



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO 14 OF 2017

JAMES KISSINGER MORE T/A MORSOFT SYSTEM.....APPELLANT

VERSUS

G4S SECURITY SERVICES (K) LTD.....RESPONDENT

(An appeal arising from the judgment and decree of Bondo Principal Magistrate in Civil Suit No. 72 of 2015-Hon M. Obiero, PM delivered on 2/8/2018)

JUDGMENT

1. This appeal arises from the Judgment and decree of Hon. M. Obiero Principal Magistrate rendered on 8/2/2018 in Bondo PM Civil Suit No 72 of 2015. The appellant's claim in the lower court was vide plaint dated 26th February, 2015 wherein the appellant sought for special damages in the sum of Kshs 94,000 being the cost of his Photocopier machine which the respondent had undertaken to convey for the appellant from Mombasa to Usenge in Siaya County and which machine was upon delivery, found damaged.
2. According to the appellant, the damaged photocopier was returned to the respondents who undertook to repair the same after an assessment was done by a technician from MFI Solutions but that the respondent failed, refused and or neglected to repair the same hence the appellant sought to be compensated for the loss of the machine and also for the loss of business prospects.
3. The defendant respondent filed a defence denying the appellant's claim for loss and damage but stating that it received the consignment and dispatched it to its destination but was not received and that it made a diligent search to confirm whether the parcel may have been misdirected but has been unable to locate it and that it conveyed the information to the appellant herein. Further, the respondent in its defence stated that under the conditions of service of the contract, displayed in the defendant's premises and written on the reverse of the collection sheet issued to the plaintiff, the plaintiff in these circumstances is only entitled to compensation not exceeding Kshs 1,000. In addition, the respondent contended that the contract document also contained advice from the defendant to its customers to sell (sic) all items of value being sent through the courier service.
4. The facts of this case are straightforward. Goods belonging to the plaintiff appellant herein were entrusted to the defendant Respondent **G4S SECURITY SERVICES (K) LTD**, a common carrier, through a contractual arrangement which was made by the defendant appellant for the one part, and the plaintiff appellant for the other part.
5. None of the parties amended their pleadings. At the trial, the plaintiff testified as PW1 and stated that he was a businessman at Usenge. He adopted his witness statement filed in court and asked for compensation in the sum of Kshs 94,000 plus general damages for the machine. He stated that he contracted the respondent herein to transport and deliver a machine from Mombasa to Usenge but that unfortunately, the machine was delivered while damaged. He complained by way of a letter and that the respondent accepted to repair the machine at an estimated cost of Kshs 38,164.00. However, the respondent failed to repair. He stated that the incident occurred on 20.4.2009.
6. According to the appellant he wrote a letter dated 21.5.2015 reminding the respondent to replace the machine and that the respondent replied stating that they were conducting investigations. The plaintiff/appellant testified that the respondent accepted liability and indicated that they were ready to compensate and so he gave them the machine and the receipts for purchase of the machine but that to that date of hearing the respondent had declined to pay. He stated that the machine was conveyed in February 2009.
7. On being cross examined by Mr. Siganga advocate for the respondent, the plaintiff stated that the business was a company with the appellant and his father being directors and that his father was writing letters as a director. He stated that he wrote the first letter dated 9.3.2009 although he did not have its copy. The plaintiff also stated that their core business was computer services based in Usenge and that he used courier services a lot. He stated that the services provides a weigh bill which he did not have in court and added that the respondent had never asked him for the weigh bill. He stated that the machine was in the custody of the respondent since 2009. He also added that he took it to Bondo Office and it was forwarded to KISUMU Office. That he took it with one of the respondent's employees to MFI Solutions.

8. He stated that MFI Solutions wrote him an invoice and that they also do photocopy business and that they were licensed but denied that the license was one of the documents he intended to rely on. He stated that they made returns to the Registrar and that he had tax returns but not produced in court. According to the appellant, the figures for loss of user were an estimate. He denied insuring the items he send using courier services.

9. The appellant was later recalled and in his further testimony given on 1.3.2017 he stated that he was a computer technician. He also produced a bundle of documents which included correspondences copy of receipts and an invoice for the repair of the computer (sic). He stated further that the machine was at that particular time with the Respondent but that it was never repaired. He prayed for compensation for the machine and loss of use of the same.

10. In further cross examination by Mr. Amula counsel for the respondent, the plaintiff stated that he went to G4S Kisumu and was assisted by one Ondwich and that the personnel of G4S looked at the machine and advised him to go and get the quotation so he proceeded to MFI Solutions and was given a quotation. Further, that later he went back to G4S office and handed over to them the said quotation, an invoice.

