



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 109 OF 2019**

**JANE KHATERA.....APPELLANT**

**VERSUS**

**XPLICO INSURANCE CO. LIMITED...RESPONDENT**

**[Being an appeal arising from the Judgment of the Learned Trial Magistrate Hon. L.A. Akoth (RM) delivered in KISUMU CMCC NO. 401 of 2017 on the 19<sup>th</sup> day of September,2019]**

**JUDGMENT**

This appeal arises from the judgment which the learned trial magistrate delivered on 19<sup>th</sup> September 2019.

1. The Appellant, **JANE KHATERA** asserted that the trial court erred by dismissing her case, after the court had made findings which were favourable to the Appellant.
2. The second complaint was that the trial court erred by granting orders which were incapable of being enforced by the Appellant.
3. It was the Appellant's further contention that the trial court ought to have awarded costs to her.
4. As far as the Appellant was concerned, she had not only pleaded her claim for special damages, specifically, but had also led evidence to prove the said claim.
5. It is common ground that in the Amended Plaintiff, the Appellant asked for Special Damages in the sum of Kshs 826,000/=.
6. The other reliefs sought in the Plaintiff were for;
  - a. **An order that the defendant do settle the outstanding bill with Check-In-Motors, to enable Check-In-Motors release the motor vehicle registration No. KCD 383A to the plaintiff.**
  - b. **An Order that the defendant do pay the plaintiff for Loss of User at Kshs 3,000/= per day from the date when the vehicle was supposed to be repaired, until the vehicle is released to the plaintiff.**
7. Being the first appellate court, I have an obligation to re-evaluate all the evidence on record, and to derive therefrom, my own conclusions.
8. However, I must always bear in mind the fact that, (unlike the learned trial magistrate), I did not have the benefit of observing the witnesses when they were testifying.
9. In the Plaintiff, the Plaintiff asserted that she was the owner of the motor vehicle KCD 383A; and that at all material times the said vehicle was insured by the Defendant, **XPLICO INSURANCE COMPANY LIMITED**.
10. The Plaintiff said that on 17<sup>th</sup> June 2016 the vehicle in issue was involved in a road accident along the Kakamega-Webuye Road.
11. Due to the accident, the vehicle was damaged extensively.

12. As the vehicle was insured by the Defendant, the Plaintiff said that she informed the Defendant about the accident.
13. The Plaintiff's case was that it is the Defendant who directed that the vehicle be towed to Check-In-Motors, Kisumu, where it was to be repaired.
14. The Plaintiff added that the Defendant appointed Kenya Pride Automobile to assess the loss sustained by the Plaintiff.
15. She said that Kenya Pride Automobile estimated the loss at Kshs 664,448/=; and that the Defendant gave authority to Check-In-Motors to repair the Plaintiff's vehicle.
16. However, Check-In-Motors thereafter notified the Defendant that three of the parts required for the repair-work were not available locally. Check-In-Motors informed the Defendant that the overall cost of the repairs would go up from Kshs 664,448/=, to Kshs 826,000/=.
17. According to the Plaintiff, her vehicle had not yet been repaired.
18. Whilst waiting for the vehicle to be repaired, the Plaintiff asserted that she sustained Loss of User.
19. She also said that she had tried to get her vehicle back from Check-In-Motors, with a view to arranging for alternative means of carrying out the necessary repairs. But the Check-In-Motors are said to have declined to release the vehicle to the Plaintiff saying that she was not their customer.
20. It is in those circumstances that the Plaintiff instituted proceedings against the Defendant.
21. In its Defence, the Defendant denied most of the assertions which the Plaintiff had made in her Plaint.
22. According to the Defendant, it had no idea about whether or not the Plaintiff owned the vehicle in issue. The Defendant also denied having been the insurer of the said vehicle.
23. The Defendant asserted that it had no knowledge of the accident in which the vehicle was involved.
24. It also denied having;
  - i. given instructions to have the vehicle *taken to Check-In-Motors for repairs*;
  - ii. appointed Kenya Pride Automobile;
  - iii. given authority to Check-In-Motors to *repair the Plaintiff's vehicle*.
25. The Defendant asserted that if any instructions were given to have the vehicle repaired at Check-in-Motors; or if any authority was given to the said Check-In-Motors to carry out the repairs, the persons who did so had no authority from the Defendant.
26. The Defendant asserted that there must have been a conspiracy between the unauthorized persons and the Check-In-Motors, with a view to hold the Defendant liable.
27. The foregoing is a summary of the respective parties cases, as laid out in the pleadings.
28. The Appellant testified as **PW1**. She testified that her vehicle, registration number **KCD 383A** was involved in an accident on 17<sup>th</sup> June 2016.
29. The accident was reported at the Malava Police Station. A Police Abstract was issued by the police, and the Plaintiff exhibited it in court.
30. According to **PW1**, the accident was reported to the Defendant, who then issued her with a Motor Claim Form.
31. **PW1** filled-in the Claim Form dated 18<sup>th</sup> June 2016; and a copy thereof was produced in court.
32. **PW1** testified that it is the Defendant who assigned assessors, Messrs Kenya Pride Automobile Assessors, who then gave the estimated cost of the repairs as being Kshs 664,448/=.
33. A copy of the Repair Estimate was produced in evidence.
34. The testimony of **PW1** is that Check-In-Motors wrote to the Defendant, requesting that an additional amount of Kshs 161,552/= be added to the estimated costs which had been prepared by Kenya Pride Automobile Assessors. The explanation for that request was that the Nose-cut; Airbags and the Rear-view Mirror were not available locally.
35. There is no evidence of any response to that request.

