



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 272 OF 2009

IMPERIAL PRIMARY SCHOOL LIMITED.....APPELLANT

VERSUS

DAVID K. OYOGO.....RESPONDENT

JUDGMENT

1. The Respondent filed a suit in the Chief Magistrate's court at Kisii seeking the following relief:-
 - a. *Special damages in terms of paragraphs 5,6, & 8.*
 - b. *Costs of the suit.*
 - c. *Interest on (a) and (b) above at court rates.*
 - d. *Any other further relief this Honourable court will deem fit and just to grant.*

2. The respondent's suit stemmed from a road traffic accident in or about 24th March, 2006 along Kisii-Nyamira road near jogoo area when the appellant driver, agent, servant and or employee of motor vehicle registration number KAT 356C Isuzu Mini-bus so negligently, carelessly and without due care and attention drove, managed and/or controlled the said motor vehicle registration number KAT 365C Isuzu Mini-Bus that the same lost control and violently hit motor vehicle registration number KAU 324T Toyota Hiace matatu. As a result of the accident the motor vehicle registration number KAU 324T Toyota Hiace Matatu was seriously damaged and was assessed by Automobile Association of Kenya.
3. With regard to the particulars of negligence on the part of the Appellant's driver servant the same were particularized as follows:-
 - a. *Driving motor vehicle registration number KAT 356C Isuzu Mini-bus at a speed which was excessive in the circumstances.*
 - b. *Driving the said motor vehicle registration number KAT 356C Isuzu Mini-bus without any and or any special look out and/due care.*
 - c. *Failing to keep any proper look-out and/or have any sufficient regard for other traffic on the road or that of the personnel carried in the motor vehicle registration number KAU 324T toyota Hiace Matatu.*
 - d. *Failing to stop, show down, swerve or in any way to manage and control motor vehicle registration number KAT 356C Mini-bus to present the same from knocking, hitting and colliding with motor vehicle number KAU 342T Toyota Hiace Matatu.*

- e. *Driving into the path of motor vehicle registration number KAU 324T Toyota Hiace Matatu.*
 - f. *Causing and or permitting the accident to occur.*
4. As a result of this accident respondent's motor vehicle i.e. registration number KAU 324T, Toyota Hiace Matatu was extensively damaged. The respondent took the motor vehicle to the garage for repairs and he spent kshs. 267, 960 to repair his damaged motor vehicle at the garage. Furthermore, the respondent also had his damaged motor vehicle registration number KAU 324T, Toyota Hiace inspected and a motor vehicle accident assessment report prepared by Automobile Association of Kenya culminating to him paying a sum of kshs. 8,700 for the inspection and the preparation of the vehicle accident assessment report which sum of money respondent claims from the appellant.
 5. Thus due to the accident motor vehicle registration number KAU 324T, Toyota Hiace matatu was out of matatu business from 24th March, 2006 and it returned to the road in 1st August, 2006 and the said motor vehicle was making an average daily income of Kshs. 5,000 per day prior to this accident.
 6. Lastly, the respondent claimed loss of income for the first three months at the rate of kshs. 5000/- per day from the defendant all totaling to kshs. 450,000 for the days his motor vehicle registration number KAU 324T, Toyota Hiace matatu was out of business from the date of the accident that is 24th March, 2006.
 7. The appellants on their part filed their defence and denied that motor vehicle KAT 356C Isuzu Mini-bus was so negligently or at all driven as alleged and the respondent was put to strict proof thereof. Thus all the particulars of negligence attributed to the appellant were denied. In the alternative, the respondent contended that the alleged accident and injuries allegedly ensuing therefrom were the natural consequences of the respondent's own negligence.
 8. PW1 was the respondent who testified and told the court that he owes motor vehicle registration no. KAU 324T Toyota Hiace. He also told the court that he bought the same in January, 2006 in Kisumu. He produced the motor vehicle's log book as Pexhibit No. 1. That the vehicle was involved in an accident along Kisii/Nyamira road on 24th March, 2006 with one KAT 356C belonging to Imperial Primary School. He confirmed that he was not present during the accident though he saw the vehicle at Kisii Police Station. He also confirmed that the same had been extensively damaged on the left side from the left passengers door up to the conductor's door.
 9. His vehicle was inspected at the police station before he hired an assessor from the Automobile Association of Kenya. The same was marked as Pmfi.2 and he paid kshs. 8.720 to AA to assess his vehicle.
 10. Later, he took the vehicle to Omari motors for repairs. Omari motors inturn issued him an invoice which was marked Pmfi.3. He paid the said Omari motors kshs. 267,960. They in turn issued him with a delivery note when he went to pick the motor vehicle after repairs. The same i.e. (delivery note) was marked Pmfi.4. He also produced 3 receipts which were marked Pmfi. 1-5 (a)(b) and (c) respectively.
 11. In addition to this he revealed that his vehicle remained at the garage for 3 months, he used to earn 5000 every day from the vehicle, the vehicle used to work for 6 days, his driver Fanuel Osoro died, the police issued him with a police abstract (Pmfi.-6) and the receipt issued to him by A.A were marked Pmfi. 7 (a) and (b) respectively.
 12. Lastly he told the court that he incurred a loss of Kshs.456,000 during the 32 months the vehicle was at the police station. He also produced daily worksheets which his conductor and driver used to file which were marked Pmfi.9 (a) (b) and (c).
 13. On cross-examination, he revealed that the vehicle remained in the garage for 3 months and not 10 days and he collected the said vehicle on 7th August, 2006. He explained that the delay was because he did not have money.
 14. PW2 was George Ongesa Angina the conductor of PW1's motor vehicle KAU 324T. He confirmed that the said vehicle used to operate as a matatu between Kisii/Kericho via Nyamira. That on 24th March, 2006 he was on his way from Kisii to Nyamira when the vehicle was involved in an accident at Jogoo at about 7.00a.m. The vehicle was on the left lane while a mini bus belonging to Imperial Primary school was ahead of them and it slowed down before turning suddenly by hitting their vehicle on the left side up to the side where he was seated. He was

