



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CLAIM NO. 4 OF 2017**

**JAMAL MOHAMMED BANDIRA..... CLAIMANT**

**VERSUS**

**OWNERS OF THE MOTOR VESSEL**

**“NASIBU” ..... DEFENDANT**

**JUDGMENT**

**The Claim**

1. The claimant is a businessman who carries on the business of general supplies in Mombasa and Somalia. The defendant are the owners of motor vessel Nasibu (MV Nasibu). The company behind the said business is Nasibu Fishing Company Limited. Although the claimant in the claim form indicated that the port of registry for the said motor vessel was Zanzibar, as at the time of filing the claim form on 10th May, 2017, the MV Nasibu had a certificate of registry No. 0141 issued in the year 2016 by Kenya Maritime Authority. Its port of registry as at the time of filing the claim was Mombasa. Zanzibar was her previous port of registry as per the documentation available in the court file.
2. The claimant avers that he hired the defendant's MV Nasibu to transport some cargo from the port of Kismayu but enroute to the port of Mombasa, she developed mechanical problems. He further states that the crew members were arrested and charged at the Kilifi Law Courts for being in Kenya illegally. The crew members were later released on 21st February, 2017.
3. The claimant contends that he provided petty cash to the Captain of the MV Nasibu to cater for legal costs including cash bail to secure the release of the vessel and the crew. He also purports to have supplied food to the Captain and crew members, fuel and spare parts to maintain the MV Nasibu, which expenses come to a total of Kshs. 722,000/=.
4. The claimant's case therefore against the defendant is for the payment of Kshs.722,000/= on account of supply of fuel, spare parts, food and petty cash to the MV Nasibu on various dates between 23rd August, 2016 and 22nd March, 2017 at the request of the defendant. Further, the claimant seeks interest at 12% p.a., until payment of the said amount in full.
5. The defendant filed an amended defence and counter-claim on 5<sup>th</sup> December, 2017. It denied the claim arguing that no cash bail was ever paid for the crew members by the claimant and that he did not supply any fuel, spare parts or petty cash. According to the defendant, the motor vessel was not on voyage on 23<sup>rd</sup> August, 2016.
6. In its counter-claim, the defendant avers that the claimant after initiation of these proceedings caused the unlawful arrest of the MV Nasibu and as a result it has suffered immense loss and damage. The defendant contends that the continued detention of MV Nasibu has led to loss of income and as a result, it claims the following special damages from the claimant:-

- (i) Repair costs for the main engine and generator - Kshs. 2,400,000/=;
- (ii) Mooring costs from 10<sup>th</sup> May 2016 to 18<sup>th</sup> September, 2017 - Kshs. 65,000/=;
- (iii) Mooring costs from 19<sup>th</sup> September, 2017 until conclusion of the case - at Kshs. 15,000/= per month;
- (iv) Travelling and accommodation expenses for the defendant (the defendant's witness) - Kshs. 25,000/= per visit;
- (v) Travelling and attendance expenses for the lawyer - Kshs. 62,000/=; and

(vi) Hire charges for round trip from Mombasa Port to Kismayu Port at a maximum of 15 days - Kshs. 450,000/= for every 15 days, until the release of the vessel.

7. In response to the counter-claim, the claimant states that the defendant would not have incurred the alleged damages and loss if it had deposited the sum of Kshs.400,000/= as security to secure the release of the motor vessel as ordered by the court.

#### **The evidence tendered and submissions**

8. When the matter came up for hearing two witnesses testified for the claimant and one witness testified for the defendant. Subsequently, the claimant filed his submissions on 23<sup>rd</sup> October, 2018 while the defendant filed its submissions on 30<sup>th</sup> October, 2018.

9. Mr. Wachira, Learned Counsel for the claimant submitted that the claim herein was an Admiralty claim as defined under Section 20(2)(m) and (p) of the Supreme Court Act, Cap 54 of England and Wales, 1981. Counsel argued that it is a claim for provisions supplied for use of the MV Nasibu and her crew thus it is a claim in rem under Admiralty law as was shown in the case of **The Owners of Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited**, Mombasa Civil Appeal No. 50 of 1989.