36. According to the Plaintiff, she requested Check-In-Motors to allow her to carry out the repairs, after she had noted that the whole exercise was taking too long. However, Check-In-Motors declined the request, stating that the Plaintiff was not their customer.
37. As the vehicle still remained at Check-In-Motors, the Plaintiff sought the assistance of the court to get it back, and in a good condition.
38. The Plaintiff also asked for compensation for Loss of User at the rate of Kshs 3,000/= per day.
39. She said that the vehicle was for her personal use. Therefore, during the period of time when she had been denied the use of the car, the Plaintiff said that she was compelled to use alternative modes of transport.
40. After the Plaintiff closed her case, the Defendant informed the trial court that it would call no witnesses.
41. I have re-analyzed all the evidence on record. I find that there was a valid Contract of Insurance between the Plaintiff and the Defendant.
42. The said Insurance Contract was valid between 18<sup>th</sup> September 2015 and 17<sup>th</sup> September 2016. Therefore, the insurance cover was in force at the material time.
43. Secondly, I find that the Plaintiff's motor vehicle, registration number **KCD 383A** was involved in an accident along Kakamega-Webuye Road.
44. The uncontroverted evidence, adduced by the Plaintiff proved that;
- 1. The defendant was notified about the accident;**
  - 2. The defendant instructed a firm of Assessors named Kenya Pride Automobile Assessors Ltd., who conducted the assessment of the plaintiff's vehicle.**
  - 3. The defendant had the vehicle taken to Check-In-Motors, for purposes of repairs.**
  - 4. The defendant issued a letter of authority to Check-In-Motors to carry out the repairs.**
  - 5. The "Repair Authority Letter" dated 22<sup>nd</sup> August 2016 specified that the defendant would settle the sum of Kshs 598,004, out of the estimated repair costs of Kshs 664,448/=. The said letter made it explicitly clear that the plaintiff was expected to pay Kshs 66,444/= directly to the garage.**
45. In the light of the foregoing, the Defendant had an obligation to pay the sum of Kshs 598,004/=.
46. However, Check-In-Motors asked the Defendant to adjust the overall payable sum upwards, to Kshs 826,000/=.
47. As I have already noted earlier herein, the Defendant did not give any commitment to Check-In-Motors.
48. In my considered opinion, there was a lack of consensus between the Defendant and the Check-In-Motors. The said development rendered it difficult for the Plaintiff to retrieve her vehicle from the garage, because the vehicle had been taken to the garage upon the instructions of the Defendant.
49. I find that the attempts made by the Plaintiff, to try and retrieve her vehicle, so that she could make alternative arrangements for its repair, constituted mitigation of her losses.
50. The learned trial magistrate declined to award the Plaintiff the Special Damages of Kshs 826,000/=. In my considered opinion, the trial court cannot be faulted for the said decision. I so hold because the Defendant could not be compelled to pay to Check-In-Motors the said amount which had been proposed by Check-In-Motors; but which the Defendant had never undertaken to pay.
51. If there was a stalemate between Check-In-Motors and the Defendant, the Defendant ought to have put in place alternative arrangements for the repair of the Plaintiff's vehicle.
52. The Plaintiff could not compel the Check-In-Motors to release the vehicle to her, as she is not the person who had a contract with the said garage.
53. By failing to either agree with Check-In-Motors to carry out the requisite repairs, or arranging for alternative persons to do the needful, the Defendant caused the Plaintiff to suffer loss.
54. She has suffered Loss of User.

