



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL SUIT NO. 1 OF 2018

JAMES MUEMA NTHIWA t/a

UPRIGHT INVESTMENT & LOGISTIC LTD.....PLAINTIFF

VERSUS

MAKUENI COUNTY SAND

CONSERVATION & UTILISATION AUTHORITY.....DEFENDANT

JUDGEMENT

Introduction:

1. The plaintiff instituted this suit via a plaint dated 09/01/2018 and filed on the same date. The cause of action is said to arise from the seizure, immobilization, and damage of his commercial motor vehicle registration No. KCE 123A. His claim is for;

- a) Kshs 7,300,000/= being the assessed value of the motor vehicle at the time of damage.*
- b) Special damages of Ksh. 119,000/=*
- c) Daily loss of income of Ksh. 29,176/= from 23/08/2017 until settlement in full of payment of (a) above.*
- d) Daily storage fee of Ksh. 500/= per day from 29/09/2017 until payment in full.*
- e) Interest on (a),(b),(c) and (d) above.*
- f) Costs of the suit.*

2. The defendant filed its statement of defence on 04/07/2018 and after the preliminaries; the suit was eventually slated for hearing on 14/11/2018.

The plaintiff's Case:

3. **PW1** was the plaintiff. He testified that he is a business man t/a Upright Investment and Logistics Ltd. He adopted his statement dated 09/01/2018 as his evidence and further stated that he co-owned motor vehicle registration No. KCE 123A, Isuzu Lorry (*the lorry*) with Equity Bank which was the financier. He identified the statement of daily average loss (MFI2), motor vehicle assessment report (MFI 4) and produced the release note and receipt as exhibits 5 (a) & (b) respectively.

4. Further, he testified that the lorry was detained for allegedly conveying sand illegally and he paid Ksh. 130,000/= as penalty but he never got the lorry back. That when the lorry was impounded on 28/07/2017, it was taken to Salama Police Station and stayed there until 03/08/2017 when it was released to Makueni County who drove it to Sultan Hamud police station.

5. That the OB report from the police station stated that it was taken and booked therein having broken down. That he tried to make enquiries from the managing director of the defendant, Jackson Muthansu, but he never responded.

6. That he wrote a demand notice seeking that the defendant avails an expert to assess and value the damage on 07/09/2017 at 10.00am. There was no compliance despite the demand notice having been received on 05/09/2017. He proceeded with the assessment and the lorry was towed to Top Grade Logistic Ltd, a garage at Athi River.

7. He produced a letter from Top Grade Logistic Ltd seeking storage charges at the rate of Ksh. 500/= per day from 15/09/2017(exh 6). He said that the lorry was still at the garage and the charges were still accumulating. That the bank loan is also accumulating and the lorry is irreparable according to the expert. A letter from equity bank showing the loan balance was produced as (exh 8).

8. He testified that he gave additional security to the bank because his property was under the threat of being auctioned. That because the lorry was grounded, he could only sell his property in order to pay the loan. He produced the OB extract from Salama police station as (exh 9). That he did not dispute that the lorry was carrying sand from Makueni but expected to get it back after paying the penalty. That the lorry's value before damage was Ksh. 7.3 million and it would cost Ksh. 4,686,632/= to repair it.

9. He testified that the lorry was driven by an unqualified driver hence the damage and that he was listed on CRB in December 2017 after 3 months of loan default. Further, it was his evidence that he has accumulated loans all over for his upkeep and that of his family. That he could not pay the penalty immediately as he had lost his wife on 31/07/2017 and had to finance the burial.

10. On cross examination, he said that he did not witness the arrest of the lorry as he was in Nairobi. That he paid the penalty for conveying sand contrary to the defendant's regulations. That the lorry broke down to the negligence of the defendant's agent/employee, Paul Ngei, who drove it as per the Salama police station OB. That dismantling was done at Top Grade Logistics Ltd garage. That the authorized driver was Omar Benjamin who was arrested by the defendant's officer.

11. Further, he stated that the motor vehicle was released to him on 14/09/2017 at 13.12 hours and assessment was done on 20/09/2017. He also said that he was not aware whether Paul Ngei towed the lorry from Salama to Sultan Hamud police station but it was in good state when it was detained.

12. **PW2** was Patrick Mutinda Sila, a certified public accountant. He testified that PW1 was his client and that he calculated the average daily loss from documents provided by PW1 such as delivery notes, invoices to regular customer, Mpesa statement, business bank statement, purchase statement, expenses receipts and cash sales. He said that all those documents were for three months prior to the accident i.e. April, May June and that they were in the report (pg 7-13).

