.2019 the Learned trial Magistrate placed primary emphasis and definitely awarded the claim on cost of repairs and valuation report. On the other hand, he remained reluctant to award damages for loss of user, fuel and towing charges for lack of proof by the appellant on a balance of probabilities.

Thus, failure to award pecuniary loss as pleaded became the seminal case on appeal. The appellant has come to this Court with a complaint that the Learned trial Magistrate was in error in declining to exercise his discretion in the area of loss of user and fuel incurred as a result of the accident. At the hearing of this appeal, counsel for the appellant, **Mr. Jengo** herein submitted that contrary to the findings made by the trial Court sufficient admissible material was produced and placed on record to justify the claim loss and damage in the legal sense. He relied on the applicability of the claim in the general operations of the business to the dictum in **Nkuene Dairy Farmers Co-op Society Ltd v Ngacha Ndeiya CA No. 154 of 2005**, **Muthoni Nduati v Wanyoike Kamau & 5 others HCCC No. 1661 of 1980**, **Kenya Bankers Association v Rose Florence Wanjiru & 2 others {2014} eKLR**, **Ryce Motors Ltd & Coast Agency v Elias Makori CA No. 119 of 1995**. Learned counsel also advanced the arguments the full manner value of the loss of use of the motor vehicle had been made by the appellant as to the date of damage. The compelling rationale submitted counsel for proof of lost use of the motor vehicle without the necessity of production of receipts and other accountable documents was addressed by the Court in **Jacob Ayiga Maruja & Another v Simeon Abayu CA No. 167 of 2002**. According to counsel when the owner is deprived of such use, he should be allowed to recover loss of use damages irrespective of whether the loss was appropriately proved by production of receipts. On this counsel cited the principles in

Mitchell Cotts (K) Ltd v Musa Freighters {2011} eKLR, Geoffrey & Another v Emergency Assistance Radio HCCC No. 340 of 1997.

Further, to this Submissions counsel argued that the dismissal of the towing charges in the context of the whole claim was a misdirection and an error on the part of the trial Court. On this ground counsel relied on the following cases in advancing his Submissions **South Sioux Farm Ltd v Christine N. Simiyu Wanzala {2017} eKLR, Leonard Nyongesa v Derrick Ngula Right CA No. 168 of 2008 {2013} eKLR, Paul N. Njoroge v Abdul Sabuni Sabuni {2015} eKLR, Suder Nanji Ltd v Bhaluo {1958} EA 762.**

Finally, counsel also submitted and under scored the ground on the confusion created by the Learned Magistrate on the award of interest on special damages. Learned Counsel contends that the appellant is entitled the amount awarded along with the interest from the date of filing such and the prescribed costs. To that extent counsel cited the cases of **P. W. v Peter Muriithi Ngari {2017} eKLR, Prem Laba v Peter Musa Mbiyu {1965} E. A 592.** Learned Counsel therefore asked this Court to allow the appeal as prayed.

The respondent's submissions

The substratum of the respondent's submissions was that the claims being pursued on appeal were lost due to non-proof by the appellant. According to counsel arguments in the submissions, if one bears in mind the principles in **Eldama Ravine Distributors Ltd & Another v Samson Kipruto Chebon CA No. 22 of 1991, Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd {2004} eKLR** plainly the inconsistency on the pleadings and on their evidence is irreconcilable. Counsel contended that the die had already been cast and there can be no retreat from that averment and lack of evidence to strictly prove the claim. Simultaneously, counsel submitted on loss of use of motor vehicle on the principle within the ambit of special damages as such the Law requires that they be equally and strictly proved. In support of the impugned Judgment counsel submitted that the Learned trial Magistrate fully conducted a proper analysis of the evidence and came to the right conclusions that are consistent with the evidence adduced during the course of the trial. Reference was made to the case of **Ndugu Transport Company Ltd & Another v Daniel Mwangi Waitthaka {2018} eKLR.** It was further argued and submitted that the Learned trial Magistrate did not err in considering that the claim on towing charges was not recoverable. Learned Counsel indicated that the decision by the Learned trial Magistrate is inconsonant with the principles in **Leonard Nyongesa (supra)** on requirements of the stamp duty on documents to be received in evidence.

Analysis and Determination

It is now trite Law that the power of this Court sitting as the first appellate Court when called upon to interfere with a question of fact tried and tested in evidence by the trial Magistrate has to bear in mind the principles in **Peters v Sunday Post Ltd {1958} EA 424 at Pg 429** where the Court held:

“As a first appellate Court we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution always to attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not distort his Judgment unless its plainly unsound or is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

Arising from what I have outlined above, it appears to be entrenched even in the English Law jurisdiction as succinctly stated in **Watt v Thomas {1947} AC 484:**

“An appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion and this is really a question of Law, the appellate Court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony, by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which, side is telling the truth or is refraining from exaggeration. Like other tribunals he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage which is denied to Courts of Appeal, of having the witnesses before him and observing the manner in which their evidence is given.”