- injured in the face and immediately taken to hospital leaving the two vehicles at the scene.
15. He also revealed that he used to fill in the daily worksheets. That the vehicle used to raise an average of kshs. 6,000 to 5,000 and above and he confirmed this from the worksheets marked pmfi.9(a),(b) and (c) as PExh. 9(A), (B) and (C) respectively. He blamed the appellant's driver for turning suddenly without indicating.
 16. PW3 was Joseck Ibrahim Okemwa a matatu's businessman plying between Kisii and Nakuru. (PW1's business partner). He told the court that PW1's vehicle was involved in an accident in Jogoo while on its way to Nakuru. On that day, he went to the scene of the accident after receiving a report on the same after the respondent (PW1) sent him to pay for assessment fees. He was issued with receipts marked Mfi. 7(a) and (b) bearing his names although he later approached A.A to delete his name and insert that of the respondent. Instead A.A corrected the anomaly by writing a letter MFI.8. He also confirmed that he got the money to pay for assessment fees from Plaintiff's business.
 17. Lastly, he produced Mfi.7(a) and (b) and 8 as exhibit No. 7(a)(b) and 8 respectively.
 18. PW4 was No. 231462 William Adenyo attached to Kisii police station traffic section. He confirmed that police abstract A602746 was issued on 29th March, 2006 in respect of an accident involving motor vehicles KAU 324T Toyota Hiace matatu and motor vehicle registration number KAT 356C Isuzu mini bus.
 19. Furthermore that the said accident was reported at Kisii police station on 24th March, 2006, it occurred around 7.00a.m. along Nyamira within jogoo area of Kisii Township. Lastly, that the case was still pending under investigations and he produced a police abstract as PEx. No.6.
 20. PW5 was Richard Nyagaka Onchwangi an accountant with Omari Motors Garage. He stated his qualifications as a holder of CPA 1 from Pwani College and his duties in the garage included preparing accounts and repair cheques.
 21. He stated that he knew PW1 as their customer who brought motor vehicle registration number KAU 324T Toyota matatu Hiace. That the said matatu was brought for repairs after it was involved in an accident. In addition to this, he confirmed he invoiced the plaintiff for the repairs of the vehicle; with an invoice dated 10th May, 2006. The said invoice was for kshs. 267,460 which was marked MFI.3.
 22. He further stated that at first PW1 had paid kshs. 200,000 on 7th July, 2006 and he was then issued with a receipt. The other receipt was on 14th July, 2006 and it was for kshs. 67,960. He produced the said receipt as PEx.No. 5(b) and (a) respectively.
 23. Later, the respondent (PW1) collected the vehicle after repairs were done. He issued him with a delivery note, Pmfi-4 which he produced as PEx.No.4. In concluding his evidence he clarified that repairs were done on first come basis, there was no directive to generate ETR receipts when he issued those receipts to PW4 and repairs were determined by the payments made by the client.
 24. On cross-examination he revealed that the receipts he issued to the respondent had no signature, he issued cheques upon directive from the workshop and he saw the plaintiff's vehicle before it was repaired.
 25. PW6 was Daniel Okeyo Jabuya a motor vehicle assessor with Automobile Association based in Kisumu. He told the trial court that he joined A.A in 2004. His qualifications included a diploma in motor vehicle engineering, a certificate holder of proficiency in insurance, and he was also qualified from the National Youth Service Engineering Institute.
 26. He told the court that he knew one Oscar Luvaha (his colleague based in Nairobi) as he had worked with him for two years in Nairobi before he was transferred to Kisumu. However he stated that he was conversant with his signature, writing and he was also a motor vehicle assessor.
 27. He then produced an inspection report in respect of motor vehicle registration KAU 324T matatu Toyota Hiace assessed by the said Oscar Luvaha. It was then that counsel for the respondent prayed for an adjournment so as to summon the said Oscar Luvaha to court.
 28. PW7 was Oscar Mwani Luvaha residing in (Nairobi an inspection officer with A.A). His qualifications included a diploma in Automative engineering from Nairobi Technical Institute and proficiency in insurance.
 29. He recalled that in 2006 he was stationed in Kisumu Branch and in 5th June, 2006 he came to their Kisii office which is covered by Kisumu Branch where they carried out an accident assessment report for motor vehicle registration number KAU 324T Toyota Hiace. That he inspected the said