13. On cross examination, he said that he had been in practice for 17 years and was registered as a certified accountant (registration No. 2884 P 1317). He showed his licence to the Court. He said that depreciation is factored in on purchased motor vehicle and is taken from the original price of the motor vehicle.

14. **PW3** was Stephen Mutinda Munuve, a valuer at Regent Auto Valuers & Association, Machakos Branch. He has been in the motor industries for 18 years and with Regent since 2010. He prepared the accident assessment report dated 27/10/2017 and signed it. He saw the lorry being towed from Sultan Hamud police station to Athi River garage as it could not start. He testified that repairing the motor vehicle would cost more than 50% of its value and that a complete engine is Ksh. 4 million. That the engine damage was caused by mishandling of gears. He was paid Ksh. 10,000/= for preparing report and Ksh. 5,000/= for attending Court.

15. On cross examination, he said that he prepared report at police station and took photos of the lorry. That the nature of damage is made out of his expert opinion. That it was the Advocate who told them to dismantle the engine and they noted the problem after the said dismantling on 20/09/2017. That on depreciation, the value goes down from the date of manufacture. He denied that the problem was because of malfunctioning due to manufacture. He also said that he was an automobile engineer.

16. On re-examination, he said that from page 79 of the report, the year of manufacture was 2015 and depreciation was 15% per annum .That the lorry was valued at 10.5 million in 2015 hence valuation of 7.3 million in 2017. The plaintiff closed his case at that juncture.

The Defendant's Case:

17. **DW1** was Paul Ngei Mutuku, an enforcement officer of the defendant. He testified that he has been a driver for 13 years and his work is to ensure that the rules of the authority are complied with. On 27/07/2017, he was on duty when he received a call about a motor vehicles that were harvesting sand illegally.

18. Their registration numbers were; KCE 127A, KBY 996X, KCC 299U. He proceeded to Kiu with a colleague called Mutuku. He showed his BCE licence to Court and continued to state that on 03/08/2017, he was driving motor vehicle KCE 123E when it just went off on the way. He adopted his statement dated 29/06/2018 as evidence.

19. The introduction of the driving licence was opposed by the plaintiff's Counsel and the objection sustained by the Court.

20. On cross examination, he stated that they had impounded the lorry on 27/07/2017 after intercepting it loaded with sand and the driver ran away when they stopped it. That it had been booked in Salama police station and was released to Muthansu and Yusuf. That when he drove it from Salama police station, he checked water and oil but because he is not a mechanic, he didn't know whether it was mechanically fit. That it was driving well from police station.

21. That the lorry's capacity is 8 tons and had driven such a vehicle in 2016. That it was the managing director who allowed him to pick the lorry. That when a driver runs away, they drive the motor vehicle. He denied using a breakdown and said that the lorry was to be taken to their compound in Wote.

22. He agreed that they never tried to trace the lorry's owner. When the lorry broke down, he called the managing director who said he would call a breakdown to tow it. It was later towed to Sultan Hamud.

23. Further, he stated that those carrying sand illegally have to pay a fine before release of motor vehicle but he was not aware as to whether the plaintiff paid Ksh. 130,000/= to collect the lorry. He agreed that to remove the lorry from Sultan Hamud, one had to tow it. He was not aware as to whether the defendant was invited to Sultan Hamud to inspect the vehicle.

24. **DW2** was Lawrence Opando Adulla, a mechanic by profession. The plaintiff's Counsel objected to him testifying but the Court disallowed the objection on the ground that his report had been filed on time.

25. DW2 proceeded to testify that he inspected the lorry on 03/08/2019 and prepared a report on 05/08/2018 which he produced as (Dexh 1). That the people present during the inspection were Counsel Ombati, DW1's colleague, Bob Makau, the plaintiff and his 2 mechanics. That they found a dismantled engine and assessed all its available parts. Some parts were missing and others were damaged. The fuel tank had some dents which could be caused by rough driving.

26. He couldn't tell the state of one pump because the lorry was not on the move. One conrod was missing and the status of the crankshaft could not be established because only engineers can do that. Damage in area where crankshaft lie could be caused by poor circulation of oil.

27. The cylinder head and valves were missing and the starter motor was not available. The cylinder block was in good condition and the 5 pistons and block were not damaged hence no evidence of wrong engagement of gear. He denied that the mechanical problem was due to poor driving and blamed it on things like oil plumb or poor circulation of oil.