Considering all aspects of this appeal, the structure of the analysis and regulation clearly applied is in consonant with the principle in the case of **Malaba v Secretary of State for the Home Department {2006} EWCA CIV 820** – wherein the Court stated:

“In assessing the adequacy of a fact finding exercise an appellate tribunal expects findings to be adequately reasoned. By its reasoning, the fact finding tribunal not only tells the losing party why he has lost but may also be able to demonstrate that it has adequately and conscientiously addressed the issue of fact which has arisen. That is particularly important when it is the credibility of an applicant, which is in issue. A lack of reasoning may demonstrate a failure adequately to address the fundamental question, is the applicant telling the truth?”

The dispute in this Court is how the Learned trial Magistrate ended up dismissing the claim on loss of user and towing charges of the subject motor vehicle.

The Law

The approach to the matter of compensatory special damages in which the realm of this appeal has been discussed in various cases **Kenya**

Bus Services Ltd v Mayende {1991} 2 KAR, Ali v Nyambu T/a Sisera CA No. 5 of 1990, Hahn v Singh {1985} KLR 16, David Bagine v Martin Bundi as cited in Jackson Kiprotich Kipngeno & Another v Daniel Kiplimo Kimetto {2008} eKLR.

In this flood of cases the scope of loss of earnings and loss of user are in the legal sense special damages that must not only be pleaded but strictly proved. The facts to such loss must be pleaded and the corresponding probative value evidenced relied upon for the Court to award such damages in **Boriham Carter v Hyde Park Hotel {1948} 64 T. L. R. 177** the Court emphasized on the assessment of special damages:

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the Court saying, this is what I have lost, I ask you to give me these damages.”

In the Plaintiff appellant had stated that his vehicle was an oil tanker transporting fuel between Mombasa – Mariakani, making about twenty trips per month at a consideration of Kshs.10,000/= on each delivery. While addressing the trial Court appellant gave evidence to the effect that his motor vehicle was damaged and for two months incurred monetary loss of Kshs.400,000/=. Although the Learned Magistrate incorrectly pointed out that the claim for loss of user was not pleaded and not strictly proved the evidence on record contradicts that perspective.

In this case, the appellant was a transporter of fuel and ran cash and carry business as supported with receipts from Bassawad Filling Station at Kisauni. The appellant was accustomed to buying fuel from that gas station. In addition there was long running contract entered with Barliadh Enterprises dated 9.1.2017 to transport fuel from the depot to the petrol station at a fee of Kshs.200,000/= per month. It is important to note that in the present case the appellant claimed only on the ground of loss of user which was not conceivable save for the occurrence of the accident. That evidence on the contract and decisive consideration of the transaction carefully analyzed comes out stronger on the broad special principle in this area that the special damages be specifically pleaded and strictly proved. I emphasize though that each case turns on a meticulous examination of its own facts and the Learned trial Magistrate failed to appreciate that the appellant had crossed the line to prove the pleaded special loss of user.

In contrast with the appellant evidence, it seems to me appropriate to rule that for better or for worse some observations made by the respondent did not fundamentally controvert that prima facie evidence on loss of user. The predominant principle here is that the trial Court set to rewrite the contract expressed by the parties whose main purpose and substance of what has been agreed was for the appellant to transport fuel every other month at a consideration of Kshs.200,000/=.

Thus, if the covenant was not to be interrupted by intervening factor of an accident disabling the appellant to carry on the transport business of fuel he could have reasonably earned Kshs.400,000/= in the two months he was afflicted.

In **David Bagaine v Martin Bundi {1997} eKLR**, the Court of Appeal affirmed the issue of loss of user as follows:

“We must and ought to make it clear that damages claimed under the title loss of user can only be special damages. The loss is what the claimant suffers specifically..... 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.”

The analogy that can be drawn on the foregoing evidence and submissions by both counsel is the except from **Kimani v Attorney General {1969} EA 503** where it was held:

“A claim for loss of business or otherwise is a claim for loss of income or earning from the business generated by the use of the car as a taxi is a claim for special damages.”

The primary rule here is the fact of the appellant monthly earnings at the time of the accident diminishing and substituting because of the damage sustained as strictly proved in the assessment report.