motor vehicle, took photographs of the same and noted that it was damaged mainly on the front side of the centre lane the parts that were damaged included inter alia:- left side head lights were shattered, front bumper lower spotter was damaged, front bumper was torn, front radiator upper grill was missing, left side front corner light was cracked, left side front indicator light got crushed, upper radiator grille panel was crushed, left hand rear view mirror was crushed, left hand door window glass was shattered, left hand door window winder machine was damaged, left hand front door inner cover was cracked, left hand side step was crushed, left hand front door rear pillar was kinked, sharp bend left side sliding door was dented, left side sliding door locks were damaged, left hand rear body panel was buckled, left hand rear mud guard was sheared, left hand rear light was missing, rear boot panel log dented, dash board was cracked, front wind screens stainless was shattered, roof panel dented, steering column shaft bent and noisy, right hand front cover light cracked and right front indicator light cracked. He also indicated the parts that were supposed to be replaced, their value and description of the repairs and labour. In total the cost was kshs. 267,960 inclusive of VAT.

30. He then prepared a report which he signed, he also took photographs of the vehicles (Pmfi-1(b) and produced them as Pexh.Nos. 1(a) and (b) respectively. Their employer charged kshs. 9,000 for court attendance. This marked the end of the respondent's case. The defence (appellant) did not adduce any evidence thus the matter proceeded to judgment.

31. In its judgment the trial court noted:-

“There is evidence to show that the plaintiff did incur kshs. 267,950 in the repairing the said motor vehicle registration number KAU 324T. There is also evidence to show that he paid kshs. 8,700 for the Assessors report. Regarding loss of user of motor vehicle, the plaintiff's evidence is that it took him 3 months to have the vehicle repaired. He attributed it to the fact he did not have money to carry out the repairs.....”

