REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 125 OF 2012

MOSES KIRIMI MBOGORI

T/A KITA GENERAL STORES……..…1ST APPELLANT

RAPHAEL NDEGE MWENDA……..…….2ND APPELLANT

MUTHEE PETER……..……3RD APPELLANT

VERSUS

ELIUD MAINA GATHUKU ……..……...RESPONDENT

JUDGMENT

FACTS

The appeal herein has emanated from the judgment of Honourable J. Wambilyanga in Othaya CMCC No.13 of 2011.

The appellants have filed their Memorandum of Appeal and list three (x3) grounds of appeal seeking to have the trial Court's judgment on loss of earnings set aside for not being strictly proved by the respondent.The grounds of appeal are inter alia:

In his plaint, the respondent had prayed for loss of earnings of Kshs.10,000/= per day from the date of the accident until payment in full. At trial, the respondent appears not to have adduced any evidence in support of this claim. The respondent only testified that he would earn Kshs.3,000/= per day from his business.

ISSUES FOR DETERMINATION

I have perused the court record and have read the written submissions filed by both parties and taken into account the authorities quoted therein and the only one issue for determination relates to whether the award made by the trial court for loss of earnings warrants interference.

ANALYSIS

This being the first appellate court it is incumbent upon this court to re-assess and re- evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Arrow Car Ltd vs Bimomo and 2 others (2004) 2KLR 10.**

It is trite law that loss of earnings is a special damage and that it must be strictly pleaded and proved.

In this case, the respondent did not produce any tangible evidence of the loss of earnings like books of account, bank statements and so on. However, he did prove that motor vehicle registration number KAW 140N was a matatu used to ferry passengers. This was rightly adduced by the trial magistrate from the police abstract. The appellants on the other hand did not produce any evidence to dispute the respondent's claim as to the use of his motor vehicle. Instead the focused on the fact that the actual earnings from the said matatu were not proved.

At this juncture I make reference to the dicta of Makau J, in **Nelson Rintari v CMC Motors Group Ltd** [2015] eKLR as the circumstances of the said case are similar to the current one.

In the said case, his Lordship stated that,

> **"……In this appeal there is no dispute that the Appellant's motor vehicle was for business. That it was for fare paying passengers from Maua to Nairobi. The evidence by PWI and PW2 confirm that the vehicle was operating from Maua to Nairobi and the fare per passenger was Ksh. 500/= per trip. This court takes judicial notice that in most cases matatu vehicles handily (sic) issue receipts to the passengers yet they continue to be in business. The evidence of proof of earnings in this country in various informal sectors cannot in mind be said to be proved by production of documents such as receipts or books of accounts, if that would be the case it would be saying those members in informal sector who cannot keep record or produce books of accounts cannot proof (sic) earnings yet it is common knowledge some of them end up being very successful entrepreneurs notwithstanding their failure to keep records…."**

In support of his contention, His Lordship proceeded to consider the *ratio decidendi* in the following cases:-

> **"…….In the case of:- Kimatu Mbuvi T/A Kimatu Mbuvi And Bros Versus Augustine Munyao Kioko C.A. Civil Appeal 203 Of 2001 (Nairobi) Court of Appeal quoted from the case of:- Mwangi & Another Versus Mwangi (1996) Llr 2859 (Cak) where the principle was underscored; thus…"In her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of loss of earning capacity can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just throw figures at the judge and ask him to assess such damages. See the case of Kenya Bus Services Limited vs. Mayende (1991) 2 KAR 232 at page 285" Further the Court of Appeal went on to state:- "We appreciate the expectation of Mr. Inamdar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there is dicta in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult. Apaloo J (as he then was) considered such difficulties in the case of a village-man in his mid-fifties dealing in cattle trade, who was injured in a road traffic accident. He stated:- "I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business book. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his likelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods…"**

While relying on the principles underscored by Makau J, in the above case, I find that by virtue of the fact that the respondent proved he was running a matatu business entitled him to loss of earnings. I am also persuaded by the dicta of Makau J in the above referenced case where he stated that:-

> **"……..I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the constitution of Kenya 2010 which obliges court's to do justice without procedural technicalities….."**

The issue therefore is reiterated; whether or not the award of Kshs.342,000/= was inordinately high or low to warrant it be interfered with.

An appellate court can only interfere with a trial Court's award if the same in inordinately high or low or if the trial magistrate took into account factors he/she should not have. I am guided by the following cases:-

Butt -vs- Khan (1981) KLR 349, it was held that:

> ***"an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***
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> **Further in the case of <u>Kemfro Africa Ltd t/a Meru Express Services and Another -vs- Lubia & Another</u> (1987) KLR 30 that:**
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> > ***"----in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court were held to be that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

Bearing the above principles in mind, I am satisfied that in the circumstances, the multiplier of 38 weeks years and multiplicand of Kshs 9000/= per week applied by the trial magistrate was neither too high nor low to warrant either to be interfered with.

<u>FINDINGS AND DETERMINATION</u>

For the forgoing reasons I find the award made by the trial court for loss of earnings does not warrant interference.

The upshot is the appeal is found to be lacking in merit and it is hereby dismissed.

Each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 7th day of April 2016.

A.MSHILA

JUDGE