REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 29 OF 2019

JACKSON MWABILI……..……..…….. APPELLANT

-VERSUS-

PETERSON MATELI.…….…….RESPONDENT

(Appeal from the Judgment and decree of the Chief Magistrate's Court at Kajiado (Hon B. Cheloti, SRM) delivered on 3rd September 2019 in CMCC No. 399 of 2018).

JUDGMENT

1. This is an appeal from the judgment and decree of B. Cheloti SRM, dated 3rd September 2019. In that judgment, the learned trial magistrate allowed the respondent's suit for damages for personal injury of Kshs. 200,000/= and special damage claim to motor vehicle registration number KAZ 336F in the sum of Kshs. 299,500/= for special damages and repairs. The court further allowed Kshs. 550,000/= as damages for loss of user. It awarded the respondent costs and interest at 10%.

2. The appellant who was the defendant before the trial court was aggrieved with that judgement and lodged his memorandum of appeal dated 20th September 2019, raising the following grounds, namely:

> ***1. That the Honourable court failed to adequately evaluate evidence and exhibits in reference to motor vehicle repair charges of Kshs. 299,500/= and claim for loss of use of the motor vehicle at Kshs. 550,000/= per day until conclusion of the suit thereby arrived at a decision that is unsustainable in law.***
>
> ***2. That the learned trial magistrate erred in law and fact by awarding the respondent the sum of Kshs. 299,500/= motor vehicle repair charges when the same was not strictly proved by way of evidence thereby arrived at a wrong decision that occasioned miscarriage for justice.***
>
> ***3. That the learned trial magistrate erred in law and fact in making assessment of damages for loss of user of motor vehicle at Kshs. 550,000/= when the said figure was not specifically pleaded and proved by evidence leading to a wrong exercise of discretion in the circumstances.***
>
> ***4. That the learned trial magistrate erred in law and fact by totally disregarding the appellant's counsel's cross-examination and authorities cited on the sum awardable in special damages thereby arriving at an erroneous exercise in assessment of special damages.***
>
> ***5. That the learned trial magistrate erred in law and fact in failing to take into account the authorities referred to her by the appellant on assessment of special damages before arriving at her decision.***
>
> ***6. That the learned magistrate failed to adequately evaluate the evidence and exhibits on record thereby arrived at an unsustainable decision.***

3. He urged that his appeal be allowed, the trial court's judgment be set aside and or this court reassess the amount and allow costs on appeal or any other relief it may deem appropriate to grant.

4. When this appeal came up for hearing, parties agreed to dispose it by way of written submissions already filed. The court drew attention of both counsel that the respondent was a member of staff in this court and asked if they were confortable to proceed with the matter before it. Both counsel indicated that they had confidence with the court and had no objection to the appeal proceeding before it. It was on that basis that this court proceeded with this appeal.

Appellant's submissions

5. The appellant filed his written submissions dated 15th December 2019 and filed on 17th December 2019. He submitted that the respondent had testified that his motor vehicle KAZ 336F was extensively damaged and was towed by S.K. Chege Break Down Services to Kitengela Police Station and he paid Kshs. 6,500/= and a receipt issued to him. He took the vehicle for assessment at Serengeti Motor Maintenance who assessed repair costs at Kshs. 299,500/=.

6. The appellant submitted that the respondent neither produced the assessment report nor photographs to support the claim that the vehicle had indeed been damaged. He therefore argued that there was no evidence before the trial court to prove the claim for material damage.

7. According to the appellant, the respondent only produced a quotation which could not form the basis for a claim for repair costs. He further argued that the respondent did not produce receipts to prove repair costs as evidence that the vehicle was indeed repaired. He submitted that the respondent admitted in cross-examination that he did not have receipts for repairs costs because the vehicle had not been repaired. He faulted the trial court for allowing the claim for repair costs in the absence of proof of the same.

