REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCA NO. 101 OF 2009

NELSON RINTARI.....APPELLANT

VERSUS

CMC MOTORS GROUP LTD.....RESPONDENT

JUDGMENT

1. The Appellant in HCCA No. 101 of 2009 was the plaintiff at the lower court while the Appellant in HCCA 109 of 2009 was the defendant in the lower court. That on 19th December, 2012 the two appeals were consolidated and heard together as they arose from the same decree and HCCA No. 101 of 2009 was to be the lead file. The court on the same day gave directions that the appeal be determined by way of written submissions.

2. The Appellant in this appeal had through a further amended plaint filed on 24th October, 2008 sued the Respondent claiming General Damages; special damages as prayed in paragraph 9A, 10, 11 and 11B, loss of earnings, costs and interest. The Respondent through its amended defence dated 8th January, 2007 denied liability and prayed that the Appellant's suit be dismissed with costs.

3. The trial court after hearing the suit found the Respondent vicarious liable through its servant/agent/employee and awarded the Appellant a total sum of Ksh. 321,740/= against the defendant together with costs, and interest however it declined to grant the Appellant any sum for loss of earnings.

4. That both the Appellant and the Respondent being aggrieved by the learned Senior Principal Magistrate's judgment preferred separate appeals.

5. The Appellant in his appeal dated 22nd September, 2008 set out five (5) grounds of appeal which shall be referred to in this appeal.

6. The Respondent on his part preferred an appeal in HCCA No. 109/2009 setting out 7 grounds of Appeal which shall be referred to in this appeal.

7. That both the Appellant and the Respondent filed their respective submissions in both appeals in support of their respective appeals and opposing positions.

8. The Appellant's submission in this appeal is that trial court was in error in failing to award damages for loss of user/loss of earnings on the basis that there were no supporting documents, urging that the Appellant proved that his motor vehicle was a bus which was on business of

carrying fare paying passengers and as such he needed not have sophisticated way of keeping accounts to be awarded the damages sought. That the Appellant sought an award of Ksh 15,000/= per day which court could have awarded taking to account that matatu business handily keep books of account.

9. The Respondent countered the Appellant's submission urging that the appeal lacks merit as the Appellant failed to prove earnings and by awarding him compensation in absence of proof of earnings would amount to enriching him unjustifiably, by way further even people run business while making losses. The Respondent further urged matatu business is a business with records and a matatu operator is not expected to be without books of records, otherwise how would the court know whether it is making profit or loss. That even if the Appellant was earning Ksh. 15,000/= per month as alleged, he obviously had expenses as well, and that no light was shed on that.

10. PWI in his evidence on earnings avered that motor vehicle KAS 050Q was operating transport business between Nairobi and Maua charging Ksh. 500/= per passenger that. That vehicle was a 33 seater bus operating in style of Prime Coach. That he was making Ksh. 20,000/= to Ksh. 22,000/= per day but he was claiming Ksh. 15,000/= being loss of earnings.

11. The Appellant did not as submitted by Respondent produce any records or books of accounts to show whether indeed he was making that kind of money and whether he was making any profit or loss. It was upon the Appellant to prove on balance of probabilities he was indeed making Ksh. 20,000/= to Ksh. 22,000/= per day as claimed which he did not. However the Respondent did not challenge the Appellant's claim that he was making Ksh. 20,000/= to Ksh. 22,000/= per day through cross-examination or any other evidence. It was not denied either that the Appellant was making some money from the business.

12. The Respondent main contention is that no records or books of accounts were availed to show how much the Appellant was earning and what the expenses at the end of each day.

13. The Appellant contended that the evidence that was required was the existence of business carrying vessel which was making income of not less than Ksh. 15,000/= per day urging the court to invoke the provisions of Article 10(2) (b) of the Constitution by doing equity and justice by awarding the appellant the amount sought.

14. In this appeal there is no dispute that the Appellant's motor vehicle was for business. That it was for fare paying passenger 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 issue receipts to the passengers yet they continue to be in business.

15. 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 earnings yet it is common knowledge some of them end up being very successful entrepreneurs notwithstanding their failure to keep records.

16. 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."

17. I have carefully gone through the lower court proceedings, and the pleadings. The Appellant had claimed damages for loss of earnings or loss of earning capacity. The loss of earnings is specifically pleaded. The damages prayed under the heading of loss of earning capacity in my view is a general damage which has to be proved on balance of probability. I am however of the view that the figures the Appellant gave of his business earnings were exaggerated and incorrect as he did not give any figures on expenditure, which must be considered before his earnings can be taken into account. I am satisfied he was in transport business and was making earnings on daily basis being a matatu business. 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.

18. Having stated that much I agree with Appellant's ground of appeal that trial court erred in failing to award general damages under the heading loss of earnings. I have considered the evidence on earnings and lack of expenditure, I consider an income of Ksh. 7,000/= per day reasonable for 43 days as prayed under paragraph 11 and 11B of further amended plaint. I therefore award the Appellant general damages for loss of earnings for the period the vehicle was immobilized coming to a total of Ksh. 291,000/=.