10. As to whether the claimant hired the defendant to transport his cargo, Counsel for the claimant submitted that Mr. Mumin (DW1), a Director of the company that owns the motor vessel admitted in his testimony that one, Abdiqadir Fandhe, his agent had negotiated the cost of the voyage with the claimant. Counsel pointed out that there was also a written contract of voyage dated 5th September, 2016 produced in court and a KRA transire issued by Customs in Kilifi showing that the goods were offloaded in Kilifi on 14th October, 2016.

11. He further submitted that the MV Nasibu reached Kilifi on 12th October, 2016 and the crew was arrested and the said vessel detained. Counsel stated that PW2, who was the Captain of the MV Nasibu testified that upon their arrest he did not receive any help from DW1 but it is the claimant, PW1, who sent him money for legal services, food provisions, security and maintenance of the vessel. Counsel contended that there was no proof to show that the owners of the MV Nasibu aided the crew members during the arrest or facilitated the maintenance of the said vessel. Therefore, Counsel opined that the expenses incurred by the MV Nasibu and the crew were only paid by the claimant.

12. On whether the claimant's dealings with the Captain of the MV Nasibu were binding on the defendant, Mr. Wachira took the position that by virtue of his position, the Captain has the power of attorney to act on behalf of the Shipowner to take measures necessary to carry out the voyage and maintain the vessel especially when the owner of the vessel cannot be reached. Counsel therefore argued that when the crew members were arrested and the Captain failed to reach the shipowner, it befell him to make major decisions including seeking help from the claimant. Counsel for the claimant therefore asserted that any agreement entered into between the Captain of MV Nasibu and the claimant was binding on the shipowner.

13. As to the amount claimed by the claimant, Mr. Wachira admitted that there was a mistake in dating of the invoices, that the first invoice issued was dated 23rd August, 2016 but it is supposed to read 23rd October, 2016. Counsel attributed the error to the illiteracy of the claimant and also suggested that the error was validated by the testimony of PW2, the Captain of the MV Nasibu, who testified that on 23rd August, 2016 the MV Nasibu had not left Kismayu for Mombasa. Counsel tallied the invoices as follows:-

- (i) The ledger for 23rd October, 2016 was for Kshs. 133,000/= which included expenses for diesel and crew;
- (ii) The ledger dated 20th February, 2017 for Kshs. 515,000/= was for lawyer's fees, security charges, upkeep expenses for the crew and charges paid to Custom's officials;
- (iii) The ledger dated 1st March, 2017 for Kshs. 54,040/= was for maintenance of the MV Nasibu; and
- (iv) The ledger dated 22nd March, 2017 for Kshs. 20,000/= was for spare parts. The total costs came to Kshs. 722,000/=.

14. Counsel for the claimant submitted that all invoices were received by the Captain and stamped with the MV Nasibu's official stamp. In regard to the counter-claim, Counsel for the claimant submitted that the arrest of the vessel through a court order was not illegal as it was made in pursuance of this claim. He argued that it was incumbent upon the defendant to ensure that despite detention of the vessel, she was regularly serviced and maintained. He faulted the defendant for failing to put up the security of Kshs.400,000/= to secure the release of the MV Nasibu as directed by the High Court. Mr. Wachira urged the court to consider that no appeal was lodged against the said ruling. He therefore argued that the amount claimed by the defendant as expenses for maintenance of the vessel was not payable by the claimant. As for the loss of income, Counsel submitted that the income of the defendant could not be proved as it had not produced tax returns or books of accounts to support the same.

15. Mr. Kuloba, Learned Counsel for the defendant, submitted that his client did not hire out its vessel to transport the claimant's goods. Counsel contended that the alleged agent of the owner of the MV Nasibu one Abdul Khadir Fandhe who entered into an agreement with the defendant to transport his cargo was never called to testify. It was therefore disputed as to whether he was ever an agent of the shipowner. Counsel for the defendant argued that the agreement for hire of the MV Nasibu dated 5<sup>th</sup> September, 2016 bears the name of a company known as Nuha Enterprises Limited and that the claimant failed to disclose how it was affiliated to him. It was also indicated that the said agreement did not have a time frame within which the goods ought to have been ferried, contrary to the rules governing drafting of maritime agreements.

16. In further reference to the aforementioned agreement, Mr. Kuloba suggested that the date of signing of the agreement given as 5th September, 2016 was suspicious as the vessel left Kismayu on 10th October, 2016, which was 35 days after the signing of the agreement.