8. On loss of user, the respondent claimed Kshs. 3000/= per day and the court awarded Kshs. 550,000/=. The appellant faulted the trial court arguing that the respondent had pleaded Kshs. 300/= per day and never amended his plaint. However, during the hearing the respondent's evidence was that the daily cost was Kshs. 3000/=. According to the appellant, the respondent stated that he paid Kshs. 3000/= daily for car hire between 19th February 2018 and November 2018 coming to approximately Kshs. 90,000/= per month. The appellant again submitted that the respondent never produced receipts to prove that he made such payments for car hire.

9. The appellant went on to submit that even if the respondent had hired a vehicle for 10 months he was under obligation to mitigate the loss. He could not spend money hiring a car when his vehicle was lying at a garage unrepaired.

10. Relying on ***Hahn v Singh*** [1985] KLR 716, the appellant argued that special damages must not only be pleaded, they must also be strictly proved as they are not the direct natural or probable consequences of the act complained of. He again relied on ***Wakim Soda Limited v Sammy Aritos*** [2017] eKLR citing ***Total Kenya Limited v Janevams Limited*** [2015] eKLR, that a party claiming special damages must demonstrate that they actually made payments or suffered the specific injury before compensation will be permitted.

11. Regarding the claim for loss of user, the appellant argued that the respondent was required to prove the loss in terms of the amount lost by way of documents detailing the business he used to do. He relied on ***Ryce Motors Limited & Another v Elias Muroki*** [1996] eKLR for the submission that special damages must be pleaded and proved and that a party cannot merely give evidence to the effect that his vehicle was making certain amount daily. He has to support such a claim through acceptable evidence.

12. The appellant concluded that the respondent did not prove his case and the trial court was wrong in allowing his various claims. He urged the court to allow the appeal.

Respondent's submissions

13. The respondent filed written submissions dated 25th February 2020. He submitted that the claim of Kshs. 299,500/= was proved through evidence on record; that the vehicle was assessed by Serengeti Motor Maintenance and the value given as Kshs. 299,500/= and that Kshs. 6,500/= was for towing charges. He submitted that the trial court only awarded repair charges of Kshs. 299,500/= which was the amount required to return the vehicle to its original state.

14. Regarding the claim for loss of user, the respondent submitted that the claim was proved through production of receipts. He argued that the amount awarded was even less than what was in the receipts. He relied on ***Samwel Kariuki Nyangoti v Johaan Distelberger*** [2017] eKLR to argue that the los of user is the value of the chattel to the owner as a going concern at the time and place of the loss so that he might be in a position to purchase a replacement. He also relied on ***Albert Kubai Mbogori V Violet Jeptum Rahedi*** CA No. 125 of 2015 for the same argument.

15. The respondent concluded that he was using the vehicle to and from work and was forced to hire a taxi as a result of the damage to his vehicle. He urged the court to dismiss the appeal with costs.

Determination

16. I have considered this appeal, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

17. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

18. Further, in ***PIL Kenya Limited v Oppong*** [2009] KLR 442, it was held that:

> ***"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent***

decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that".

19. Parties recorded consent on liability before the trial court in the ratio of 80% against the appellant and 20% against the respondent. The trial court was left to determine the issue of quantum and parties led evidence on that.

20. The respondent (**PW1**) testified relying on his witness statement dated 23rd May 2018 and the list of documents which were adopted in evidence as PEX 1- 4. He told the court that the damage to the vehicle was extensive; that he consulted a motor vehicle valuer who assessed the vehicle and that he spent Kshs. 299,500/= to restore the vehicle to its original shape. He also told the court that the vehicle was towed from the scene of accident at a cost of Kshs. 6500/=; that he had to get a taxi to and from work and other personal engagements at Kshs. 3000/= per day.

21. In cross-examination, the respondent stated that the P3 produced showed that he suffered head injuries; that the vehicle was extensively damaged and that the assessor prepared a report but there were no photographs. He further stated that he was given a quotation on repairs for the damage amounting to Kshs. 299,500/=. He admitted that the motor vehicle had not been repaired and therefore he did not have receipts. He also stated that he was paying Kshs. 3000/= daily for a taxi and he had produced receipts. He maintained that he had not repaired the vehicle and that it was the person who was to repair the vehicle who prepared the quotation. The appellant did not call any evidence.

