



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL APPEAL NO.6 OF 2017 (FORMERLY ELDORET HCCA NO.162/11)

AFRICAN LINE TRANSPORT COMPANY.....1ST APPELLANT

SWALEH KITSAO.....2ND APPELLANT

VERSUS

SYLVESTER KEITANY..... .RESPONDENT

[An appeal from the Judgment/decree of Hon. Kasera, Senior Resident Magistrate delivered on 25th August 2011 in Eldama Ravine RMCC No .40/2010.]

JUDGMENT

INTRODUCTION

1. The appellants herein were the defendants in the lower suit whereas the respondent was the plaintiff. The respondent had sued the appellants alleging that on or about the 25th December 2009, his motor vehicle registration no. KBD 768 TOYOTA MATATU was being driven lawfully and carefully along Equator Trading Center when the 2nd defendant (2nd appellant herein) so negligently drove motor vehicle registration no. KAP 306E/ZB 6261 MERCEDES BENZ along the said road permitting the same to violently collide with his motor vehicle causing extensive material damage. The appellants put in their defence denying the allegations by the respondent. The matter was set down to hearing, the appellants never availed any witness whereas the respondent testified in support of his case. The parties recorded a consent on liability on 12/07/2011 in the ratio of 80:20 in favour of the plaintiff (respondent) as against the defendants (appellants). The parties filed their written submissions and Judgment was delivered in favour of the plaintiff (respondent) as against the defendants (appellants) for a sum of Kshs.235,562.

2. Being aggrieved, the appellants filed a memorandum of appeal on 21st September 2011. The grounds of the appeal are as follows:

a. That the learned trial magistrate erred in law in failing to apply as is settled on the special damages and require that the same be strictly proved as pleaded.

b. That the learned trial magistrate erred in law in failing to acknowledge and find that the plaintiff/respondent has not adduced any evidence in support of his claim for loss of user and proceeding to award the same to the plaintiff.

c. That the learned trial magistrate therefore erred in law and fact in treating damages claimed by

the plaintiff/respondent for loss of user as general damages.

d. That the learned trial magistrate failed to consider submissions by counsel for the defendant/appellants and critically analyze the same and accord it due weight particularly on the issue of damages claimed for loss of user.

THE APPELLANTS' SUBMISSIONS

3. Parties to the suit agreed to file written submissions. The appellants' contention is that the only issue for determination by the lower court was on both general and special damages. The plaintiff had pleaded the following at paragraph 7 of the plaint.

Particulars of special damages

- i. Police abstractkshs.200
- ii. Towing chargeskshs.5,000
- iii. Assessment report charges.....kshs.1,800
- iv. Repair charges and damages.....kshs.63,452
- v. Loss of user for 15 days at the rate of Kshs 15,000 per day & further
loss of user for 5 days at the rate of Kshs 9,000.....Kshs 270,000

4. The appellants argued grounds 1, 2, and 3 as one and ground 4 alone. The first issue was on special damages. They argued that special damages must not only be pleaded but must also be strictly and specifically proved as held by the Court of Appeal in Civil Appeal No. 180 of 1993 **William Kiplangat Maritim & Anor vs Benson Omwenga as cited in Francis Muchee Nthiga vs David N.Waweru**. The same position was held in **Coast Bus Service Ltd vs Murunga Danyi & 2 Others** Civil Appeal No.192 of 1992(unreported) where it stated:-

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case.”

The burden of proof was on the respondents in accordance with sections 107 and 108 of the Evidence Act.

5. The respondents pleaded for kshs 340,452 but only proved Kshs.1,800 being payment for assessment of the report which was exhibit no. 8 and exhibit no.7 which showed kshs 63,452 being the estimate cost of repair by Steering Automobile Valuers and Assessors Ltd. No receipt was produced for towing charges and police abstract. It is the appellants' submission that the estimate repair cannot be the actual cost incurred .The valuer only gave an opinion; the onus was on the respondent to prove. In these two cases the court held the same position. **Tahir Sheikh Transporters Ltd vs Awadh Ghalib vs Joseph Gichuki Waweru** (2015) eKLR and in **David Langat & Anor vs Muturi Gachira Thenje** (2015) eKLR the court held that the trial court had failed to ascertain for himself the actual amount that the respondent had spent having his vehicle repaired instead relied on the repair estimates in the assessment report. Further the respondent could not rely on photographs of the damaged vehicle to support the claim that he incurred expenses to repair his vehicle. In **Lawrence Maina Gatiga & Another Vs Daniel Wachira Karitu** (2014) eKLR the court held that “photos and assessment report from AA need support to **demonstrate that the respondent actually incurred those expenses**. *I take into consideration that estimates do not necessarily mean that the sum shown is what was spent”*.