32. The assessors report PEx. No. 1(a) produced by Luvaha (PW6) shows that repairs were expected to take 10 days.

“.....it is not in dispute that the plaintiffs motor vehicle was for commercial use as he together with Angima (PW1) testified that the vehicle used to bring an average of kshs. 5000 per day as can be seen from exhibits numbers 9(a), (b) and (c) respectively. I would take 10 days as reasonable time within which the vehicle ought to have taken to repair had the plaintiff promptly paid the sum of Kshs. 267,960 to Omari Motors garage thus kshs. 5000 x 10 days will add upto kshs. 50,000 for loss of user”

33. Thus judgment was entered for the plaintiff as against the defendant as hereunder:

- a. *Special damages in terms of paragraphs 5,6 and 8 of the plaintiff kshs. 326,660.*
- b. *Costs and interests of the suit.*

34. The above judgment and decree by the trial court triggered this appeal. In its memorandum of appeal dated 3rd December, 2009 the defendant now appellant's (has appealed against the entire judgment and decree of the trial court on the following grounds:-

1. *The learned Magistrate erred in law when he leaded the case against the weight of evidence led at the trial.*
2. *The learned trial magistrate erred in fact and in law when despite definite finding that the investigating officer was never called to testify and that the inspection report and the accident scene sketch plans were never produced, he still went ahead to find the appellant liable while it was always the duty of the respondent to prove his allegations.*
3. *Despite there being no specific finding of negligence made against and or attributed to the appellant or evidence which was led in that regard by the respondent, the learned trial magistrate erred in fact and in law in holding that the appellant was wholly liable for the alleged accident as he did.*
4. *The learned trial magistrate erred in law and in fact when he held that the appellant was wholly to*

- blame for the accident in the circumstances at 100% and in so doing failed to address his mind to the provisions of order XX rule 4 of the Civil procedure Rules in preparing the judgment.*
5. *The learned magistrate erred in law when he in fact inferred negligence on the Appellant on the basis of submissions of counsel for the respondent from the bar as opposed to making definite findings of facts on the same from evidence led by the respondent at the trial and in proceeding to decide the case on the basis of alleged inferences of negligence against the Appellant.*
 6. *The learned magistrate erred in law when he failed in his duty as the trial court to evaluate the evidence, consider he pleadings and to make his own findings in his judgment from he evidence led at the trial and to note the material discrepancies and departure in the pleadings and in the evidence which the respondent led at the trial.*
 7. *It is the appellant's case and contention that the learned magistrate erred in fact and in law in making an award of kshs. 326,660/- as special damages which had neither been pleaded nor proved at the trial.*
 8. *The leaned magistrate thereby used his discretion wrongly in failing to apportion liability on half ratio in the circumstances and in failing to consider the pleadings and the submissions urged on behalf of the appellant before him.*
 9. *The learned trial magistrate erred in law and in fact when in his judgment he relied on documentary evidence and exhibits which were illegally produced at the trial by the respondent herself without the makers thereof being called to produce them contrary to the provisions of the Evidence Act.*
 10. *The leaned trial magistrate erred in fact and in law when he literally ignored and failed to take into account the evidence which was led on behalf of the respondent which tended to favour the appellant at the trial and instead embarked on a process of deciding the case on the basis of presumptions and not evidence and indeed when there was evidence that it was the respondent's vehicle that rammed on to the appellant's motor vehicle which was ahead.*
 - 11.

35. *When the appeal came before Sitati, J on 11th June, 2014, it was agreed between counsels representing both parties that the above appeal be argued through filing and exchanging written submissions. Submissions have been duly filed by respective counsels and I have read them.*
36. *This court, being conscious of its role as the first appellate court as stated in **Selle vs. Associated Motor Boat Co. Ltd {1968} E.A 123** has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must however bear in mind that it neither saw, nor heard the witnesses and hence make due allowance for that.*
37. *In the present case it is an undisputed fact that an accident involving the respondent and the appellants motor vehicle occurred along jogoo road. From the evidence adduced by all the respondent witness and the respondent included Pw2, who happened to be the conductor of the respondent's vehicle on the material day squarely blamed the appellant's driver over the said accident. The appellant on the other hand as I have indicated above did not rebut this evidence as they never called any witnesses to rebut this fact.*
38. *In **Civil appeal No. 127 of 2004 Kipkebe Limited vs. Moses Kauni Masaki** the High Court sitting in Kisii held as Musinga J (as he was then). That:*

“Where a defendant wishes to an lest evidence of a plaintiff, the defendant is under an obligation to adduce such evidence as would be sufficient to controvert that of the plaintiff. The appellant having failed to do so, the trial court was right in holding that the appellant was fully liable for the occurrence of the accident.