28. On cross examination he agreed that his name was not on the report and the model of Isuzu, year of manufacture and chasis number were not captured. Those 5 parts were captured but no value attributed to the damage neither was the value of the good parts and missing parts.

29. His opinion was that the lorry was not a write off and could be repaired. He was not sure as to whether the crank shaft could be re issued as he did not have engineering equipment to assess. The cost of repair was not estimated neither was the market value of the whole engine.

30. That according to the owner, the lorry was in th

31. e same place for about 2 years and time was of essence due to devaluation loss of value. He agreed that he never checked the value of the missing parts.

32. **DW3** was Bob Okoth Makari an automotive technician at comfort motor garage. He said that he inspected the lorry with DW2 and another on 03/08/2018 at Athi River. That the lorry's owner and other technicians were also present. The report produced by DW2 contained their findings. On cross examination, he agreed that his name was not in the report.

33. The defendant closed its case at that juncture and the plaintiff's counsel applied to recall their expert witness

PW2 Recalled:

34. The witness was shown (Dexh1) and totally disagreed with the general comments. He observed that there was no costing of the parts. That he personally went to Sultan Hamud police station and checked the lorry. He disagreed that lack of oil caused the problem. That the crankshaft needed not go to engineering firm and could be re-used. The pressure plate and clutch were normal.

35. He agreed that the dent on fuel tank could be caused by rough driving. That when he inspected the lorry, it had all parts contrary to comment No.4. That only 2 pistons were good and he did not note any missing parts.

36. On cross examination, he maintained that there were no missing parts and disputed the comment on crankshaft. He agreed with comment No. 3 and further stated that he did not take engine block for inspection as crankshaft and pistons were bent. The oil pump had a dent at the bottom but functioning.

37. The parties agreed to file submissions to canvass their final submissions but none complied with the timelines agreed thus judgement was based on evidence and pleadings on record.

ISSUES

38. Having looked at the evidence on record and the pleadings, it is my considered view that the following issues arise for determination;

a) Who is liable for the damage to the lorry?

b) Whether the plaintiff is entitled to the orders sought.

ANALYSIS:

Liability:

39. It is not in dispute that the lorry was seized and detained at the instance of the defendant's officials in two police stations. According to DW1, the lorry was arrested for harvesting sand illegally. The plaintiff did not dispute that the lorry was carrying sand from Makueni but expected to get it back after paying the penalty.

40. There is a receipt from the defendant [exh 5(a)] showing that the plaintiff paid a fine of Ksh. 130,000/= on 22/08/2017 and was issued with a release note on the same day [exh 5(b)]. The defendant admitted that this fine was illegal as it was levied in contravention of section 26 of the Makueni County Sand and Utilization Act 2015 (*the Act*).

41. It beats logic as to why the defendant did not present the lorry to Court as soon as possible, if the driver had run away; why couldn't it charge the plaintiff? The defendant's conduct smells to high heavens and one would be forgiven for concluding that the delay dallying was for extortion purposes which it actually did by levying an illegal fine.

42. Be that as it may, the OB extract from Salama police station shows that the lorry was detained at the station after arrest and released to the defendant's officials on 03/08/2017. DW1 agreed that he was the one driving the lorry towards Wote when it broke down and had to be towed to Sultan Hamud police station.

43. The OB extract from the station confirms that the lorry was towed into the station on 03/08/2017 at 17.55hrs. After paying the illegal fine, the plaintiff was issued with a release note and proceeded to Salama police station only to find that his lorry was at Sultan Hamud.

44. Upon realizing that the lorry had been damaged, the plaintiff invited the defendant for assessment. The demand letter was received by the defendant on 05/09/2017 and the assessment was scheduled for 07/09/2017 at 10.00am but the defendant did not attend. Accordingly, the plaintiff proceeded with the assessment in the defendant's absence and the accident assessment report prepared by Regent Valuer & Assessors Ltd was produced as (exh 4).

45. According to the report, the damage was "*...as a result of driver engaging lower gear from high gear when heavily loaded at a high speed at a sloppy glide.*" The experts recommended that the damage be treated as constructive total loss on the basis that economical repairs are not possible.

46. The defendant disputed the cause of the damage and engaged Comfort Auto Ltd to conduct another assessment. The resultant report was produced as (Dexh 1) by DW1 who testified that he was a mechanic by profession. According to him, the damage was caused by lack of oil due to either blockage in the oil gallery or non-functional oil pump.