6. The appellants submit further that the respondent did not prove loss of user even though they pleaded

the same. The respondent pleaded for loss of user of 15 days at the rate of Kshs.15,000 per day, a further loss of user for 5 days at Kshs 9,000 totaling to Kshs.270,000/-. In his testimony at the trial he testified that he lost Kshs 22,000/- per day. The court went ahead and awarded him Ksh.15,400. The appellants submit that loss of user is a special damage claim and hence has to be proved. In Civil Appeal no.283/1996, **David Bagine vs Martin Bundi as cited in Jackson Kiprotich Kipngeno & Another Vs Daniel Kiplimo Kimetto [2008] eKLR** 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...”

In **Summer Limited Meru Vs Moses Kithinji Nkanata (2006) eKLR** the respondent was not able to prove his daily income from the matatu business and the High Court held that the claim for loss of user should be rejected as the same was not strictly proved before the lower court.

7. The appellants also submit that the court failed to consider and analyze submissions filed by them at the lower court. The appellants had relied on **Bungoma High Court Civil Appeal no.37 of 2002 Eliud Maniafu Sabuni vs Kenya Commercial Bank** where the respondent in that case failed to produce documents to prove loss of earnings.

8. In conclusion, the respondent urges the court to find that the respondent only proved Kshs 1,800 only. The cost of repair awarded for Kshs 63,452.00 was not strictly and specifically proved but the respondent only gave an estimate but not the actual receipt as evidence. Thus the award of Kshs 231,000 on loss of user was erroneous. The appellant therefore urged the Court to allow the appeal and that the judgment in the lower court be reviewed and/or set aside.

THE RESPONDENT’S SUBMISSIONS

9. The respondent submits that the trial court was right in fact and law in entering judgment in favor of the respondent. The respondent testified in support of his claim while the appellants chose to remain silent, hence the evidence on record was uncontroverted as seen in **Linus Nganga Kiongo & 3 others v. Town Council of Kikuyu [2012] eKLR** as reported in the **Mombasa HC Civil Appeal no. 88/2009 D.T. Dobie & Company(K) Ltd Vs Wanyonyi Wafula Chebukati** where the Court stated,

“What are the consequences of a party failing to adduce evidence. Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated. In the circumstances the counter-claim must fail”

10. In response to the appellant’s ground that the court erred to apply the law in special damages which have to be strictly proved, the respondent states that indeed he proved his claim on special damages, by producing a valuation report which was exhibit no.7. The said valuation report contained the cost of repairs to a sum of Kshs 63,452. Therefore the court was right in awarding the said sum. They have relied in the Court of Appeal at Nyeri Civil Appeal no.154/2005 **Nkuene Dairy Farmers Co-operative Society Ltd & James Kimathi Vs Ngacha Ndeiya (2010) eKLR**, On the award of loss of user without prove, the respondent submits that receipts are not the only requirement for proof of loss of user as seen in **Mombasa HC Civil Appeal No. 88 of 2009 (supra)**. He further states that the vehicle was a matatu which ferried passengers and the policy of insurance was proof enough.

11. The appellants raised an issue that the court treated the claim on loss of user as general damages. The respondent agrees with the appellants that loss of user has to be specifically pleaded and proved and this was pleaded in the plaint and the respondent testified in court. The vehicle could not be used for its business during repair. The charge sheet (exhibit 4) shows that the vehicle was a matatu which ferried passengers and it belonged to Great Rift Shuttle.

12. In response to ground 4 of the appeal, the respondent submits that the appellants never produced anything to fortify what the respondent had adduced in evidence. The respondent still insists that by production of the valuation report and the photographs that was proof enough. He has further relied on Rule 55 of the Traffic Rules. Rule 55A is on labeling of the yellow bands on public service vehicles.