As laid down in **Mbogo v Shah {1968} E. A** The duty of this Court on an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his discretion wrongly in principle or perversely on the facts of the case. Looking at the matter as a whole it is manifestly plain that the appellant had placed evidence by way of oral and documentary evidence showing clearly loss of user of Kshs.400,000/= for the period of two months. It therefore became obligatory of the Learned trial Magistrate to exercise his discretion in favour of the appellant by granting of the award on that limb of special damages.

The other prime issue the appellant has raised objection go to the very root of the provisions under Section 19 (1) of the Stamp Duty Act which the Learned trial Magistrate invoked to dismiss the claim on towing charges of Kshs.52,200/=.

The statutory provision enunciated in the above Section, I accept it as a sound proposition of Law. The only question in connection therewith is whether or not the Learned trial Magistrate correctly applied it when dealing with the mater on admission of the receipt proving the loss and damage incurred by the appellant due and payable by the respondent.

For the benefit of the Learned trial Magistrate, I will repeat what the Court of Appeal said in **Paul N. Njoroge v Abdul Sabongo {2015} eKLR**:

“The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480 of the Laws of Kenya were invalid and inadmissible in evidence.”

But this Court has held that to be erroneous and accepts the view it took in the case of **Stallion Insurance Company Limited v Ignazio Messina & Co. S. P. A. {2007} eKLR** where it stated thus:

“it suffices to state that Sections 19 (3), 20, 21 and 22 of the Act provided a relief in a situation where a document or instrument had not been stamped when it ought to have been stamped.”

The course open to the Learned Judge was as in the case of **Suderji Nanji v Bhaloo {1958} EA 76 at pg 763 where Lord J** as he then quoted with approval the holding in **Bagahat Ram v Raven Chond 2 {1930} A. I. R Lah 854** that:

“Before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the Court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the stamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/respondent and he must be given the opportunity. We would adopt similar reasoning in finding that the trial Court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the Act itself, provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.”

As a general rule, the Court should allow the issue of invalidity based on non-payment of Stamp Duty to be raised in any proceedings where it is relevant before final Judgment.

With regard to stamp duty statutory rights on non-admissibility of an instrument/document/receipt in evidence have already been generally explained.

As a foreshadowed above, however, the Law imposes a far reaching sophisticated duty of procedural fairness upon those who decide judicial matters as a whole to ensure compliance and the defect at first instance is cured. In **Mannes v Onslow – Fane {1978} WLR 1520**:

“It had always previously been held that a breach of the rules of natural justice resulted in the determination being null and void, in the same way as any other act which was ultra vires. For the duty to act fairly, just like the duty to act reasonably, was enforced as can implied statutory requirement, so that failure to observe it meant that the judicial act or decision was outside the statutory power, unjustified by Law, and therefore ultra vires and void.”

This question profoundly affected the course taken by the Learned trial Magistrate in dismissing the claim on towing charges. Needless to say maintaining non-admissibility of a document in evidence on grounds of non-payment of stamp duty without procedural fairness would be an incorrect interpretation of parliament’s true intentions. Another possibility on this ground is to look at it that some statutory duties may be held to be merely directory, so that there is no penal liability for disregard of them. But as adumbrated by the Court of Appeal in **Paul Njoroge case (supra)**.

The statute has a scheme of its own for penalties and enforcement and the Court in exercising discretion should be sympathetic to an action for damages unless the statute expressly indicates otherwise.

I cannot help feeling in these circumstances to this case that the appellant was short changed pursuant to the holding by the Learned trial Magistrate that loss of user and towing charges were not specifically pleaded and proved in that Court. In this regard, I have no hesitation to interfere with the decision that the Learned trial Magistrate was in error when he held as such to deny the claim under these two limbs.

My last comments relates to the issue on award of interest. While general damages are presumed by the Law from the invasion of a right. Special damages refer to the particular loss and damage suffered by a party beyond that presumed by Law from the mere fact of an invasion of a right and is always to be proved strictly by evidence. Thus, there is relevance in ranking the award of interest. The trial Court is entitled to award interest to a successful litigant in money decrees that position is accorded by the Law under Section 26 (1) of the Civil Procedure Act. The Court of Appeal in **Shariff Salim & Another v Maundu Kikava {1989} eKLR** said this:

“Where and in so far as a decree is for payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of payment or such earlier date as the Court thinks fit.”

The appeal which is now before this Court is also in respect of clarity on the issue of interest. It follows that the appellant is entitled to interest in regard to general damages from the date of Judgment whilst the action on special damages applicable valid interest with effect from 10.1.2017 till payment in full. For all these reasons, I would allow this appeal by setting aside the dismissal order on loss of user of the motor vehicle and loss of fuel as earlier pleaded by the appellant.

Accordingly, the appeal is allowed with costs to the appellant. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atiang holding brief for C. B. Gor advocate for the respondent