REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J

CIVIL APPEAL NO. 146 OF 2018

BETWEEN

PAUL OSUGO MAKOMBI..... APPELLANT

AND

SAMUEL ONDIEKI MOMANYI.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon.J. K. Mutai, RM dated 20th November 2018 in Ogembo SRMCC No. 61 of 2016*)

JUDGMENT

1. It was not in dispute that on 5th August 2015, the appellant's motor vehicle registration number KCA 022C ("the Probox") and the respondent's motor vehicle registration number KCD 102E ("the Matatu") collided at Itumbe area along Kisii-Kilgoris road. The trial magistrate found the appellant fully liable and entered judgment for the respondent for Kshs. 542,472.00 as follows:

Material damage	Kshs. 361,572.00
Vehicle valuation charges	Kshs. 5,900.00
Towing charges	Kshs. 30,900.00
Loss of use	Kshs. 150,000.00

2. The appellant appeals the finding on liability and assessment of damages based on the grounds of appeal set out in the memorandum of appeal dated 19th December 2018. In considering the ground therein, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126**).

3. I will tackle the issue of liability first. The respondent (PW 1) testified that he was the beneficial owner of the Matatu. He was informed of the accident, reported the matter to the police and was issued with a police abstract. An eye witness to the accident, Charles Nyandwaro Makori (PW 3), recalled that on 5th August 2015, he was on board the Matatu heading from Kisii to Itumbe when the Probox started overtaking other vehicles and hit the Matatu head on. He told the court that the Matatu was travelling at about 50kph while the Probox was overspeeding and overtaking at a corner.

4. The appellant (DW 1) testified that he was a passenger in the Probox and on the material day. When the vehicle reached Itumbe area, he saw a tractor and Toyota Saloon ahead of them. The Toyota saloon applied emergency brakes forcing his driver to swerve right to avoid knocking the Toyota Saloon from behind. Before the Probox could full swerve right, the oncoming Matatu and knocked the bumper and headlight and plunged into a ditch on the left side of the road. The driver of the Probox, Geoffrey Mayaka Ogega (DW 2) recalled that the as he was heading to Kisii, a Toyota Saloon ahead of him applied emergency brakes and in order to avoid hitting it, he swerved to the right but the oncoming Matatu emerged from the opposite direction at a high speed and reamed into the front bumper of Probox and damaged the head light. The Matatu lost control and landed into a ditch on the left side of the road.

5. The trial magistrate in a perfunctory judgment failed to analyse the testimony of the witnesses before coming to a conclusion on the issue of liability. The court held as follows:

> *I have evaluated the evidence and I find that the defendant made bare denials which he had difficulty sustaining at the trial. The*

narrative is a poorly constructed one and only points toward culpability of the driver of motor vehicle registration mark KCA 022C for the accident.

6. Counsel for the appellant submitted that there was a collision of two vehicles hence the trial magistrate ought to have apportioned liability and based on the facts of the case, the respondent should have borne greater liability particularly since the driver of the Matatu did not testify to give an account of the accident hence the appellant case was more believable. Counsel for the respondent supported the conclusion of the trial magistrate on the ground that the Probox hit the Matatu from the front and that there was no evidence that the appellant's driver could not have been avoided.

7. I have re-evaluated the evidence and I am satisfied that there was a collision involving the Matatu and the Probox. Both parties and their witnesses blamed each other in their respective pleadings and therefore the trial magistrate erred in holding that the appellant's defence was a bare denial. The question for consideration is who was to blame for the accident and if so, to what extent.

8. In as much as the respondent did not call the driver to testify, PW 3 was a competent witness who was present when the accident took place. His view of the accident that the Probox was trying to trying to overtake before it hit the Matutu is supported by the fact the Matatu was damaged on the front right side. On the hand the appellant's case does not hold much water. If there were two vehicles in front of Probox, why would the Matatu be overtaking when there were two vehicles which it did not hit? Further, the testimony of DW 1 and DW 2 is that the Matatu landed in a ditch on the left side of the road. If this was true, the Matatu would have sustained damage on its left side which is not supported by the evidence. The totality of the evidence is that the Probox was overtaking when it hit the Matatu. This is supported by the damage sustained by the Matatu on its right side and the damage sustained by the Probox on its right side. The Matatu cannot escape liability as it may have been driving too fast to slow down and avoid a collision of an oncoming vehicle. I would therefore apportion liability at 80:20 against the appellant.