11. The plaintiff/appellant closed his case without calling any witness.

12. The defendant called one witness **Macmu Ronald Ambulo** who testified on 31/5/2017 as DW1 and stated that he was based in Kisumu and that he knew the plaintiff. He stated that he worked with G4S in courier department and that the company deals in transportation of goods. He admitted that the plaintiff was their customer and that they transported his parcel to Kisumu in 2009.

13. DW1 stated that when the plaintiff went to pick his parcel, the respondent realized that it was a photocopier machine and that the glass had cracked where paper is normally placed. A manager Mr. George Ayako was called to witness the damage and that the company was to compensate the plaintiff. According to the respondent's witness, there were two options that of repairing the machine or the customer was to go with the machine and submit to the respondent the quotation and that the appellant chose to go with the machine and avail the quotation. He stated that the respondent also assessed the damage and that Mr. Ayako consulted a technician who gave the quotation to be Kshs 1,500.

14. On being cross examined by Mr. Baqwaja advocate for the appellant, DW1 stated that the only damage to the photocopier was the broken glass. He denied knowledge of any other damage. He stated that the cost of such machines would be about Kshs 25,000, but that he did not know the exact price. He stated that the machine was dispatched in Mombasa to Kisumu through Nairobi. That it was an old machine. The witness admitted that the machine was damaged while in transit. He stated that the appellant took the machine with hi. He stated that the company undertook to settle the claim. He denied that the company representative was present when the machine was taken to MFI Solutions for assessment. He denied that they were liable to replace the machine with a new one as the machine was not damaged beyond repair.

15. In reexamination, the respondent's witness maintained that the company would only compensate the appellant for the broken glass.

16. The parties advocates were given time to file written submissions but only the appellant's counsel filed written submissions upon which the trial court rendered its decision dismissing the appellant's claim for the cost of the machine at Kshs 94,000. Instead, the trial magistrate held that the plaintiff was only entitled to Kshs 38, 164, being the cost of repair of the machine. In addition, the trial court awarded the appellant Kshs 300 per month for three months being the claim for loss of use of the machine.

17. Dissatisfied with the judgment and decree of the trial court, the appellant herein filed this appeal setting out the following grounds of appeal:

1. That the learned trial magistrate erred in law by failing to find and hold that special damages had been specifically proven as pleaded by failing to award the appellants a sum of Kshs 94, 000 being the value of the photocopy machine claimed.

2. The learned trial magistrate erred in law and fact by failing to carefully evaluate the evidence tendered and appreciate that the photocopy machine claimed has been in custody of the respondent from March 2009 and the appellant did not claim or need repair costs of Kshs 38, 164 as awarded.

3. The learned trial magistrate totally misdirected himself in evaluation of the evidence produced before him and arrived at a wrong decision on quantum awarded for loss of user thereby occasioning a miscarriage of justice.

4. The ruling is contrary to the provisions of Order 21 of the Civil Procedure Rules and provisions of the Evidence Act.

5. The decision was against the weight of the evidence tendered.

18. The appellant prayed that the appeal be allowed, judgment and decree of the trial court dated 2nd August 2017 be set aside and judgment be entered for the appellant as prayed for in the plaint.

Submissions on appeal

19. Only the appellant filed submissions on 28th November, 2018 which were adopted to canvass the appeal herein. On ground one, the appellant's counsel submitted that the appellant in his plaint had specifically pleaded for special damages of Kshs 94,000 which he also proved at the hearing by producing a receipt for purchase of a new photocopier but that the trial magistrate erred in awarding the appellant Kshs 38,164 which was the cost of repairs and which the appellant never asked for. Reliance was placed on **Capital Fish Kenya Limited v KPLC Ltd [29016] e KLR; NSSF v Sifa International Ltd[2016], Macharia & Waiguru v Muranga Municipal Council & Another[2014]e KLR and Provincial Insurance Co. EA v Mordecai Mwanga Nandwa Ksm CACA 179 of 1995 [UR]**, on the requirement that special damages must be specifically pleaded and strictly proved.

20. On ground two, the appellant's counsel submitted that the trial magistrate made a hasty conclusion that the appellant was in possession of the machine and proceeded to award him repair costs of Kshs 38,164 which he never pleaded yet the appellant testified that he gave the respondent the machine and receipts for purchase of the same. Counsel maintained that the machine was never returned to the appellant. That the appellant never signed for the release of the consignment from the respondent hence there was no evidence that the appellant was in possession of the photocopier machine.

