REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 98 OF 2017

DR. STEPHEN KARANJA KIBUKU.....APPELLANT

- VERSUS -

SAFARICOM LIMITED.....RESPONDENT

(Being an Appeal from the judgment of Hon. J.B. Kalo, Chief Magistrate dated and

delivered 4th July 2017 in the Chief Magistrate's court at Nakuru Civil Case No. 118 of 2015)

JUDGMENT

1. Judgment subject of this appeal was delivered on the 4th July 2017 upon the appellants claim for special damages arising from an accident involving his motor vehicle Registration No. KBJ 382C Nissan X-trail on the 12th October 2014 and the Respondents Toyota Hilux Registration Number KBZ 723V. The appellants vehicle was extensively damaged and upon valuation was declared a write off. The appellant in the primary suit sought compensation for the value of his motor vehicle, loss of user and some damages for medical expenses from minor injuries he sustained.

Being special damages, the loss was tabulated including value of the vehicle and associated expenses

2. In his judgment, the trial court found in favour of the appellant in the sum of Kshs.875,783/= together with costs and interest.

3. The gravaman of this appeal is that the trial magistrate erred in law and fact by reducing the special damages stated at Kshs.1,411,283/= by Kshs.535,000/= in respect of loss of user of the vehicle, and his tabulation for car hire expenses for a period of 137 days calculated at Kshs.685,000/=.

4. The trial court is further faulted for what the appellant states as misapplication and misappreciation of the true meaning of the **Doctrine of unjust enrichment.**

5. It is urged by the appellant that this court do vary substitute and increase the award on car-hire charges being claim for loss of user of the appellants vehicle from Kshs. 150,000/= as awarded to Kshs.685,000/= as pleaded and allegedly proved.

6. Two issues stand out for determination thus:

1. ***Whether the trial magistrate erred in law and fact in allowing compensation by way of Car-hire expenses to the appellant for a period of 30 days in the sum of Kshs.150,000/= in place of the sum of Kshs.685,000/= for 137 days as pleaded.***

2. ***Application of the Doctrine of unjust enrichment in the context of loss of user of an accident motor vehicle.***

7. It is trite that an appellate court will be slow to interfere with a trial court's discretion in the assessment of damages unless it is clear that the court misdirected itself on the law, misapprehended the facts or took into account that which he ought not to- **United India Insurance Co. Ltd -vs- East African Underwriters (Kenya) Ltd (1985) KLR Pg 899**.

8. **Damages for loss of user of an accident motor vehicle**.

In his plaint dated 12th December 2015 the appellant a medical doctor/practitioner was rendered immobile from the date of accident and had to seek car-hire services for a period of 137 days at the rate of Kshs.5,000/= per day hence Kshs.685,000/= To prove this special loss and

claim the appellant produced a car hire agreement dated 20th October 2014 for a period of 137 days for the sum of Kshs.685,000/= PExt 5 – and payment receipts – PExt 16(a) and 16(b).

9. Upon hearing the trial court found the respondent wholly liable for the accident and consequential loss and damages. He awarded car hire costs for 30 days at the rate of Kshs.5,000/= per day thus Kshs.150,000/= and added that

> ***"An award higher than that would unjustly enrich the plaintiff who has already been compensated for the value of the motor vehicle."***

10. The appellant's submissions is that the matter of unjust enrichment was not an issue for the court's determination, that the trial court ought not have considered the same and cited the case **Global Vehicle Kenya Ltd -vs- Lenana Road Motor (2015) e KLR** quoting **David Siroga Ole Tukai -vs- Francis Arap Muge & Others C.A No. 76 of 2014 –** to buttress the principle that the duty of a court is to adjudicate upon specific matters in dispute that have been raised by the parties.

11. The Respondent on the other hand submits that though proved by production of receipts the sum claimed was too high and unreasonable. It further held that the appellant should not enrich himself unjustly having been compensated for the loss of the vehicle, by claiming loss for 137 days.

12. There is no doubt that the claim for loss of user is a special damage – **C.A No. 283 of 1996, David Bageine -vs- Martin Bundi**, cited in **Jackson Kiprotich Kipng'eno and Another -vs- Daniel Kiplimo Kimetto (2008) e KLR,** and must be strictly proved.

13. In my opinion what is of importance here is to determine whether it was prudent and reasonable for the appellant to hire an alternative vehicle for a period of 137 days after the accident.

It is noted that the accident occurred on the 12th October 2014. The damages were assessed and a report prepared by Paramount Assessors on the 13th October 2014 – PExt. It was written off.

14. It is further shown that after the above valuation the vehicle was released to the appellant who sold the salvage at Kshs.245,000/= on the 2015 January 2015. Looking at the valuation report, the vehicle had a pre-accident value of Kshs.820,000/= that ordinarily the Insurance would have paid him. The appellant did not testify as to none payment of this money by his insurer.