22. After considering the evidence, the trial court was satisfied that the respondent had proved his case on a balance of probabilities. The court awarded the respondent Kshs. 200,000/= for the personal injuries he sustained. The court also allowed his claim for repair costs of Kshs. 299,500/=. It further allowed the respondent's claim for loss of user of Kshs. 550,000/=, costs and interest at 10%, prompting this appeal.

23. As already adverted to, parties recorded consent on liability. The issue left for determination by the trial court was quantum of damages.

24. Although the appellant raised 6 grounds of appeal, in my view, there are only two grounds since some of the grounds are repetitive. The main grounds are, whether the trial court was in order to allow the claim for repair costs of Kshs. 299.500/= and whether the claim for loss of user of Kshs. 550,000/= was proved. The appellant did not challenge the award of general damages of Kshs. 200,000/= for personal injuries the respondent sustained.

25. This appeal, as I understand it, is directed against the claims for repair costs and loss of user the trial court awarded to the respondent. The appellant has argued that the trial court was wrong in allowing the claims repair costs of Kshs. 299,500/= and Kshs. 550,000/= loss of user. It is the appellant's case that these claims being in the nature of special damages; they were either not properly pleaded or strictly proved.

26. According to the appellant, the respondent admitted in cross-examination that the vehicle had not been repaired and for that reason, he had no receipts to support his claim of Kshs. 299,500/=.

27. On loss of user, the appellant similarly argued that although the respondent pleaded Kshs. 300/= per day, he testified that he spent Kshs. 3000/= daily but had not amended his Plaint.

28. The respondent on his part argued that he had produced the quotation on repair costs to show that repairs cost would be Kshs. 299,500/= and that he hired a taxi at Kshs. 3000 per day hence the claim for loss of user.

29. I have perused the pleadings and the record of the trial court, including respondent's evidence. In his Plaint, the respondent pleaded for special damages as follows:

(a) Medical report Kshs. 3000/=;

(b) Loss of use of vehicle at Kshs. 300/= per day till conclusion of the case;

(c) Cost of repairs of motor vehicle KAZ 336F Kshs. 299,500/=;

(d) ***Motor vehicle towing charges Kshs. 6500/=.***

30. In the reliefs, the respondent prayed for special damages of a total of Kshs. 308,000/=. This indeed confirms, as submitted by the appellant, that some of what the respondent claimed were special damages.

31. The question that arises for determination in this appeal is whether the appellant is right in his contention that the respondent did not prove his case as required on the two claims for cost of repairs and loss of user.

Claim for repair costs.

32. There is no doubt that the respondent's claim for repair costs was special damage claim. In that regard, the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing.

33. In ***Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited*** [2016] eKLR, the Court of Appeal reiterated the fact that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.

34. In the case before the trial court, the respondent stated that his vehicle was damaged. He took it to a repairer who assessed the damage and prepared an assessment report which he produced in evidence. The assessment report put the cost of repairs at Kshs. 299,500. The respondent admitted in cross examination that the vehicle had not been repaired and that he had not receipts to support the claim for repair costs. This is what he told the court in cross examination;

> ***" I visited Dr. Mutiso to get a medical report. The P3 produced before court indicates that I had a head injury which were (sic) soft tissue injuries. My motor vehicle was extensively damaged and a report by the assessor was done but there was no photograph. Quotation on the damages was also issued amounting to Kshs. 299,500/=. The motor vehicle has not been repaired therefore I don't have a receipt. I have been paying kshs. 3000/= for taxi and I have produced the said receipts. I haven't repaired the motor vehicle. The person who was meant to repair motor vehicle had done his quotation."***

35. It is plain from the respondent's evidence that the vehicle had not been repaired. He also admitted that he did not adduce any evidence to prove his claim for repair costs. There were no receipts to show that money was expended to put the vehicle back to its original position which he wanted the court to order the appellant to reimburse him. Although he pleaded this claim, that he suffered special damage, he did not prove that the vehicle had been repaired. He was clear that as at the time of hearing the suit the vehicle had not been repaired.