39. *Thus since the appellant never adduced any evidence to rebut the evidence of PW2 who was a witness to the said accident, it was invariable for the trial court to hold that the appellant's were wholly liable for the accident that occurred involving the respondent's motor vehicle.*
40. *The appellant has also taken issue with the fact that the trial court awarded the respondent special damages that he did not prove. It is now trite law that special damages must not only be pleaded but proved strictly. In reference to the judgment by the trial court he awarded damages both on user and expenses incurred by the respondents in the garage.*
41. *On user, the evidence of PW2 who was the respondent's motor vehicle conductor comes into*

focus. PW2 testified that he used to fill daily worksheet(Pmfi.9 (a)(b) and (c) and the vehicle used to raise an average of kshs. 6,000 to kshs. 5,000 and above. The learned trial magistrate accepted the above evidence and referred to the evidence of PW7th (Automobile Assessor) that the said motor vehicle would have taken 10 days to repair thus he took kshs. 5,000 and multiplied by 10 and he awarded the respondent kshs. 50,000 on loss of user.

42.However unlike the trial court in the instant case accepting the evidence of the respondent's worksheet as evidence of the daily income of the respondent's motor vehicle the trial court in **Ryce Motor Ltd and Another vs. Muroki {1995-1998} 2 E.A 363**, rejected the same.

43.When the matter went on Appeal the court of appeal held:-

“the learned judge had before him by way of plaintiff's evidence exhibits 2 and 3 as proof of alleged loss of profits Exhibit.2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act.....”

“the said pieces of paper in court view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of kshs. 4,500 per day. He did not support such claim by any acceptable evidence.....and he set aside the award in its entirety?.

44.The respondent in this case as per the evidence of PW2 produced a worksheet in the trial court showing the motor vehicle's daily income which was set as kshs. 5,000. The said worksheet was marked as exh.9(a)(b) and (c) (though I have tried to look for it in the file but I do not seem to find it). In reference to the above authority Ryce (supra) it is my humble view that the respondent was unable to prove such loss of user since his position was the same as that of Ryce (supra) in the sense that his claim for special damages in terms of loss of user was not strictly proved. This court being a high court will automatically be bound by decisions on the same matter made by the Court of Appeal. Therefore, the award given by the trial court of kshs. 50,000 a loss of user MUST be rejected.

45.Lastly, on the issue of respondent's award of special damages on the expenses he incurred in the garage, the same was not only pleaded but proved. The respondent's witness.PW6 the Automobile Association assessor attested to the fact that he took photos of PW4's vehicle, gave a detailed assessment on the vehicle on where it had been damaged after the accident and produced Pexh.1 as the report of the damages the respondents motor vehicle had and the costs he was to incur when the vehicle was taken to the garage.

46.The respondent on the other hand attested to the fact that he took the vehicle to the garage and paid kshs. 267,960/= inclusive of VAT. His evidence was corroborated by PW7 the assessor who assessed that the respondent's motor vehicle would incur that amount when taken for repair.

47.Thus the award of kshs. 267,960 by the learned trial magistrate to the respondent by all means was correct as the respondent had not only pleaded but proved to the letter that he had indeed incurred the said expenses.

48.For the foregoing reasons, this appeal is allowed partly i.e. the amount of damages awarded to the respondent as per loss of user i.e. kshs. 50,000 is set aside while the amount awarded to the respondent for costs incurred repairing his motor vehicle i.e. kshs. 267,960 is upheld. As to who gets costs since the appeal has succeeded partially, each party will bear their own costs.

Dated and delivered at KISII this 7th day of November, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Okongo –not in for appellant

Omwega for respondent

Edwin Mongare court clerk.