17. As to whether the vessel reached its destination, the Port of Mombasa, Mr. Kuloba submitted that the transire produced to show that the

goods were offloaded at the port of Kilifi could not be used for that particular voyage as a transire is a document that shows that the goods listed thereon have come from a home port and not an overseas one. Additionally, Counsel stated that the transire gives the name of the Master of the MV Nasibu as one M. Shee and Jamal M. Bandira, the claimant, yet he never made any reference to M. Shee. Counsel for the defendant pointed out that the said transire indicated that the MV Nasibu set sail on 14th October, 2016 yet her Captain, PW2 stated that he was arrested on 13th October, 2016. Counsel for the defendant expressed the view that the variance in the documentation and testimony of the claimant's witness proves that the defendant did not enter into any agreement with the claimant to ferry his cargo.

18. Mr. Kuloba did not contest the fact that the crew of the MV Nasibu were arrested and subjected to a trial. It was however denied that the owner of the vessel abandoned the crew members. Instead, Counsel submitted that the shipowner could not interfere with the said criminal proceedings. It was contended that if at all the claimant assisted the crew members, it was at his own volition and not at the request of the defendant.

19. On the counter-claim, Mr. Kuloba submitted that the arrest of the MV Nasibu was actuated by the malice and gross negligence which included false allegations made by the claimant. Counsel stated that as at 30<sup>th</sup> June, 2016, MV Nasibu had a local safety certificate but when she was arrested, she was forced to remain at sea without operation which resulted in severe damage to her. Counsel urged the court to award the defendant damages for wrongful arrest of the ship.

### **ANALYSIS AND DETERMINATION**

20. The issues for determination as listed by the claimant are as follows:-

- a) Whether the claimant's claim qualifies to be an admiralty claim;
- b) Whether the claimant hired the defendant's vessel to transport his cargo from Kismayu, Somalia to Mombasa Port;
- c) Whether the vessel reached the port of destination, Mombasa from the port of departure, Kismayu;
- d) Whether the owners of the vessel abandoned the vessel and the crew in Kilifi for over 4 months;
- e) Whether the claimant's contractual dealings with the vessel's captain were binding on the defendant;
- f) Whether the claimant has proved his case to the required standards; and
- g) What of the defendant's counter-claim?

#### **a) Whether the claimant's claim qualifies to be an admiralty claim**

21. The jurisdiction of this court to entertain this matter as an admiralty claim was determined by Justice P.J. Otieno vide his ruling dated 4<sup>th</sup> August, 2017. The Hon. Judge held that the claim herein falls under the realm of Admiralty law. I need not decide on a matter that was fully addressed in a ruling delivered by a court of concurrent jurisdiction.

#### **b) Whether the claimant hired the defendant's vessel to transport his cargo from Kismayu, Somalia to Mombasa Port**

22. The claimant contends that he hired the MV Nasibu through an agent of the owner of the vessel by the name Abdul Khadir Fandhe. Initially, the claimant averred that he hired the vessel orally and there was no written agreement. However, when the claimant who was PW1 was recalled to testify he gave evidence that there was a written agreement dated 5<sup>th</sup> September, 2016 between the claimant and the defendant's agent in which the claimant was to pay US Dollars 3,000 plus fuel of US Dollars 1,200 to hire the MV Nasibu from the Port of Kismayu to the Port of Mombasa and back to Kismayu. DW1 on the other hand, disputed ever hiring out the vessel through the defendant's agent to the claimant and testified that he does not allow any other person to charter out the vessel as he does it personally.

23. This court allowed the claimant, PW1, to be recalled to adduce further evidence. He produced an agreement dated 5<sup>th</sup> September, 2016. In reference to the claim form filed on 10<sup>th</sup> May, 2017, the amount claimed by the claimant is said to have accrued from 23<sup>rd</sup> August, 2016 to 22<sup>nd</sup> March, 2017. The claimant however later indicated that the date of 23<sup>rd</sup> August, 2016 was erroneous. When cross examined, DW1, Mumin Ali Mumin, admitted that part of the cargo that was aboard MV Nasibu at the material time belonged to the claimant. He also acknowledged that he knew Abdul Khadir Fandhe and that he was the defendant's agent in Kismayu. DW1 went ahead to state that Abdul Khadir Fandhe is the person who brings cargo for consignees to the defendant's vessel and that he negotiates the costs of transporting the cargo.

