



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO.40 OF 2017

IBRAHIM NDIRANGU GICHUKI.....APPELLANT

- V E R S U S -

GEOFFREY MWANGI NDERITU.....RESPONDENT

J U D G M E N T

The appellant, **Ibrahim Ndirangu Gichuki** was the plaintiff in Nyahururu SPMCC.192/2014, where he had sued the defendant, now respondent, Geoffrey Mwangi Nderitu for:

i) Material loss and damage	Kshs.412,800/=
ii) Assessor's Report	Kshs.10,000/=
iii) Towing charges	Kshs.22,000/=
iv) Loss of use and income for 44 days at Kshs.4,200 per day	<u>Kshs.184,800/=</u>
Total.....	<u>Kshs.629,600/=</u>

The claim arose from a material damage and loss occasioned to the appellant's motor vehicle KBA 625Y (Toyota) which was involved in a collision with the respondent's motor vehicle **Reg.No.KBB 121R Toyota**.

After hearing the case the trial court granted judgment to the appellant on all items except the claim for loss of use and income for 44 days at Kshs.4,200/= totaling Kshs.184,800/=.

Mr. Waichungo, counsel for the appellant submitted that the finding by the trial court that the claim was not proved was erroneous because the business was informal, did not involve issuance of receipts; that the appellant produced in evidence daily work sheet records which were prima facie evidence of the income that the plaintiff was making daily; that he produced records of the trips made daily, the income collected and expenditure incurred, salaries paid to conductor and costs of the repairs.

Counsel relied on two decisions:

- i) **HCC.2027/1995 George Montet v Fredrick Kokai Kusero** where the court relied on documents presented by the plaintiff on the records he kept for operating the motor vehicle, and an award of Kshs.3,000/= loss of income per day was granted.
- ii) **CA.178/1997 Amirali Karmali v Shobhag Chandra Ratilal Shah**, where the court accepted an invoice and a letter of acknowledgement as confirming payment.

Counsel further urged that the respondent did not object to production of the daily worksheets as exhibits.

The respondent's counsel did not appear at the hearing of the appeal and did not file their submissions as directed by the court on 18/4/2018.

In the Lower Court, the appellant testified that his motor vehicle KBA 625Y was a 14 seater matatu. In support for the claim of loss of user,

PW1 told the court that he used to make Kshs.4,200/= per day and kept worksheets which were produced in evidence as P.Ex.3 for the period 1/6/2014 to 18/6/2014.

According to **PW2, Joseph Mwangi Kariuki**; the motor vehicle assessor, the vehicle was likely to take 30 days to avail spare parts and reports. In the judgment, the court held that the claim for loss of income should have been specifically proved, through receipts as if it was special damages. The court held that tabulation recording in a book is not admissible and the court declined to award the sum claimed.

First of all, there was no dispute that the subject matter vehicle was a matatu carrying on transport business. It must have been bringing in some money on a daily basis. I have seen the tabulation of the income and expenditure of the motor vehicle produced in evidence. This is an informal business and in my view, a daily record of the income and expenditure was good enough to prove such a claim.

I have considered the two decisions relied upon by the counsel. In the **George Montet case (Supra)** the court found that the plaintiff had produced documents showing that he earned an average of Kshs.3,000/= per day and that the defendant never asked for further and better particulars. The court was satisfied that the claim was proved.

In the decision of **Amirali Karmali (Supra)** the court held:

“But apart from that, it is manifest from the case as a whole - the uncontested admission, or challenge of the veracity, of the invoices and letters of acknowledgement produced by the Appellant; and indeed, the behavior of the respondent as already referred to by the learned Judge, in not really caring what happened in the case – that the learned Judge was clearly wrong in the exercise of his discretion in rejecting the unassailed documentary evidence of the appellant, and which is our view, resulted in an injustice.”

In this case the evidence by the appellant on lose of use was uncontroverted and it is un-understandable why the court rejected it.

I am alive to the decision of **Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v AM Lubia & Olive Lubia (1982-88) I KAR 727** in which the court laid down the principles to guide the appellate court when to interfere with an award of damages by a trial court. The appellate court will interfere with an award of damages where the trial court has applied wrong principles, for example taking into account irrelevant factors, or failing to take into account a relevant factor, or misapplying or not understanding the correct law or not appreciating the evidence adduced or that the damages awarded are inordinately high or low. Some error of principle must be assumed.

In this case, I have found that the appellant’s evidence on loss of user was not challenged in any way and the court had no reason rejecting it. The judgment of the court was therefore based on the wrong principles.

In his evidence, the appellant did not specify how long the vehicle was under repair. PW2 however estimated that the vehicle would take about 30 days to repair.

The accident occurred on 19/6/2014 and I have seen the receipts in which spares were bought, were issued upto about 8/8/2014. The appellant claimed loss of user for 44 days.

I am satisfied from the documents produced, that the said subject vehicle may have been out of use for over the 44 days claimed. I find that the trial court erred in finding that the said claim was not proved.

I find that the claim was proved on a balance of probability. I allow the appeal and award the sum claimed, in the plaint which worked out as follows; Kshs.4,200/= per day for 44 days which totals Kshs.184,800/= less 15% liability (by consent) which works out at Kshs.157,080/=. I will also award costs of this appeal.

Dated, Signed and Delivered at NYAHURURU this 11th day of October, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Chege holding brief for Mr. Waichungo for the appellant

Ropita - Court Assistant