47. His findings were highly disputed by PW2 who was recalled. I have keenly looked at the report and find it wanting for various reasons. Firstly, it did not have DW1's name or any other name for that purpose but had a signature, apparently of the director of Comfort Auto Ltd. There was however no attempt to establish a nexus between DW1 and the company hence this Court has no way of knowing whether DW1 was the director.

48. Secondly, no value was attributed to the damaged parts and there was no indication of how much it would cost to repair the damaged parts hence nothing to guide the Court. Thirdly, it is not possible to tell whether Comfort Auto Ltd is involved in professional motor valuation and assessment because even the report is silent.

49. Instead, the letter head states that they are dealers in "*direct spare parts importers, distributors of automobile parts & general supplies, mechanical, electrical, panel beating & paint work.*" In my view, Comfort Auto Ltd leans more towards an ordinary garage than a firm of professional valuers and assessors.

50. Fourthly, DW1 contradicted the report with regard to the cause of the damage when he testified that before driving the lorry, he had checked oil and water and confirmed that oil was okay and there were no oil leaks.

51. It is therefore my considered view that the defendant's report did not rebut the one prepared by the experts who were engaged by the plaintiff. Accordingly, the plaintiff has on a balance of probabilities proved that the damage to the lorry was caused by the unskilled driving of DW1 who was an agent/servant and or employee of the defendant. Accordingly, the defendant is wholly liable for the loss.

Whether the plaintiff is entitled to the orders sought:

52. According to the report, the value of the motor vehicle was assessed at Ksh. 7,300,000/= at the time of damage. Looking at this amount *visa vis* the cost of repairs, I agree with the experts that it does not make economic sense to repair the lorry.

53. I also note that the indicated cost of repair (4,686,632/=) does not include the cost of gear box which was not dismantled to ascertain its condition after being mishandled. Accordingly, the plaintiff is entitled to this claim (ksh 7.3 million).

54. The special damages of Ksh.119,000/= was proved via the bundle of receipts produced.

55. As for the daily loss of income, the plaintiff produced a statement of daily average loss of business income (exh 2) prepared by Sila and Associates, a firm of Certified Public Accountants. The statement confirmed that the daily loss of income was Ksh. 29,126/=.

56. However the figure is not indicated whether it was net or gross thus court to consider that. The court has also to take into account the repair costs and breakdowns which would keep motor vehicle off the road and thus no earnings for the period of repair *inter alia*. The plaintiff has not disclosed payment of tax on the generated earnings.

57. For these factors which could diminish earnings generated, the court would award loss of income for 21 days in a month for an amount of Ksh. 15,000/=.

58. On period to be compensated, the plaintiff claims same up to the date of the date of payment in full. However up to date of delivery of judgment, 12/7/019 is a period of about 2 years. That is a long and unreasonable period.

59. The claimant is expected to mitigate his loses by taking such measures which might bring down his loses. I thus adopt a one year period as held by **Gikonyo J** in ***Joseph Mwangi Gitundu vs Gateway Insurance Company Ltd HCC (Milimani) 224 of 2007***. Thus the amount is **15,000/= x 252 days = 3,780,000/=**.

60. I agree with the plaintiff that the daily loss of income should be calculated with effect from 23/08/2017 because the defendant issued the release note on 22/08/2017 and the plaintiff had a legitimate expectation to resume business on the day that followed.

61. With regard to storage charges, (exh 7) is a letter from Top Grade Logistics indicating that they have stored the lorry from 15/09/2017 at the rate of Ksh. 500/= per day. The plaintiff has however claimed the storage charges with effect from 20/09/2017 and this is the date that the Court should adopt.

62. The number of days from 20/09/2017 to the date of this judgment (12/07/2019) is 662. The plaintiff is therefore entitled to Ksh. 331,000/= (662 x 500). The plaintiff should afterwards make arrangements to remove the damaged lorry from Top Grade Logistics as soon as possible.

63. As for costs and interest, the same shall follow event.

Conclusion:

It is therefore this court finding that the plaintiff has proved his case on balance of probabilities as summarized below. The court thus enters judgement for the plaintiff against defendant as follows;

1. Judgement is entered for the plaintiff against defendant for;

a) Liability 100% against the defendant.

b) On quantum;

i. Value of the motor vehicle - Ksh. 7,300,000/=

ii. Special damage - Ksh. 119,000/=

iii. Loss of income -15,000/= x 252 days = 3,780,000/=

iv. Storage charges - (662 x 500) = 331,000/=

Total Award - Ksh. 11,530,000/=

c) Plus costs and interest at court rates from the date of the judgement.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

C. KARIUKI

JUDGE