21. On ground three, the appellant's counsel submitted that the appellant was entitled to Kshs 600 per day for loss of user of the machine because there was correspondence by the appellant to the respondent on what the appellant was losing per day hence the court should have awarded Kshs 108, 000 and not Kshs 27,000. Reliance was placed on *George Monte v Fredrick Kokai Kusero CC No 2027 of 1995* where the court observed that the loss of user of Kshs 3,000 per day was pleaded in the plaint and the defendant did not ask for further and better particulars thus entered judgment at the pleaded rate and guided by the decision in *David Bagaine v Martin Bundi CA 283 of 1996*, the court allowed reasonable time for repairs to be five months.

22. On grounds four and five, learned counsel submitted that the trial magistrate did not set out reasons for the decision hence the judgment was deficient of the requirements under Order 21 Rules 4 and 5 of the Civil Procedure Rules. It was also submitted that the trial magistrate failed to consider the appellant's testimony and so he arrived at a wrong decision. Reliance was placed on *South Nyanza Sugar Co Ltd v Omwando Omwando [2011] e KLR*. The appellant prayed for judgment in its favour as sought in the plaint and costs at both levels.

DETERMINATION

23. I have considered the appeal herein, the pleadings and evidence in the lower court, the submissions by counsel for the appellant in this appeal and before the trial court as supported by the decided cases cited. In my humble view, the following issues flow for determination:

- 1. Whether the appellant was entitled to Kshs 94,000 being the cost of a new photocopier machine.**
- 2. Whether the trial magistrate erred in awarding the appellant Kshs 38,164 for the costs of repair of the machine, which sum was never pleaded or sought by the appellant**
- 3. Whether the appellant was entitled to the loss of user and if so, at what rate per month and for what reasonable period.**
- 4. Whether the trial magistrate in arriving at the decision that he did failed to give reasons for the decision thereby violating the provisions of Order 21 of the Civil procedure Rules and the Evidence Act**
- 5. What orders should the court make**
- 6. Who should bear costs of this appeal?**

24. It is not in dispute that the defendant respondent herein accepted liability for damaging the appellant's photocopier machine and agreeing to have it assessed for repairs. This is evident from the testimony of DW1 who clearly testified that the machine was consigned but on delivery it was found to have been damaged and that the appellant was given two options of repairing the machine or the customer to go with the machine and give the respondent the quotation. According to DW1, the customer opted to take away the machine and to avail the quotation. According to the respondent's witness, the appellant took away the machine and that the respondent also assessed the cost of repair to be just Kshs 1500. On the part of the appellant, he maintained that he gave out the machine and documents to the respondent and that the machine was never surrendered back to him.

25. Counsel for the appellant in his submissions before this court asserted that he had submitted in the lower court that no consignment or parcel can be received from the Respondent Company without the appellant having signed a delivery note signifying acceptance or acknowledgement. The trial magistrate in his analysis of the evidence adduced by the appellant found that the letter dated 23rd April 2009 from MFI Solutions addressed to the appellant, which also provided the assessment for the cost of repair of the damaged machine was clear that the MFI Solutions personnel had visited the appellant's organization and assessed the damage on the machine at the appellant's premises. On that basis, the trial court made and inference and concluded that the subject material machine must have been at the Appellant's premises and not at the respondent's premises.

26. The law is clear that he who alleges must prove. See sections 107-109 of the Evidence Act. In this case, it was upon the appellant to prove that the machine had been delivered to the respondent to assess the damage and compensate the appellant for the said damage. I have perused the exhibits produced by the appellant in support of his case but I do not see any document showing that the appellant either received the damaged machine from the respondent or that he delivered the same to the respondent for assessment of the damage for purposes of repair. With the letter dated 23rd April 2009 clearly showing that the MFI Solutions visited the appellant's organization where they carried out the assessment of the damage, it is not for the respondent to prove that they delivered the machine to the appellant but for the appellant to demonstrate that after the said assessment by MFI Solutions, the appellant delivered the machine to the respondent for repair or compensation for a new machine.

27. In my humble view, the trial magistrate's finding of fact was supported by the assessment of not only oral evidence but documentary evidence adduced and I therefore find no fault in his finding that the machine was with the appellant.

