REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 157 OF 2011

RAWE PETER MAROA……APPELLANT

VERSUS

G4 SECURITY LTD…….RESPONDENT

JUDGMENT

1. The appellant herein **Rawe Peter Maroa** through the firm of Kerario Marwa & Co. Advocates filed a memorandum of Appeal dated 5th August, 2011 appealing on the whole judgment and Decree of learned Senior Resident Magistrate Honourable Kibet Sambu in Migori SPMCC.NO. 62 of 2010 on the following rounds:-

1. *The learned trial magistrate erred in law and facts when he held that the plaintiff had not proved his case without taking into account that liability had been accepted by the Defendant at 2010.*

2. *The learned magistrate erred in law and facts when he required a higher stand and of proof than that required by the law.*

3. *The learned trial magistrate erred in law and facts when he failed to find that the plaintiff had tendered enough evidence to support his claim.*

4. *The learned magistrate erred when he failed to find that this being a claim for special damages and the Defendant having admitted 70% of the claim, then the plaintiff was entitled to judgment for the admitted figure.*

5. *The learned magistrate was braised against the plaintiff.*

2. **REASONS WHEREFORE** the appellate prays that:

a. *The Appeal be allowed with costs to the Appellant.*
b. *The judgment and decree of the trial court be set aside.*
c. *Judgment be entered for the plaintiff.*

3. The case before the trial court was straight forward as only the plaintiff (now appellant) led evidence as follows:-

PW1 Rawe Peter Maroa told the court that on the December, 2009 his motor vehicle registration No. KAQ 134D Toyota Corrolla Taxi was knocked by a motor vehicle registration No. KBG 694R along Uriri-Awedo road.

4. Following the said accident he was issued with a police abstract at Awendo police station which was produced as P.Exh.1. He told the court that as a result of the accident, his motor vehicle was completely written off following the accident and he also produced an inspection report as PExh.2. Furthermore, he produced photographs of the wreckage which he produced as PExh.3 and stated that he had brought the said motor vehicle at kshs. 420,000 from one Nyangi Silvester on 21st May, 2009 and produced an agreement to that effect which was marked as P.Exh.5.
5. In addition to this, he told the trial court that he was doing PSV business with the said motor vehicle and to support the same he produced daily transactions from the months of July, 2009 to 5th December, 2009. That at the time of the accident, his average income on the PSV Motor vehicle was kshs. 2,000 but he could earn upto even kshs. 6,000 when business was good. He produced the daily record book as an exhibit in his case as PEx.6. Following damage caused to his motor vehicle, he had to sell it as a wreck or scrap at kshs. 60,000 against its value of kshs. 420,000.
6. Lastly, he prayed for special damages on the value of the motor vehicle less salvage value and costs of income at rate of kshs. 2,500 for a period of six months plus costs and interest. He added that the sold the wreck in around April, 2010 after its assessment.
7. On cross-examination the plaintiff revealed:

- *The motor vehicle was driven by one Fred Mogaka and he was at work when accident occurred.*

- *His driver had a PSV licence at the time of the accident.*

- *He did not have a service report to show that the motor vehicle was serviceable and in good condition as at the time of accident.*

- *An inspection report was prepared in the subject motor vehicle following the accident. He admitted that although his motor vehicle was defective prior to the accident the defects could not have contributed to the occurrence of the accident.*

- *He did not have a valuation report on the subject motor vehicle prior to the accident and he also did not have a motor vehicle Assessment report before the court.*
- *After the accident motor vehicle was Keptat the police station for about 3 months but it was never repaired at all.*
- *He eventually sold it off by dismantling it as spares but he had no evidence to show that he sold the accident motor vehicle as a scrap.*
- *He also confirmed that the never used to pay Kenya Revenue Authority any taxes from the proceeds of the subject motor vehicle but he used to pay Municipal Council car park fees.*

8. This marked the close of the plaintiff's case. The defendant did not adduce any evidence but stated that they wished to record a consent which stated:-

> *"That by consent judgment on liability be and is hereby entered in favour of the plaintiff and against the Defendant at the ratios 20% : 80% respectively".*

<u>In its judgment, the trial court held:-</u>

From the consent; I would like to point out that the plaintiff's claim against the defendant's is wholly founded and it premised n material damage, which claim in law as rightfully submitted by the defendant's counsels in the written submissions must not only be specifically pleaded but specifically proven as well. The plaintiff in this regard in the filed pleadings did not set out the material damages incurred thereto, inform of repairs made following the accident. He did not in evidence, adduce any evidence in demonstrations on how he had arrived at Kshs. 400,000/- being the value of the damaged motor vehicle by failing to produce in evidence a pre-accident value of the subject motor vehicle prepared by an expert, in his instance a motor vehicle assessor nor the salvage value of the subject motor vehicle.