24. Mr. Abdul Khadir Fandhe was never called to testify although there is on record a supplementary list of witnesses filed by the claimant that named him as a witness. His statement was annexed thereto. Arising from the testimony of DW1, it is difficult to dispute that the claimant hired the MV Nasibu to transport his cargo from the Port of Kismayu to the Port of Mombasa.

#### **c) Whether the vessel reached the port of destination, Mombasa from the port of departure, Kismayu**

25. The claimant alleged that while on the voyage the MV Nasibu developed some mechanical problems and had to dock at the port of Kilifi. It is while at the said port that the crew members and the Captain of the vessel, PW2 were arrested. The defendant disputes these assertions.

26. The claimant annexed a copy of a transire dated 14<sup>th</sup> October, 2016 to show that the vessel did arrive at the Port of Kilifi. The defendant disapproved of the transire claiming that the document proves that the goods listed thereon had originated from a local port and not an overseas one. The defendant suggested that the claimant's goods were loaded at the port of Kismayu headed to Mombasa thus the transire could not apply in this case.

27. A reading of the transire dated 14<sup>th</sup> October, 2016 counteracts the suggestion made by Counsel for the defendant. The said document was prepared at Kilifi and it shows that the goods listed thereon were for onward transmission to the Old Port of Mombasa. The document also proves that the vessel arrived at the Port of Kilifi. No proof was tendered to show that the vessel arrived at its intended destination, the Port of Mombasa.

**d) Whether the owners of the vessel abandoned the vessel and the crew in Kilifi for over 4 months and whether the claimant's contractual dealings with the vessel's Captain were binding on the defendant**

28. The claimant alleged that upon the arrest of the crew of the MV Nasibu, he had to step in and assist them with upkeep by making provisions of food, water, maintenance of the MV Nasibu and payment of professional legal fees to assist in defending the criminal charges that the crew were charged with. The claimant asserted that he did this at the request of the Captain of the MV Nasibu. On the other hand, the defendant contended that when the crew members were arrested there was nothing much that he could do as he was trying not to interfere with the criminal proceedings. It is difficult to conclude from the evidence tendered that the defendant abandoned his crew at Kilifi for 4 months. In his evidence DW1 indicated that he sent money to the Captain. On cross-examination he admitted that he did not produce the evidence to support the foregoing in court.

**e) If the Captain of the vessel could enter into a binding agreement with the claimant?**

29. The issue of whether PW2, was the Captain of the MV Nasibu was contested by the defendant who alleged that the transire document showed that the Master of the said vessel was one M. Shee. During cross examination, DW1 admitted that M. Shee was the Captain of the MV Nasibu in the year 2015 but at the time when the issue herein arose, PW2 was the Captain of the ship. It is thus clear that the Captain of the MV Nasibu was PW2, Osielo Okoth O'King, PW2. It was his evidence that he was engaged by DW1 on 17th August, 2016 as the Captain of the ship. He stated that they sailed from Kismayu on 10th October, 2016 for Mombasa with cargo aboard the MV Nasibu.

30. The claimant's Counsel asserted that the Captain has the power of attorney to act on behalf of the owner of the ship in carrying out the voyage and to maintain the vessel. In the treatise book "**The International Law of the Shipmaster**" by **John A.C. Cartner, Richard P. Fiske and Tara L. Leister**, the authors describe the relationship between the shipmaster (Captain) and owner of the ship as follows:-

*"The shipmaster's primary legal function is to act as the agent of the shipowner. That is the case, too, whether he is commanding the vessel for the owner's account or for a charterer, usually a time charterer. There are various aspects to this agency but his private authority and powers are derivative of this agency. However, this is not his only source of private authority. Private authority beyond his employment contract is contained in, among other documents, bills of lading, charter parties, infra, and shipper advice. The private powers are also founded on the laws of the flag state in agency and contract. To perform his duties, the master must have sufficient authority in contract and in law for his status and position as master to exercise his powers so that he can perform his mandated duties. Thus as a general matter, unless otherwise contracted, "the master is authorized to perform whatever acts are ordinarily necessary for the safe and proper prosecution of the voyage with regard to both the ship and the cargo".... The master is an agent under contract with the owner. Agency is a part of the general maritime law. In general terms the master is both an agent and employee of the owner. That relationship ipso facto is most unusual and probably without equal in the spectrum of the employer-employee relationship. The master in each capacity owes a fiduciary duty to the owner. Each relationship imposes a duty of loyalty, good faith and fair dealing on the part of the master. In the technical words of agency law, a shipmaster is a servant of the owner-Master who appoints and then directs the shipmaster; the owner-master is primarily responsible for the acts of the servant-shipmaster and defines through their contract of agency the private scope of the shipmaster's power.*