28. Moreover, if the machine had been at the respondent's premises when MFI Solutions were assessing it, then the latter would have sent to the respondent the invoice to settle and not to the appellant. I therefore believe the evidence of DW1 when he testified that out of the two options given to the appellant, he chose to go with the machine and bring the quotation for repairs which from the letter of 23rd April 2009, he did.

29. I have also examined the exhibits produced by the appellant and I note that the appellant's letter dated 21-5-2009 does not mention anything to do with the assessment done by MFI Solutions. The appellant was demanding for immediate replacement and delivery of the machine. The rest of the photocopy of the letter is redacted. It would appear that the appellant covered part of the communication when photocopying the said letter and as the exhibit was a photocopy, this court is unable to appreciate what else the appellant was communicating to the respondent.
30. Although the appellant claims that the machine was delivered to the respondent together with receipts for the purchase as requested by the respondent, the letter dated 18/3/2010 written by the appellant's counsel Neto Otieno & Co Advocates shows that only **copy of receipt proof of purchase** of the aforesaid copier was sent and no mention of the original or physical machine being delivered was made in the said letter. In any event, a machine could not be enclosed in a letter. It had to be delivered physically. No means of delivery of the machine is mentioned anywhere in the correspondence between the parties.
31. Furthermore, from the appellant's own exhibit which is a receipt for Kshs 94,000 dated 6th February 2009 for the purchase of the machine, this court observes that the quantity of the purchased items was four. The first two identical items description is not clear from the photocopy, but the price was Kshs 35,000 for two items. The second item is a HP Printer used at Kshs 5,000 whereas the fourth item was a **Mita Copier used priced at Kshs 50,000**. The total amount shown for the four items is Kshs 94,000. The appellant did not in his evidence attempt to distinguish the items purchased and whether all the listed items suffered damage leading to the claim for the whole Kshs 94,000.
32. Even the invoice letter dated 23rd March 2009 by MFI Solutions mentioned the damage to **Kyocera Mita Photocopier Model DC 1856 SERIAL No. NH007312H** and not to the other three items contained in the photocopy of receipt for purchase of the items listed. The invoice shows the damaged items in the **Kyocera Mita Photocopier to be the Drum, Developer and Platen Cover Glass** and the cost of each damaged part is indicated.
33. The question that this court poses, being a first appellate court and in exercise of its powers under section 78 of the Civil procedure Act is whether the appellant bought the Mita Photocopier at Kshs 94,000 and therefore whether he was entitled to this amount or whether the Mita Photocopier as a separate item on the purchase receipt was purchased at Kshs 50,000? I find that from the photocopy of receipt produced as exhibit, the Mita Photocopier was a separate item purchased at Kshs 50,000 and not Kshs 94,000 which was claimed by the appellant. In addition, I find that there was no evidence to show that all the four items were damaged in transit to warrant a claim for Kshs 94,000 by the appellant.
34. In my humble view, the appellant was economical with the truth and this aspect escaped the attention of the trial court. Therefore, assuming that the appellant had proved his case on a balance of probabilities, that the respondent was in possession of the photocopier, and that the appellant was therefore entitled to compensation for a new machine, my observation is that the appellant would only be entitled to Kshs 50,000 and not Kshs 94,000. This is because, as stated above, a used HP printer and the other first two identical items as listed costing Kshs 17,500 are not the same as a used Mita Copier.
35. It was also not demonstrated before the trial court that the first two identical items whose cost is stated as Kshs 17,500 per item, totaling to Kshs 35,000 were inseparable components of the Mita Copier.
36. The other issue that this court has with the trial court's permitting production of secondary evidence in the form of photocopy of the receipt which is not clear is that although the appellant stated that the original receipt was with the respondent and the trial court bought that argument, the letter dated **18th March 2010 written by Neto Otieno Advocate** to the respondent only forwarded **a copy of the receipt as proof of purchase** of the damaged Copier. There was no Notice to Produce served upon the respondent to produce photocopy of the receipt, as required under section 69 of the Evidence Act.
37. In addition, although the said copy of receipt was sent to the respondent vide letter of 18/3/2010, the photocopy of receipt filed in court and produced as exhibit **is certified on 7/04/2015 as true copy of the original, long after the copy of the receipt had been delivered to the respondent**.
38. I have also observed that another document which was certified as a true copy of the original and which was produced as exhibit by the appellant is the invoice dated 23rd April, 2009. Therefore, the question is, which receipt and invoice were being certified as original on 7/4/2015 if the appellant was not in possession of originals thereof as at 7th April 2015 as per the certification stamp of **Kennedy Ochieng Omollo, Commissioner for oaths**?
39. In my humble view, this is what further proves that the appellant was not truthful. He acted mischievously by deliberately withholding from the court primary documentary evidence which were in his possession with a view to gaining an undue advantage over the defendant/respondent herein.
40. This court notes that the appellant filed the suit in person before instructing an advocate to represent him in the course of the hearing and therefore the advocate may not be privy to these mischiefs noted by this court. His plaint filed in court on 7th April 2015 and dated 26th February 2015 was accompanied by a verifying affidavit sworn on 7th April 2015 before Kennedy Ochieng Omollo, the Commissioner for Oaths who certified his documents to wit, the invoice dated 23rd April 2009 and the receipt dated 6/2/2009 as true copies of the originals.
41. In the view of this court, had the trial magistrate been vigilant on this piece of documentary evidence produced by the appellant herein, he could not have allowed the production of photocopies of the receipt and invoice as exhibits, which photocopies are not clear especially the receipt and as no Notice to Produce was served upon the respondents as required by section 69 of the Evidence Act.
42. For the above reason, the trial court ought to have found that as the original documents were in possession of the appellant who had photocopies thereof certified as true copies of originals on 7th April 2015, at the time of filing his suit in court, the appellant ought not to