55. In the case of **NDUNGU TRANSPORT COMPANY LIMITED & ANOTHER Vs DANIEL MWANGI W. LETEIPA [2018] eKLR** Mumbi Ngugi J. expressed herself thus;

**“What emerges from these decisions is that the correct position in law in this jurisdiction is that a claim for loss of user is a special damage claim.**

**Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved cannot stand.”**

56. In this case I note that the plaint contained a prayer for the award of compensation;

**“..... for loss of user at Kshs 3,000/= per day, from the date the vehicle was supposed to be repaired as per the Insurance Regulatory Authority Rules.”**

57. The Plaintiff did not lead evidence to prove what the said Insurance Regulatory Authority Rules stipulated in respect to her specific claim. In other words, the pleading was not specific, in that regard.

58. The pleadings were also not specific about what constituted the basis of the claim at the rate of Kshs 3,000/= per day.

59. If the Plaintiff was hiring a vehicle every day, she should have so specified.

60. Apart from the lack of specificity in the pleadings, I find that the Plaintiff did not specifically prove the losses she sustained.

61. Therefore, the trial court cannot be faulted for rejecting the Appellant’s claim for loss of user.

62. Meanwhile, as regards the sums payable to Check-In-Motors, I find that the Defendant was liable to pay to Check-In-Motors the sum of Kshs 598,004/=, in accordance with the Repair Authority Letter dated 22<sup>nd</sup> August 2016. The said sum would be payable, as and when Check-In-Motors had carried out the requisite repairs.

63. If, for any reason, Check-In-Motors is unable to carry out the repairs under the terms which the Defendant had authorized, it is the responsibility of the Defendant to get that garage to release the vehicle to either the Plaintiff or to another garage. I so hold because in the letter dated 22<sup>nd</sup> August 2016, the Defendant had expressly told the garage that;

**“The vehicle should NOT be released before Re-inspection and proof of release letter from us.”**

64. In my considered view, the learned trial magistrate erred when she dismissed the Plaintiff’s suit, yet at the same time directed the Defendant to;

**“..... cause repair authority letter dated 22/08/2016 to be executed to the letter.”**

65. By ordering the Defendant to execute the contents of the Repair Authority Letter, the trial court must be deemed to have found the Defendant liable, to that extent.

66. The bottom-line of the Plaintiff’s claim is that she wishes to have her vehicle returned to her by the Defendant, after it is properly rectified.

67. If the Defendant decides to have the repairs carried out at Check-In-Motors, the Plaintiff would be obliged to pay Kshs 66,444/=, to the said garage.

68. Justice demands that the Defendant meet its obligations under the policy of insurance.

69. Therefore, the Defendant is ordered to have the vehicle repaired and released to the Plaintiff within the next 30 days, or in the alternative, the Defendant should get the vehicle returned to the Plaintiff forthwith, together with the sum of Kshs 598,004/=, which the Defendant had expressly committed itself to being liable for.

70. Accordingly, the appeal is allowed, as set out above. The Respondent shall pay to the Appellant the costs of the appeal as well as the costs of the suit.

**DATED, SIGNED and DELIVERED at KISUMU This 5<sup>th</sup> day of November 2020**

**FRED A. OCHIENG**

**JUDGE**