31. It is clear from the above extract that the Shipmaster/Captain of a ship acts as an agent of the shipowner. In this fiduciary relationship which may not necessarily be created by a written agreement, the Shipmaster (Captain) is charged with management of the ship and the voyage. It is incumbent upon the Captain to ensure that the ship, crew members and the cargo therein are safe. This duty extends to doing anything that will ensure that the voyage is successful while taking into consideration the interests of the shipowner. The Captain is however required to promptly inform the shipowner of all matters that are likely to affect his interest.

32. In this case, PW2 testified that when they were arrested and the MV Nasibu was detained, he tried to reach the shipowner but he was unable to. He therefore sought assistance from the claimant. DW1, on the other hand stated that he did send some money to PW2 to assist in their upkeep and maintenance of the said vessel but he did not have any proof to support his assertion.

33. PW2 testified that he sought money from the claimant to facilitate payment of their bond after they were arrested, to ensure that the MV Nasibu and the cargo were secure, for maintenance of the said vessel and money for provisions of the crew members. In my view, once the crew members were arrested it was necessary to ensure that the MV Nasibu was secure and in good condition during the pendency of the trial to safeguard the seaworthiness of the vessel. Therefore, any dealings between the PW2 and the claimant were binding on the defendant as far as they related to the maintenance of the vessel including her crew and the cargo. Any claim arising from such expenses however had to be proved on a balance of probabilities.

**f) Whether the claimant has proved his case to the required standards**

34. The ledgers (documents) that the claimant relied on are handwritten and are generalized in terms of the expense that the claimant was paying for. The ledger erroneously dated 23rd August, 2016 reads as follows:-

(i) Captain	-	30,000/=
(ii) Desal (Diesel)	-	20,000/=
(iii) Tungu/Kamal	-	35,000/=
(iv) Crew	-	8,000/=
(v) 2 Crew Court	-	<u>40,000/=</u>
Kshs.		133,000/=

35. Another document filed by the claimant to support his claim is dated 20th February, 2017. It reads as follows:-

(i) Loyair (Lawyer)	-	13,500/=
(ii) Court	-	220,000/=
(iii) CID	-	20,000
(iv) Customs	-	20,000/=
(v) PIL/Expenses	-	<u>130,000/=</u>
Kshs.		515,000/=

36. A third document relied on is dated 1<sup>st</sup> March, 2017. It reads as follows:-

(i) Dounti salfejka (Abu)	-	15,000/=
(ii) Fundi	-	8,000/=
(iii) Motor Biyod	-	12,000/=
(iv) Xaring/Rashin/Disel	-	<u>19,040/=</u>
Kshs.		54,040

37. A further document dated 22<sup>nd</sup> March, 2017 reads as follows:-

(i) Barosinka La Saobix yay	-	4,000/=
(ii) Barosin Lasoo Gaday	-	6,000/=
(iii) Abdiraham Akhil	-	<u>10,000/=</u>
Kshs.		20,000/=

38. The said documents were purportedly signed by the Captain of the vessel, PW2, O'king and contain a stamp said to belong to the MV Nasibu's Captain. The documents however, do not specify exactly what the claimant was paying for. It is not indicated what the money given for the two crew members for court was intended for. One cannot tell whether the said money was utilized to pay for their bond or to pay an Advocate to represent them or if at all the money was utilized for court expenses. There are no receipts availed from Kilifi Law Courts to show that the said money was paid to the court. Money was paid to the CID. One cannot fathom what the payment to the CID was for, as no receipt was produced for the Kshs. 20,000/=. No receipt was produced for the alleged payment to Customs. It is not indicated why it was necessary to pay PIL expenses. There is no receipt to show that diesel was actually purchased. The expense for the Captain is also not specific. It cannot be ascertained if the money was channeled towards maintenance of the vessel, cargo and the crew. These questions cannot be answered through the documents that were filed in court.