have been allowed to produce photocopies in court as exhibits.

43. I however agree with the trial court's finding of fact that the appellant's exhibit in the form of an invoice letter dated 23rd April 2009 from MFI Solutions addressed to him is clear that the assessment carried out on the damaged machine was done at the appellant's organization and not at the respondent's. If the appellant wanted to counter the respondent's argument that the machine was with him, then it was important that the appellant adduces evidence of when the machine was delivered to the respondent and if it was so delivered, there must have been an acknowledgment signed. This evidence was not adduced before the trial court. It is on that account that I agree with the finding of the trial court that the machine was with the appellant and that therefore the respondent could not be asked to pay for a new machine, when the machine conveyed and damaged was, in fact, used and its price as stated on the receipt was Kshs 50,000 and not Kshs 94,000 claimed by the appellant. I will however return to make my conclusion on this first issue after determining the second issue.

44. On the second issue where the trial court found and held that the appellant was entitled to Kshs 38,164 being the cost of repairs as assessed by MFI Solutions, I find this award not sustainable. This is because the appellant never pleaded for this cost and never asked for it even in his evidence in chief or in his submissions. As was held in *Blay v Pollard and Morris [1930] 1 K B 628*, cases must be decided on issues on record and if it is desired to raise other issues they must be placed on record by amendment. In *Charles C. Sande v Kenya Co-Operative Creameries Limited Civil Appeal No. 154 of 1992*, the Court underscored the need for parties to have notice of issues in an action when it stated that:

“All the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are.”

45. The decisions in *Town Council of Awendo V Nelson Oduor Onyango* and *Galaxy Paints Co. Ltd V Falcon Guards Ltd*, support the same proposition.

46. The appellant was categorical in his claim that he wanted compensation for a new machine costing Kshs 94,000 and not the cost of repairs. That being the case, it was erroneous for the trial magistrate to award the appellant the cost of repairs as he did not have the discretionary power that he exercised in granting that remedy. That position accords with the decision in *Abdul Shakoor v Abdul Majid Sheikh Nairobi Civil Appeal No. 161 of 1991* to the effect that **“in general, a plaintiff is not entitled to a relief which he has not specified in his claim.”**

47. I am therefore persuaded that the award in favour of the appellant for Kshs. 38,164 being the cost of repairs to the damaged copier machine cannot be upheld and I would allow the appeal to that extent, by setting aside the award. Accordingly, the award of Kshs 38,164 is hereby set aside. This settles issue number two above.

48. Back to the issue of whether the appellant is entitled to a sum of Kshs 94,000 claimed being the value of the damaged machine, I have found that the Copier Machine as per the photocopy of the receipt was valued at Kshs 50,000 and not Kshs 94000. Furthermore, albeit the appellant pleaded at paragraph 5 of his plaint and claimed that the machine was brand new, his photocopy of receipt produced as exhibit show that it was used. I have also found that the appellant did not ask or plead for payment of the damage as assessed by MFI Solutions. I have also agreed with the trial court's finding that the machine was not in possession of the respondent as at the time of the claim as there was no evidence that after MFI Solutions assessed the damage to the machine at the appellant's organization and invoiced the appellant, he ever took it to the respondent's premises.