9. As regards the issue of damages, the appellant complained that the respondent did not prove his case as he relied only on the estimate of repairs rather that the real cost of repair. He also complained that the claim for loss of user was not established to the required standard. Both parties agreed that the special damages must be pleaded and proved to the required standard.

10. The gravamen of the appellant's case is that the respondent failed to provide evidence of actual repair as opposed to the assessor's report which was produced by Francis Egesa (PW 2). He testified that he was an employed by the Automobile Association of Kenya as a valuer/motor vehicle assessor. He prepared a report on instruction of PW 1 which showed that the total replacement and labour costs amounted to Kshs. 361,572/-. The report showed that the damage on the Matatu was on the right side. He based the estimate the cost of parts from garages and spare part sellers. PW 2's qualifications were not challenged and neither was the cost of the replacement parts or the estimated cost of repair. I also find that PW 2's description of the damage was consistent with the testimony of PW 1 and PW 3.

11. When a similar issue was raised in ***Nkuene Dairy Farmers Co-operative Society Limited v Ngacha Ndeiya*** **NYR CA Civil Appeal No. 154 of 2003 [2010] eKLR**, the Court of Appeal settled the matter as follows:

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.

12. Based on the aforesaid decision and the uncontested valuation report, I find and hold that the respondent proved that the cost of damage to the Matatu amounted to Kshs. 361, 527. The cost of the report and towing charges for the Matatu were controverted and were properly awarded.

13. The final claim concerns the item for loss of use. There is no dispute that the respondent's vehicle was a Matatu. The question for resolution is whether the respondent proved that he was earning Kshs. 4,000/- per day as his net income. Apart from a bland statement, the respondent did not give or provide any evidence of the earning or a record of such earning. I find that PW 1's testimony is insufficient to support his claim for loss of use. In ***Samuel Kariuki Nyagoti v Johann Distelberger*** **NRB CA Civil Appeal No. 59 of 2010 [2017] eKLR** the Court of Appeal considered whether a claim for loss of use had been substantiated to the required standard. It observed as follows:

[20] The appellant proved by evidence that his vehicle was operating as a matatu and that at the time of the accident, it was so operating. It was assessed as a write off and an award was made for loss of the vehicle. He claimed loss of user of Kshs. 3,500/- a day for one year. He gave evidence of the routes he was operating – Nairobi, Thika Matuu and that he was making three trips a day. He also gave evidence of what the vehicle earned for each trip and the expenses incurred per day including the cost of fuel and the fees he paid for the stage. He testified that the daily net income used to fluctuate from Kshs. 4,000/- to 3,500/- and that the records were lost during the accident.

14. Unlike in the aforementioned case, the respondent did not give any evidence of the routes the Matatu plied, the number of trips per day, the fare charged and collected and the expenses paid. He did not produce any licences or business documents that would have been used to support the claim by shedding light on his business. I therefore find and hold that although the claim was pleaded, it was not proved to the required standard.

15. For the reasons I have set out, I allow the appeal, set aside the judgment and decree of the subordinate court and substitute it with judgment for the respondent against the appellant on liability apportioned at 80:20 against the appellant and for Kshs. 392, 472.00 as special damages made up as follows:

Material damage	Kshs. 361,572.00

Vehicle valuation charges	Kshs. 5,900.00
Towing charges	Kshs. 30,900.00
TOTAL	Kshs. 392,472.00

16. The judgment shall accrue interest at court rates from the date of filing suit until payment in full. The respondent shall have costs of the suit in the subordinate court while the appellant shall have costs of the appeal which I assess at Kshs. 50,000/- exclusive of court fees.

DATED and **DELIVERED** at **KISII** this 4th day of **APRIL** 2019.

D.S. MAJANJA

JUDGE

Ms Mogusu instructed by Mogusu Miencha and Company Advocates for the appellant.

Mr K. Gichana instructed by Ben K. Gichana and Company Advocates for the respondent.