36. As the Court of Appeal held in ***Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited*** (supra), apart from listing the alleged loss and damage, no evidence was lead in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. There was not credible documentary evidence in support of the alleged special damages.

37. And in ***David Bagine v Martin Bundi*** *(*283 of 1996) [1997] eKLR, the Court of Appeal, referred to the judgment by ***Lord Goddard CJ*** **in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177),** and again observed that:

> ***"It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the 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; they have to prove it."***

38. From the evidence on record, I am persuaded that the trial court fell into error when it allowed the claim for repair costs when it had not been proved as required by law.

Loss of user

39. The appellant also faulted the trial court for allowing the respondent's claim for loss of user. He argued that the respondent was required to prove the loss in terms of the amount lost by way of documents detailing the business he used to do using the vehicle. The respondent contended that he proved this claim through production of receipts. He argued that the amount awarded by the trial court was even less than what was in the receipts. He therefore urged the court not to interfere with the trial court's award. Both sides relied on several decisions to support their respective position.

40. I have considered the parties' respective arguments on this limb. I have also perused the trial court's record on this aspect. The respondent claimed damages for loss of user. In his plaint, he pleaded that he was paying Kshs. 300 per day for a hired vehicle. In his evidence, he stated that he paid Kshs. 3,000/- daily for that purpose. The appellant argued quite correctly that there was inconsistency between what was pleaded and the testimony yet the respondent did not amend his plaint.

41. The respondent pleaded that his vehicle was damaged and taken to a garage. It had not been repaired as at the time of hearing of the suit before the trial court. He pleaded that he was paying Kshs 300 daily and wanted that amount awarded to him from the time of the accident to the time the suit was determined. In his testimony, he stated that he was paying Kshs. 3000 daily for hiring a taxi to and from work and other personal engagements. The appellant argued that the respondent did not prove this claim and therefore the trial court was at fault in allowing it.

42. ***Samuel Kariuki Nyangoti v Johaan Distelberger*** (supra), where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

> ***"[16] The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases."*** (emphasis)

43. The Court of Appeal also cited with approval the decision of ***Apaloo, J.*** (as he then was) in ***Wambua v Patel & Another*** [1986] KLR 336,where the court had found the plaintiff had not kept proper records of what he earned but stated:

> ***""Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because***

he did not develop more sophisticated business method" …. But a victim does not lose his remedy in damages because the quantification is difficult."

44. In ***Team for Kenya National Sports Complex & 2 others v. Chabari M'Ingaruni (***Civil Appeal No. 293 of 1998), a claim for loss of use of a vehicle, a matatu, which had apparently been written off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts had been produced upon the court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff.

45. Further in ***Peter Njuguna Joseph & Another v Anna Moraa*** (Civil Appeal No. 23 of 1991), the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.(see also ***Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi.(***Civil Appeal No. 10 of 1991).

46. The above decisions are clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user.

47. In the present appeal, the respondent did not state in his pleadings what kind of vehicle he had; what it was used for and if he made any profit from its use. It was on that basis that he appellant argued that the claim for loss of user had not been proved. He testified however, that he hired a vehicle for use to and from work and other personal engagement. The appellant did not challenge this evidence in cross examination.

48. I have also perused the appellant's defence before the trial court. He denied generally that the respondent sustained injuries, loss and damage as particularized in paragraph 6 of the plaint and put him to strict proof. The appellant also denied that the respondent was entitled to both special and general damages pleaded in his plaint.

49. As already adverted to, parties recorded a consent on liability, the appellant shouldered 80% liability while the respondent took 20%. The issue of liability was therefore not in dispute before the trial court neither is it before this court. The issue is whether the respondent was entitled to the claim for loss of user.

50. The decisions cited by parties and those referred to by this court are on loss of user in the context of profit from the damaged vehicle. They are unanimous that loss of user is allowable and that the court should not unduly demand strict proof like in the case of special damages. In fact the Court of Appeal was clear that the head of loss of user is in the nature of general damages and is proved on a balance of probabilities.