39. In the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**, the Court of Appeal held as follows:-

***"Were the goods supplied to the vessel for her operation or maintenance? To find the answer to this question one must turn first to the affidavit of Mr. Kariuki in support of the immediate arrest of the motor tanker "Lillian S". The deponent is silent as to the purpose for which the gas oil and fuel were supplied. Next I turn to the affidavit of Saliarelis, the Secretary of Sea Guardian Company SA., the legal and beneficial owner of the motor vessel "Lillian S". The secretary states that the master of the vessel did***

not place any order with the plaintiffs for the supply of any fuel or gas oil to the vessel. The crunch turns on paragraph 7 of the affidavit wherein it is stated that the material fuel was ordered by and was the property of SOSCO and –

*“Was only delivered to the vessel in consequence of separate arrangements made between the Master and Southern Oil supply company limited as a result of which the vessel was used as a base for the storage of the said fuel and oil pending its sale by SOSCO to other vessels.”*

*That evidence is to the effect that the fuel was supplied for a purpose other than operation or maintenance. That view is supported by the account of Tsakiris, a director of SOSCO who in paragraph 5 of his affidavit states-*

*“That pursuant to arrangements made with the owners of the motor vessel “Lillian S” SOSCO Limited used the motor vessel ... as a base for storing the fuel oil pending the sale and supply of the same to other vessels in the port of Mombasa.”*

*In the light of that evidence, I conclude that the motor vessel “Lillian S” was utilized as a base for storing the fuel oil before it was sold to other vessels. There was therefore no reasonably direct connection between the storage of the fuel oil and the operation or maintenance of the vessel “Lillian S”. I do not find in this case any evidence adduced by the plaintiff to show that the supply of the goods was for operation or maintenance of the vessel “Lillian S” or indeed a particular ship”.*

40. In **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited** [2016] eKLR, the Court of Appeal held as follows:-

“For this proposition the appellant relied on the case of **Mitchell Cotts (K) Ltd vs Musa Freighters** [2011] eKLR in which this Court expressed itself thus:

*“... In the light of the above and in the circumstances we cannot fault the superior court which accepted the only evidence which was tendered to the court on the issue, the appellant having failed to give any evidence on the value of the tyres it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance tilting in favour of the respondent on the critical issue of the value of the uncollected tyres. The court did its best and cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court...”.*

*We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. Further the facts in that case are clearly distinguishable from the facts of this case. In that case the appellant had in its defence admitted the value attached to the tyres.*

*However, its main averment in the defence was that the tyres had been delivered whereas the respondent claimed they had not. This is not the case here. Further considering the colossal amount demanded of the respondent by the appellant running into millions of shillings, the appellant could not run away from the requirement of specifically proving the loss with credible evidence. We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.*

*...In the case of **Ryce Motors Ltd & Another vs Muchoki** (1995-98) 2 E. A 363 (CAK) commenting on statements of accounts presented without more as in this case stated, this Court observed;*

*“... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages.”*

41. It is the finding of this court that although the claimant specifically pleaded the amounts that he gave to the Captain of the MV Nasibu, the same were not proved. No proof was tendered to show that the money was spent for purposes suggested by the claimant and Captain of the said ship

**g) What of the defendant’s counter-claim**

42. In his counter-claim the defendant averred that the arrest of the MV Nasibu was occasioned by the gross negligence of the claimant. The defendant claimed that had the claimant not moved the court to have the MV Nasibu arrested, the ship would be operational. The defendant stated that when the ship was arrested she remained at the sea unoperated thus occasioning her immense damage whereas prior to the arrest, she was in good condition as was evidenced by the safety certificate dated 30<sup>th</sup> June, 2016. The claimant on his part argued that the arrest of the vessel was lawful therefore he is under no obligation to compensate the defendant for its loss.

43. In the ruling of Judge P.J. Otieno delivered on 4<sup>th</sup> August, 2017 he found that the arrest of the MV Nasibu was lawful. The court however considered that the continued arrest of the ship increased the costs that the ship was incurring. The court directed that the MV Nasibu could be released to the defendant if it deposited in court security in the sum of Kshs. 400,000/= in cash. The defendant did not deposit security in court or appeal against the decision of the said Judge. DW1 in his evidence said that he did not have the money to deposit as security for release of the MV Nasibu.

44. The implication of the dismissal of the claimant's claim would be that the loss suffered by the defendant would have to be paid by the claimant as was it not for the claimant's action, the defendant would not be in the situation it finds itself in now.