49. My inference is further informed by the fact that there was no evidence to suggest that the respondent needed the machine to effect repairs on the same. There was no evidence that the respondent was dealing in copier machines and in my view, this is what informed the respondent suggesting to the appellant that the damage be assessed by experts and the respondent be supplied with documentation on the same for purposes of compensation limited to the damage, not a new machine, as there was no evidence that the machine was damaged beyond any economical repair.

50. Accordingly, I am satisfied that the appellant was not entitled to compensation for total loss of the copier machine as the machine was in his custody awaiting repairs to be effected as per the invoice by MFI Solutions.

51. On the third issue of whether the appellant was entitled to the loss of user and if so, at what rate per month and for what reasonable period, the appellant pleaded that he was entitled to loss of user of the damaged machine because it was bought for business and that for all that time from March 2009 to 7th April 2015 when he was filing suit for recovery, he had lost business at the rate of Kshs 600 per day. He urged the court to grant him the same. He pleaded it as general damages but gave a figure of Kshs 600 per day from which he urged the trial court to calculate the lost earnings from the photocopier business.

52. The trial court awarded the plaintiff /appellant loss of user for a period of three months at the rate of Kshs 300/ per day for six months which the appellant is contesting, and seeking enhancement to Kshs 600/- per day for six months.

53. According to the appellant, the defendant did not ask for better and further particulars of loss of user and therefore the court should have awarded him the claim as prayed. Reliance was placed on the decision by Angawa J in *George Montet v Fredrick Kokai Kusero* (supra). I have read the decision. That decision is persuasive and not binding on this court. **In addition**, in that case, the plaintiff produced documents of the records of his motor vehicle's operations for which he was seeking for compensation for loss of user unlike in the instant case where the appellant never produced any document of records to show how much his other machines were bringing in per day for close to six years as he waited for either the repair of or replacement of his damaged machine.

54. My other point of departure is that the holding by Angawa J shifts the burden of proof to the defendant. The burden of proof always lie on he who alleges as stipulated in sections 107 and 108 of the Evidence Act. It does not therefore mean that where the plaintiff lays a claim and the defendant does not respond, then the plaintiff is automatically entitled to an award as prayed, especially where the claim, though a

special damage, is couched as a general damage that would require proof of loss, as was in this case.

55. In analyzing this issue of whether to interfere with the decision of the trial court in awarding damages, I am well aware of the well settled principles on which an appellate court will disturb an award in damages. In *Premier Diary Limited v Amarjit Singh Sagoo & Another [2013] eKLR* the Court of Appeal stated:

“It is the duty of this court, on a first appeal like this one, to reconsider the whole matter and re-evaluate the same to reach our own conclusions always remembering however, that we did not hear the parties or observe their demeanour, an advantage only the trial Judge had. Sir Kenneth O’Connor sitting at the predecessor of this Court spoke on this issue very well when he said in *Peters v Sunday Post Limited [1985] EA 424*:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...”

56. In *M O R vs Franciscan Sisters of the Immaculate [2017] eKLR* the court considered the circumstances under which an appellate court could interfere with a trial court’s award of damages and stated:

“The law is that an appellate court will not interfere with a trial court’s award in damages unless the award is so inordinately high or low as to represent an entirely erroneous estimate, or it is shown that the court proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at a figure that was inordinately high or low.”

57. In *Jackson Kiprotich Kipngeno & another v Daniel Kiplimo Kimetto [2008]e KLR*, citing *David Bagaine v Martin Bundi* (supra), the Court held:

“we must and ought to make it clear that damages under the title” loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase, “doing the best I can.” These damages as pointed out earlier by us must be strictly proved....” [Emphasis added]

58. In *Summer Limited Meru v Moses Kithinji Nkanata High Court Civil Appeal No. 89 of 2004 [2006]e KLR*, Lenaola J (as he then was), held that the amount of earnings from a business is not a matter that can be left to judicial discretion or reason since it is a special damage that must be specifically proved. Without such proof, it cannot be awarded. The judge stated and I concur:

“On the first point, my view is that the amount of earnings from the matatu business is not a matter that can be left to judicial discretion or reason. It is a special damage that must be specifically proved. Without such proof it cannot be awarded. I note that the learned trial Magistrate said this on the point:[emphasis added]

“Under this head, I do note that no documentary evidence was supplied to support the averment of Kshs.3000/- daily profit. In the absence of records, I make an award of Kshs.1,000/=. The Plaintiff has failed to mitigate his losses, therefore, I allow the same for a period of 1 year.”[emphasis added]

Like the trial Judge in *Ryce Motors Ltd and Anor v Muroki (1995-1998) 2 EA 363*, the learned trial Magistrate was given a booklet to support the claim for Kshs.3, 000/- per day which she rejected. The Court of Appeal said this when the matter came before it on Appeal:

“The Learned Judge had before him by way of Plaintiff’s evidence exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act.....”