ANALYSIS, ISSUES AND DETERMINATION

13. The appellants are asking for the court to review and /or set aside the judgment of the trial court plus costs of this appeal. The court has looked at both submissions and authorities cited together with the Record of Appeal. The following are the issues for determination:

- a. Whether or not the trial court erred in awarding loss of user as general damages;
- b. Whether loss of user is a special damage claim;
- c. Whether or not the respondent proved loss of user; and
- d. Whether the respondent proved the cost of repair.

14. This is the first appeal and the court has the duty to re-evaluate and reconsider the evidence adduced in the trial court in order to arrive at an independent conclusion, considering that the court did not see the witnesses This is well established in the famous case of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123, *Peters vs Sunday Post Limited* [1985] EA 424, *Kenya Ports Authority v Kuston (Kenya) Ltd* (2009) EA212 and in *Pil Kenya Ltd v Oppong* (2009) KLR 442.

It is not in dispute that the accident occurred though the appellants had denied all the allegations made by the respondent. The parties filed a consent in court on liability at the ratio of 20:80 in favor of the respondent as against the appellants. Therefore liability is not in dispute.

15. The respondent pleaded for the following.

Particulars of special damages

- i. police abstractkshs 200
- ii. Towing chargeskshs 5,000
- iii. Assessment report charges.....kshs 1,800
- iv. Repair charges and damages.....kshs 63,452
- v. Loss of user for 15 days at the rate of Kshs 15,000 per day &
further loss of user for 5 days at the rate of Kshs 9,000....Kshs 270,000

It is a well-established principle that parties are bound by their pleadings. The Court of Appeal in *Suleiman Rahemtulla Omar & Another v Musa Hersi Fahiye & 5 others* [2014] eKLR followed its own decision in *Chumo Arap Songok v David Kibiego Rotich* (2006) eKLR which held as follows:

“The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings.”

16. The title to the particulars is “special damages” this is a claim that has to be specifically pleaded and specially proved. The respondent during trial produced a valuation report from Steering Automobile Valuers and Assessors as exhibit 7 and a receipt for Kshs 1,800 paid for preparation of the report as exhibit 8. The Court has perused the respondent’s evidence on record and seen that

no other receipt was produced. The appellants submit that being a special claim the respondent was under a duty to produce all receipts as proof for the claim. The respondent argued that the fact that the appellants did not oppose the production of the valuation report which contained the estimate cost then this should not be raised at the appeal stage since the evidence in the lower court remained unchallenged. They relied in the Mombasa HC Civil Appeal no. 88/2009, *D.T Dobie & Company Ltd Vs Wanyonyi Wafula Chebukati*. In this case the court stated that where the defense availed no witness then the plaintiff's case remained unchallenged.

17. It is however the duty of the appellate court to look at what was produced in support of the claim in the lower court. The court agrees with the case in *Kampala City Council v Nakaye* [1972] EA 446 where the Court of Appeal was of the view that a special damage claim need not only be specifically pleaded but must also be strictly proved. This was the position too in *Hahn vs Singh* (1985) KLR 716 where the Court stated:

"[S]pecial damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."

18. In *Nkuene Dairy Farmers Co-op & Another Vs Ngacha Ndeiya*, Nyeri Civil Appeal no.154/2005, the valuation report had outlined the cost of repair for the specific parts. In the present appeal the respondent produced the valuation report, which. Contains the cost of repairs amounting to Ksh.29,000 and also it had the description of repair cost amounting to Ksh.25,700. The assessor who prepared this report never testified in court but the same was produced by the respondent. I agree with the appellant that the respondent was to produce receipts in support of this estimate.

19. It is also trite law that he who alleges must prove. Sections 107,108 and 109 of the Evidence Act Cap 80 Laws of Kenya are clear that:

107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those acts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given on either side.

109 the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

20. On the issue of loss of user the respondents testified in the trial court that he lost Ksh.22,000 per day. He said, "the motor vehicle was a shuttle from Nairobi to Eldoret that was in December. I lost money for use per person 22,000 per day. I paid Ksh.200 for police abstract. I paid Kshs.5,000 report Kshs.63,000. I pray for Kshs.340,452" This statement in evidence does not indicate how many days the vehicle was not in use The respondent did not state how long the repairs took. It is the appellants' contention that loss of user has to be specific by stating the number of days. The trial court relied on the plaint to give 15 days as loss of user.