19. The Respondent combined some of its grounds of appeal and I propose to consider them as argued. In grounds Nos. 1 and 5 of the Respondent's appeal it is argued that after Respondent's agent serviced the Appellant's vehicle on 8th March 2009 and was driven to Meru main bus stage, then for 1 ½ kilometers upto Gikumene before the oil indicator came on the driver did not drive back to the Appellant's garage and was turned away before he went to a different garage which detected the malfitting of the oil filter and did the repair. The Respondent's contention is that DWI drained the oil and fitted oil filter to the satisfaction of the Appellant's driver who came back after 2 days saying they wanted money.

20. The evidence of PWI is that on 8th March, 2005 his driver took his vehicle KAS 050Q to Respondent's for oil change, filter change and greasing, which the Respondent admitted. DWI is the person who carried out the service. That PWI was called by PW2 after he had traveled for 1 ½ kilometers from the bus stage informing him the vehicle engine had gone off. PWI advised PW2 to go back to CMC, PW2 went and found DWI who told him he had finalized the matter. So PW2 went to PW3 garage for service. The bus was towed to PW3 garage which PWI authorized to check the engine. That PWI went to Respondent's service bay and found them very hostile telling him to ask the driver about the vehicle.

21. I have very carefully considered the evidence of PWI, PW2, PW3 and DWI in its entirety and I am in agreement with trial court's finding and holding that the engine knock was caused by the negligence of the Respondent's agent DWI but not by PW3 who went to scene after PW2 had noticed that the KAS 050Q engine had gone off. The vehicle was towed for repair at PW3's garage. I agree with trial court's finding that the oil filter had not been professionally changed and that the oil filter was not properly locked. The engine failure was caused by Respondent's agent omission and/or negligence and not by PW3 and I further find the Respondent was duly informed of the malfitting of oil filter by PWI and PW2 but acted negligently and showed no concern by chasing PWI and PW2 away by his hostility. I find no merit in grounds No's 1 and 5 of the appeal.

22. The Respondent in grounds numbers 2, 3 and 4 faulted the learned trial magistrate by finding that the Appellant was liable and stating:-

"It is not enough to say that when the filter was fitted and oil changed the engine was run but no defect was noted. I take judicial notice that if a filter is not properly fitted to can escape the notice of the person fitting if it is not run long enough. Oil becomes thin as the engine gets hotter and this is when any malfitting can be detected. The damage to the engine on 8th March, 2005 can only be attributed to malfitting of the oil filter by Charles Muriungi Muguna (DWI) the Defendant's servant. This is negligence he is therefore liable for the damages and the Defendant is therefore vicariously liable." arguing that there was no evidence at all to support the above proposition by the trial magistrate other than the magistrate's purported judicial notice of the same.

23. The trial magistrate reasoning was that oil becomes light or thin on being heated which is a fact and the possibility of leakage and being noticed is high. I find no error in that finding whether one is to take judicial notice of that or not.

24. The evidence on record and which is not disputed by both parties is that Appellant's vehicle had no mechanical defects or problem when DWI was changing the oil filter; however after traveling for 1 ½ kilometers it ceased and had engine knock due to spilling of oil. The cause of spilling of the oil could not be contributed to any other factor other than the improper fitting of the oil filter by DWI. I therefore do not in my view agree that the suit was determined on alleged wrongful judicial notice. I therefore find no merit in grounds No's 2, 3 and 4 of the Respondent's Memorandum of Appeal.

25. The Respondent under grounds No's 5 and 6 urges that on the merits of the case the Appellant's suit ought not to have succeeded for the following reasons; that no expert evidence was called about the alleged damage; that there is a break of alleged causation by the Respondent and for failure to involve the Respondent by PW2 and lastly other causes.

26. I have considered evidence on record and especially the evidence of PW2, PW3 and DWI. DWI admitted fitting the oil filter immediately before the engine knock. He was the last mechanic to have fitted the oil engine. The vehicle traveled only 1 ½ kilometers before all the oil spilled out. PW3 confirmed the engine knock was caused by malfitting of oil filter. PW3 is qualified mechanic with many years' experience. The Respondent did not challenge the evidence of PW3 on the cause of engine knock. I have not found any break of the alleged causation by the Appellant. PWI and PW2 involved the Respondent's agents who became hostile to PWI and

PW2. No evidence on other causes of engine knock was tendered by the Respondents as regard old age and bad service. The trial court rightly found the cause of December, 2005 breakdown was directly related to the problem that was caused by the wrong fitting of the filter by the Respondent's employee.

I agree with the trial court's finding. I therefore find no merit in the Respondent's grounds of Appeal No's 5 and 6 and I dismiss them.

27. The upshot is that HCCA No. 101 of 2009 is allowed and HCCA No. 109 of 2009 is dismissed. I therefore make the following orders:-

1. ***Appellant's Appeal dated 22nd September, 2009 is allowed. The lower court judgment is set aside and substituted as follows:-***

(a) The lower courts award of Ksh. 321, 740/= is upheld.

(b) Appellant is awarded general damages for loss of earning of Ksh. 291,000/=

2. Respondents Appeal dated 8th October, 2009 is dismissed.

3. The Appellant gets costs of this appeal with interest.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF MAY 2015

J. A. MAKAU

JUDGE

Delivered in open court in presence of:-

Ms. Kiome for Appellant

Mr. Mutegi for Respondent

CC Penina/Mwenda

J. A. MAKAU

JUDGE