The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The Plaintiff simply gave evidence to the effect that his matatu was bringing him income of Kshs.4, 500/- per day. He did not support such claim by any acceptable evidence and we set aside the award in its entirety.”

The Plaintiff in the Ryce case was in the same position as the Respondent in this case and once he was unable to prove his daily income from the matatu business then the claim for loss of user must be rejected. I must do the same in this regard and will set aside the entire award of Kshs.365,000/- as the same was not based on any plea that was strictly proved before the lower court. In fact the lower court agreed that there was no proof of the claim for loss of user and having done so, it should not have made any award under that heading.” [Emphasis added]

59. The above holdings are on all fours with this case and appeal. The appellant herein simply placed before the trial court figures of Kshs 600/- as his daily income from the photocopier business. He could not prove his daily income from the alleged photocopier business. On that basis alone, this court does not find the ground upon which the trial court awarded him Kshs 300/- per day for three months.

60. The appellant failed to produce any single document to verify that he was engaged in such photocopying business and that on a daily basis he earned Kshs 600 or thereabout yet the burden of proof lay on him to prove his claim.

61. In the above cited case of *David Bagaine v Martin Bundi*, the Court of Appeal further stated:

“...having so erred, the learned Judge proceeded to assess the same for a period of nearly three years. There, the learned Judge seriously erred. 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.”[Emphasis added]

62. In this case, the appellant did not testify as to how long it would have taken to repair the damaged machine, after it was assessed by MFI Solutions. The trial court gratuitously awarded him three months yet no evidence was adduced to show that the copier machine was ever taken in for repair and how long it took to repair the same after the assessment on by MFI Solutions.

63. The assessment by MFI Solutions as per their invoice letter dated 23rd April 2009 show that the machine required replacement of a drum, developer and a platen cover glass and the technical manager requested for Local Purchase Order or cheques for the amount stated to enable them replace the items in the photocopier. This court is aware that a photocopier is not like a motor vehicle which can be panel beaten. The assessment is clear that the items needed to be replaced upon payment or submission of Local Purchase Order.

64. There is no evidence on record to show that the appellant, upon the respondent’s refusal to repair the machine in time, he proceeded to repair the machine and claim for reimbursement. In my view, from the onset, the appellant had a mindset that he needed a new machine or Kshs 94,000. Yet, as I have stated above, there was no evidence to show that the Mita Copier machine was bought at Kshs 94000 and not Kshs 50,000 indicated on the photocopy of the receipt produced in evidence as an exhibit.

65. In my humble view, the appellant could only be entitled to the loss of user if he adduced real and not supposed evidence on how much he would have earned per day from the copier machine. He could also only get an award for a reasonable period of time that it would take to repair the damaged machine and not wait for nearly six years to claim for loss of user for all that time.

66. Although his advocate sought for six months loss, the submission was contrary to the pleading in the plaint. Even assuming that the appellant had proved his claim on loss of user on a balance of probabilities which he did not, It was the duty of the appellant to mitigate the loss and ensure that the machine was repaired as soon as it was practicable, so that it goes back to do business to reduce further losses, and not to wait for nearly six years. In law, a claimant is expected to mitigate his losses by taking such measures which will bring down his losses.

67. Therefore whereas there is no dispute that the appellant’s machine was damaged as it was being conveyed by the Respondent from Mombasa, the appellant was under a duty to prove his claim on a balance of probabilities by way of adducing evidence in court and not through submissions.

68. In *Douglas Odhiambo Apel &another v Telkom Kenya Ltd,(supra)* the court of Appeal held that:

“A plaintiff is under a duty to present evidence to prove his claim such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court, unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. Submissions, as he correctly observed, are not evidence.”[emphasis added]

69. . The plaintiff needed to prove on a balance of probabilities that he was engaged in photocopying business and that he was earning Kshs 600 per day and that he lost such earnings due to the damage caused to his machine. If he had a license for the business in question as admitted in cross examination, nothing prevented him from producing such license and if his company filed returns to the Registrar and also made Tax returns, he should have produced such evidence to support his claim. If the appellant had other machines doing the Photocopying business then nothing prevented him from producing in court the record for the daily collections for the business to show how much he earned for the court to assess loss of user for a reasonable period.