21. On cross examination the respondents testified that he would make 15,400 per day. He however did not produce any accounting documents to verify to the court, yet the burden of proof as stated above lies on him. The valuation report produced by the respondent indicated the repair would take 4 working days. It states, "Labor (estimated to take 4 working days, working 8 hours a day at a flat rate of Ksh350 per hour)". The respondent herein did not adduce evidence as to where the vehicle was repaired since this would have shed light to the court on the number of days it took for completion of the repairs.

22. In the case of **David Bagaine v Martin Bundi [1997] eKLR**, the Court of Appeal considered the issue of loss of user and held:

“We must and ought to make it clear that damages claimed under the title, “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can.” The damages as pointed out earlier by us must be strictly proved. 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”.

23. In addition, the court erred in using the days testified by the respondent and ignoring what the valuer had indicated in the valuation report. The report indicated four days was enough for the vehicle to be repaired. I find that the court erred in using 15 days. The valuer was an expert and his opinion was right on the period the vehicle would take to be repaired. Moreover, it was the duty of the respondent to mitigate his loss and ensure that the vehicle was taken for repair so that he goes back to his business to reduce further losses. In Nairobi, HCCC No. 224 of 2007 **Joseph Mwangi Gitundu v Gateway Ins. Co. Ltd**, Gikonyo, J. held as follows: **“In law a claimant is expected to mitigate his losses by taking such measures which will bring down his losses.”**

24. Has the respondent proved his case on a balance of probability as required by law? The parties herein do not dispute that the vehicle was damaged. The valuation report had photos of the damaged vehicle. The respondent produced a police abstract, proceedings of the traffic case, a log book, valuation report, a receipt of Ksh.1,800 for preparation of the report, copy of agreement, transfer form. Although he testified that he paid Kshs.200 for obtaining a police abstract and Kshs.5000 for towing charges the respondent never produced a receipt for any of them as evidence. In **Great Lakes Transport Co. (U) Ltd V Kenya Revenue Authority**, (2009) eKLR 720, the Court, considered how proof of payment, in a claim for special damages may be established and distinguished an invoice from a receipt in the following terms:

*“Although the claim was pleaded at paragraph 7(b) of the amended plaint and prayed for in the prayers, the proof advanced in respect of it did not meet the required standard. **There was no receipt produced to show that actual cash was paid, or any payment made for the alleged purchase of tyres. A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have been proved very easily by producing either a receipt from M/s General Tyres Sales Limited which was alleged to have supplied the alleged tyres or a witness from that company to confirm that indeed money changed hands when the alleged new tyres were acquired by and delivered to the appellant...** [T]here was no evidence that the appellant bought new tyres for the subject vehicle. Mr Gikandi has endeavored to show that an “invoice” is different from a “proforma invoice” and has made effort to persuade us that an invoice should be treated as a “receipt”. **With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment.** What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect receipt.”*

In the present appeal, the respondent neither produced any invoice to show that a certain amount was be paid for the repairs. The only receipt produced was for Ksh.1,800/=

25. Further a claim for special damages must not only be pleaded, but must be strictly proved. How then are these special damages to be proved? In **Douglas Odhiambo Apel & Anor Vs 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. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur**”.

26. I agree with Kasango, J in ***D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati*** [2014] eKLR where the learned Judge follows Denning J. in ***Miller v Minister of Pensions (1947)*** 2 ALL ER 372 that the burden of proof in civil cases is on a balance of probability –

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

27. The respondent thus has failed to prove his case on a balance of probability. If at all repairs were carried out on the respondent’s vehicle then it would have taken four days as stated in the valuation report. However in the absence of any document to show where the repairs were carried out and the actual repair period, this court cannot assume that they were, and at what cost. The onus of proof was on the respondent to avail all evidence in support of his case.

28. In conclusion the Court finds that the appeal has merit and allows the appeal and holds that the respondent only proved Ksh.1,800.

ORDERS

29. Accordingly, for the reasons set out above, the Judgment of the trial court entered is hereby set aside. The court enters judgment for the respondent in the sum of Ksh 1,800 with interest at court rates since the date of filing suit.

30. Costs of this appeal to the appellant.

31. There shall be no order as to costs in the trial court.

DATED AND DELIVERED THIS 14TH DAY OF JULY 2017.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Chepng’oswo for Mr. Mukite for the Appellant

Mr. Moranga for Mr. Nyagaka for the Respondent.