51. The respondent claimed loss of user and stated that he had to hire a taxi for use after his vehicle had been damaged. He produced receipts which the appellant did not challenge. Loss of user in the context of the respondent's case, was the damage he suffered following the inconvenience of not having his vehicle available for use after it has been involved in an accident thus rendering it unfit for use temporarily for a period. A claim for loss of user in this case, refers to compensation for what the respondent suffered as a result of not being able to use his damaged vehicle.

52. Where he used the vehicle for personal convenience, it is the view of this court that his claim for loss of user could succeed in the absence of authority to the contrary. The vehicle was for use and the respondent did not use it due to damage caused by the appellant's negligence liability of which he admitted. The question then was how much.

53. The trial court awarded the respondent Kshs. 550,000/= on this claim. This is what the trial court stated:

"I have perused the submissions of both the plaintiff and defendant and the authorities annexed thereto as well as the consent recorded. In determining the amount due to the plaintiff the court has reviewed the injuries sustained and is of the view that a compensation of Kshs. 200,000/- is adequate for general damages…I also award Kshs. 299,500/- for special damages as prayed and proved. The court further awards Kshs. 550,000/- for damages for loss of use plus costs of the suit and interest at the rate of 10% from the date of decree." (Underlining mine)

54. The claim of loss of user being a claim for general damages, its award by a trial court amounts to exercise of judicial discretion. An appellate court would not readily interfere with the trial court's exercise of discretion unless it is shown that the court applied wrong principles of law; took into account irrelevant factors; failed to take into account a relevant factor or the award is inordinately high or low as to represent an erroneous estimate.

55. The trial court did not give reasons how it arrived at Kshs. 550,000/= for loss of user. The respondent pleaded that he was paying Kshs. 300/= per week while his testimony was that he was paying Kshs. 3,000/= daily for the hire of a taxi and produced receipts for Kshs. 3,000/=. He did not amend his pleadings to correct the amount to Kshs. 3,000/=. The trial court did not also state whether it accepted Kshs. 300 as pleaded or Kshs. 3,000/= in the testimony. The trial court was therefore in error for not justifying the amount of Kshs. 550,000/= it awarded to the respondent under this head.

56. In the circumstances of this case, the respondent pleaded Kshs. 300/= but testified that he paid Kshs. 3,000/=. There is no doubt his vehicle was damaged and he pleaded that he was spending some money to hire a vehicle for use. He produced receipts and agreements to that effect. The accident occurred on 18th February 2018 and the respondent started hiring a taxi thereafter.

57. I do not think a taxi could be hired at Kshs 300/= a day unless it was for a short distance. The respondent wanted to be compensated

from the time he hired the taxi after the accident to the time his suit was concluded. The law as laid down in the authorities is that a plaintiff should act reasonably and mitigate this loss. Courts have generally allowed a short period of about six months which would be reasonable to have the vehicle repaired.

58. In the respondent's case, this court will take that he spent a reasonable amount to hire a taxi. Having failed to amend his pleadings to harmonize the amount pleaded and that in his testimony, an amount of **Kshs. 2000/=** per day would be appropriate in the circumstances. The court would also accept a period of six months as reasonable to have had the vehicle repaired and released for use. That would work out to **Kshs. 60,000/=** per month and **Kshs. 360,000**/= for six months.

59. In the end, the appeal partially succeeds. The trial court's judgment dated 3rd September 2019 is partially set aside in that the award of **Kshs. 299, 500**/= to the respondent for repair costs of is set aside. The award of **Kshs. 550,000/=** for loss of use is also set aside and in place therefor the respondent is awarded **Kshs. 360,000/=.** As there was no appeal against the award of general damages of **Kshs 200,000/=** for personal injuries, that award remains.

60. The total award to the respondent is therefore Kshs. 560,000/=. This amount is subject to each party's level of contribution. Cost and interest as ordered by the trial court.

61. As the appeal has substantially succeeded, each party shall bear costs of the appeal.

62. Orders accordingly

Dated, Signed and Delivered at Kajiado this 2nd day of October, 2020.

E. C. MWITA

JUDGE