70. The trial court in my humble view, erred in assessing loss of user at a global figure of Kshs 300 per day for a period of three months as no basis was laid for such a gratuitous award. In my humble view, the award was made on the basis of speculation and wrong principles and this court must correct the same by setting aside an erroneous award which was made without proof.

71. In *Summer Limited Meru v Moses Kithinji Nkanata [supra]*, Lenaola J (as he then was) made it clear and is still good law that the amount of earnings from a business is not a matter for judicial discretion or reason since it is a special damage that must be specifically proved. Without such proof, it cannot be awarded.

72. The trial court in awarding what he considered to be reasonable compensation to the appellant for loss of expected income following the damage to the machine which was bought for business stated:

“... It is clear that the plaintiff has nor demonstrated by way of any document what he was earning from a similar business before he bought the machine which is the subject matter herein. As such, the figure of Kshs 600 per day has no basis. Considering the circumstances of this case, I do find that Kshs 300 per day is reasonable.”

73. The trial court then went on to award the Kshs 300 per day for three months on the basis that the appellant took possession of the machine immediately and that he should have mitigated the loss which he was likely to suffer in the event that the defendant did not repair

the machine on time. He found that the appellant should have repaired the machine in three months not six months prayed for.

74. It is worth noting that the plaintiff pleaded for general damages for loss of business from the said photocopier at Kshs 600 per day since March 2009, and in his testimony he maintained that he was praying for compensation for the machine and general damages, not special damages.

75. I am further fortified by the persuasive decision by Mumbi J in *Ndugu Transport Company Limited & another v Daniel Mwangi Waitaha Leteipa [2018] eKLR Civil Appeal No 21 of 2016 Kericho HC [2018]* citing with approval *Civil Appeal No. 283/1996, David Bagaine vs Martin Bundi as cited in Jackson Kiprotich Kipngeno & Another vs Daniel Kiplimo Kimetto [2008] eKLR* where it was held that:

“We must and ought to make it clear that damages under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase, “doing the best I can “These damages as pointed out earlier by us must be strictly proved...”

76. The learned Judge also referred to *Civil Appeal No. 25 of 2013 Macharia Waiguru versus Murang’a Municipal Council & Another (2014) eKLR* where the Court of Appeal (Nyeri) stated:

“On the issue relating to the claim of Kshs. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended plaint indicates that this is a claim for Kshs. 300,000/= and loss of user which is a claim for special damages.”

77. The Court of Appeal in the above decision cited its earlier decision in *Siree v Lake Turkana El Molo Lodges (2002) 2EA 521* where it had held:

“This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages.”

78. For all the above reasons based on sound judicial precedents, I find and hold that the award of damages in the sum of Kshs 27,000 made in favour of the appellant by the trial court being for loss of user was made in error and based on wrong principles. The same is hereby set aside and quashed.

79. The appellant also claimed that the judgment of the trial court was devoid of reasons for the decision. I disagree. The learned trial magistrate in his judgment analyzed the evidence as adduced by both parties, considered the submissions by the appellant’s counsel and framed issues for determination and proceeded to determine each of the issues with reasons therein. Accordingly, I find the ground of appeal not well founded. Furthermore, the facts of the case were fairly straight forward and therefore it was not difficult for the trial court to arrive at his decision with reasons.

80. In the premises, I find and hold that this appeal, other than the ground No. 2, lacks merit. The same must be dismissed. In addition, I find and hold that the appellant did not prove any of his claims before the trial court on a balance of probabilities. I set aside the judgment and award made by the trial court on the claim for loss of user/ loss of business. I also set aside the award for the cost of repair of the Mita Copier machine as the same was never pleaded by the appellant. In the end, I allow this appeal only to the extent that the award for the cost of repairs were not pleaded and therefore were not available for the trial court to award. I dismiss the rest of the grounds of appeal and further proceed to dismiss the appellants’ suit before the trial court.

81. On costs, as the respondent did not participate in these proceedings, I order that each party bear their own costs of this appeal. On costs of the lower court, I observe that neither the appellant herein nor the respondent diligently conducted their respective cases in the lower court and as the respondent has not participated in the appeal herein, I order that each party bear their own costs of proceedings in the lower court.

Dated, Signed and Delivered in open court at Siaya this 17th day of July 2019

R.E. ABURILI

JUDGE

In the presence of:

Mr. Onyango Charles Advocate for the Appellant and also holding brief for Mr. Siganga for the Respondent

CA: Brenda