15. It was the appellant's testimony that he got the valuation report on 17th October 2014. From that date he knew that the vehicle could not be repaired and his insurance would pay the insured value less the salvage value to him. That being the position was there a plausible reason to continue hiring an alternative vehicle at the expense of the respondent when it became clear that the appellant's vehicle could not be repaired?

16. I agree with the trial magistrate's holding that to do so, with expectation of compensation would amount to unjust enrichment, which is stated as an enrichment by receipt of a benefit at the expense of the other party unjustly – **Abdul Gayur Yusuf Hasham -vs- National Hospital Insurance Fund (2010) e KLR.**

17. The only issue that I have is not that the loss of user was not strictly proved **but whether the period of 137 days is reasonable in the circumstances** after the vehicle was written off, and that information passed on to the appellant within a period of one week.

18. **Did the appellant mitigate his loss?**

A claimant in such circumstances is expected to mitigate his losses by taking appropriate measures, to at least minimise the loss.

19. The Court of Appeal in **Kiptoo -vs A.G (2010) EA 2010** held that

> ***"The Principe of law guiding mitigation of losses is that it is the duty of the plaintiff to take all reasonable steps to mitigate his loss he has sustained consequent upon the wrongful act --- the duty arises immediately the plaintiff realises that an interest of his has been injured by breach of contract or tort.----"***

20. The appellant did not testify as what steps he took especially after notification that his vehicle was written off. Was it reasonable that he would continue hiring a vehicle for four and half months yet he knew that his vehicle could not be repaired? I say no, and more so that he even bought the salvage and sold it to a 3rd party.

> This is further informed by the holding in **Pemuga Auto Spares and Another -vs- Margaret Korir Tagi (2015) e KLR** where the court held that once a vehicle is written off, the only compensation should be the pre-accident value, less salvage value as assessed and any other consequential expenses that are subject to proof.

21. I am of the opinion that expenses of hiring an alternative vehicle for more than a reasonable period and without doubt not 137 days, is compensatable. In **Civil Appeal No. 118 of 2014**. The court was of the opinion that a reasonable period for repair for a vehicle was fourteen days. See also **Farah Award Gullet -vs- CMCC Motors Group Ltd (2017) e KLR** where Omondi J reiterated the requirement of a claimant to mitigate his losses.

22. Damages for loss of user of a chattel in this case a vehicle can be limited to a reasonable period – during the repair period and the period

required for assessment. Ordinarily this period should not be beyond 30 days unless there are exceptional circumstances that ought to be stated and proved.

23. In the instant case the timelines are clear. There was no repair the vehicle having been written off. The appellant did to testify as to the time when he was compensated by payment of the pre-accident value.

Guided by the authorities cited together with **David Barine case (Supra),** I find that the learned Magistrate exercised his discretion judiciously by allowing loss of user for 30 days. I find that period as reasonable and have no good reason to upset that findings.

24. **Doctrine of unjust enrichment**

Parties have submitted extensively on this doctrine and its application.

I have considered the circumstances under which the trial magistrate invoked the same. The principle of unjust enrichment requires that a party has received a benefit unjustly, and such party is required to make restitution to the other party. It presupposes that

a) A party has been enriched by the receipt of a benefit

b) That he has been so enriched at the expense of the giver and

c) ***That it would be unjust to allow him to retain the benefit.***

See **Abdul Gayur Yusuf Hasham** Case (Supra).

25. Upon analysis the evidence tendered by the appellant which evidence I have re-evaluated. The learned magistrate was in order to invoke the doctrine as what the appellant had claimed damages for loss of user for 137 days was too long and unreasonable. No mitigation of the loss by the appellant was demonstrated.

26. Thus when the trial magistrate held that to allow the whole claim would benefit or enrich the appellant unjustly, it was well thought out, and find no fault in that finding.

Being a legal principle it ought not to have been pleaded by any of the parties. As captured in the case **Madhupaper International Ltd and Another -vs- Kenya Commercial Bank Ltd and 2 Others (2003) e KLR.**

> ***"--- the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should in justice, restore it to the plaintiff--"***

27. Had the trial court awarded the loss of user for the entire 137 days, it was his considered opinion that the appellant would have been unjustly enriched.

There is no legal principle that bars a judicial officer from expressing his opinion on a legal or non legal matter so long as it is within the four corners of the dispute before him and such opinion is rendered while in the the process of determining such dispute.

28. Suffice to state that nothing turns on, on that ground of appeal. I have stated that there wold have been no justifiable cause to allow loss of user for the accident vehicle for the 137 days.

Consequently, and for the reasons stated in the body of this decision, I find no merit in the appeal. It is dismissed.

29. I am not persuaded to either vary or substitute the findings of the trial magistrate in his judgment dated the 4th July 2017.

The appeal is dismissed with costs to the Respondent.

Dated, signed and delivered this 6th day of December 2018.

J.N. MULWA

JUDGE