45. The defendant specifically pleaded the expenses listed in paragraph 6 of this Judgment. The defendant attached a bundle of receipts to its bundle of documents filed on 13<sup>th</sup> August, 2018. In the said bundle there is a receipt for payment of Kshs.15,000/= as port dues to the Kenya Revenue Authority. The said expense was however never pleaded by the defendant therefore he cannot claim it. The defendant also annexed various receipts for payment of salary at Kshs.15,000/= per month from June, 2017 to August, 2018. Again this expense was never pleaded therefore it cannot be claimed.

46. Further, there is receipt of Kshs. 160,000/= for assessment of engine of the vessel. This expense was pleaded under the claim of "repair of engine". The same is therefore payable. An expense for Kshs.380,000/= which was proved was paid for mechanical services. There are also four receipts for the payment of security of vessel for 15,000/= each thus a total of 60,000/=. A receipt for towing of the ship to Tudor for Kshs. 50,000/=. The vessel has also incurred mooring charges of Kshs. 3,000/= per day from 19/09/2017.

47. Also, the claimant entered into a contract on 1<sup>st</sup> January, 2018 with Ajitec Marine Engineers to maintain and service the MV Nasibu at a cost of Kshs. 20,000/= per month. This amount was proved by the defendant vide a letter dated 1<sup>st</sup> January, 2018. Additionally, there are invoices received by the defendant for various parts of the vessel that will need to be replaced; maritime safety equipment proforma from Sun Fire & Safety at Kshs. 478,500/=; proforma for the generator from Car & General at Kshs. 817,105.98/=; spare parts of the main engine from Mantrac for Kshs. 2,695,078.89/= and proforma for water pump from Engineer Supplies for Kshs. 51,000/=. The expenses that are payable to the defendant by the claimant so as to restore the vessel back to working condition are those pleaded in the counter-claim.

48. As for the loss of income, the defendant claimed that he attached evidence of the income generated by the vessel. The evidence attached were two agreements for charter of the MV Nasibu the vessel for Kshs, 400,000/= for 15 days for a round trip. The defendant suggested that the claimant should compensate him Kshs. 450,000/= for every 15 days as per the counter-claim. Therefore, the defendant claims that his income for the month is Kshs. 900,000/=.

49. The mere fact that the defendant produced two agreements to show that the MV Nasibu generates Kshs.400,000/= for a round trip of 15 days is not sufficient proof that the defendant was assured that the vessel would be hired after every 15 days. Therefore, one cannot conclude that the claimant made Kshs. 900,000/= every month. The defendant's ship has however been lying idle due to the warrants of arrest that were issued on application of the claimant. I therefore award the defendant Kshs. 400,000/= per month as loss of income from 10<sup>th</sup> May, 2017 until the date of this Judgment, based on the charter agreements he produced as evidence of the earnings the MV Nasibu made for carriage of goods. It was DW1's evidence that when the MV Nasibu was not chartered, she was engaged in fishing business.

50. I therefore dismiss the claim by the claimant and allow the counter-claim by the defendant to the extent of the pleaded and proved expenses outlined below:-

- (i) Repair costs of the main engine and generator of MV Nasibu – Kshs. 2,400,000/=;
- (ii) Mooring costs from 10<sup>th</sup> May, 2017 to 18<sup>th</sup> September, 2017 – Kshs. 65,000/=;
- (iii) Mooring costs from 19<sup>th</sup> September, 2017 until conclusion of the case at Kshs. 15,000/= per month = 15 months x 15,000=Kshs. 225,000/=;
- (iv) Hire charges for a round trip from Mombasa port to Kismayu port and back at Kshs. 400,000/= per month from the date of the arrest of MV Nasibu on 10<sup>th</sup> May, 2017= Kshs. 400,000 x19 months = Kshs. 7,600,000/=;
- (v) Gross award = Kshs. 10,290,000/=.

51. I decline to award general damages as no evidence was adduced to support the said claim. I award costs of the Admiralty claim to the defendant. Interest is also awarded to the defendant at court rates. Travel and accommodation expenses claimed fall under costs and they will be paid under the said head.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of December, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Wachira for the claimant

Ms Sidinyu holding brief for Mr. Kuloba for the defendant

Mr. Oliver Musundi - Court Assistant