9. The sale agreement produced as (PEx.4). In my new would not suffice, in proving the pre-

accident value of the subject motor vehicle. It was incumbent and prudent for the plaintiff to damage caused and the estimated costs of repairs carried out and/or to be carried out to salvage value of the subject motor vehicle and to demonstrate in evidence by production of professional motor vehicle assessors report on the pre-value and/or salvage value of the subject motor vehicle.

10. Secondly, it is admittedly in evidence that the plaintiff had left the subject motor vehicle to the idle at the police station for a period of three months. He, in effect did not mitigate the loss by having same repaired at the earliest opportunity. He did not demonstrate in evidence on how he had arrived at kshs. 2,500 being his daily income by selling to produce in evidence the next taxed income on the proceeds of the subject motor vehicle in daily basis. The daily records book produced (PExh.5) cannot be said to be an accurate prove of the plaintiff's daily income from the proceeds of the subject motor vehicle, which document, to the has not evidential value in law?
11. I, in upshot find the plaintiff having failed to prove this case against the Defendants on a balance of probability as required by law and it is for those reasons that I hereby dismiss the plaintiff's suit with costs to the defendants?
12. When the matter came before Sitati, J on 11th June, 2014, counsel representing both parties agreed to argue the above appeal by filing and exchanging written submissions. On 7th October, 2014, the matter came before me and I now confirm that both parties have now filed their submissions. Which I have duly read.
13. This court, being conscious of its role as the first appellate court as stated in ***Selle V. 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 witness and hence make due allowance for that.
14. The trial court had been asked to determine on the issue on quantum of damages since liability had already been consented by both parties during trial to stand at a ratio of 20:80 for the plaintiff and defendant respectively.
15. As I have stated above, the trial court dismissed the appellant suit on reasons that since appellant's claim was based material damages, such should have been proved strictly as material damages are special damages. However, in my humble view, the learned magistrate even after having dismissed the suit, he was duly bound to assess damages he would otherwise have awarded the appellant in the event that he had found in his favour. This is an elementary requirement of law see ***Nordetai Mwanga vs. Bhogai's Garage Ltd, CA. No. 124 of 1993(UR).*** Simply put, the principle is that a trial court in a claim for damages is required to assess the damages it would otherwise have awarded even if it proceeds to dismiss the claim.
16. On the whole therefore, the learned magistrate erred in striking out the suit and also failing to assess the damages he would have awarded had the appellant been successful. The appeal must therefore be allowed on that basis.
17. The question now this court seeks to answer to what appropriate damages are awardable to the appellant? From the evidence adduced in the trial court the appellant produced a sale agreement of the motor vehicle which stated that he bought the same at kshs. 420,000. This evidence was never rebutted by the respondents(defendants) and on a balance of probability the value of the said motor vehicle according to the evidence presented before the trial court remains Kshs. 420,000.
18. In addition to this, the appellant stated that he used to receive a daily income of about kshs. 2,500 daily and around 6,000 when business was good. He produced the motor vehicles public service licence and a copy of some daily inventory records showing that the motor vehicle made about kshs. 2,500 daily. The said records were said to be from the month of July, 2009 to 8th December, 2009.
19. In the instant case the appellant in his plaint prayed for 2,500 as loss of user per day for 6 months and produced a booklet to evidence the daily returns his motor vehicle made.
20. However, the trial judge in ***Ryce Motors Ltd and another vs. Muroki {1995-1998) 2 E.A 363,*** the trial magistrate in that case was given a booklet to support the claim for kshs. 3000 per day which she rejected. The Court of Appeal said this when the matter came before it on appeal:-

> *"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 dated and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the account upon which the court*

can act……"

21. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion?
22. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of kshs. 2,500 per day. He did not support such claim by any acceptable evidence……. And re set aside the award in its entirely?
23. In the instant case, the same position applies as in Ryce (supra) and thus the trial magistrate was right in stating that there was no proof of the claim for loss of user.
24. The next question is whether the claim for the pre-accident value of the motor vehicle should be awarded as opposed to the trial courts decision not to award any at all. I am aware of the court of Appeal decision in ***Peter Njuguna Joseph & Another vs. Anna Moraa C.A. 2B/91*** which states that the pre-accident value is only awardable if there was evidence of that value and that in this case no such value was proved and the whole claim must be dismissed.
25. However, I am alive to the fact that as I mentioned earlier(above) the appellant did infact produce a sale agreement which clearly states that he bought the said motor vehicle at kshs. 420,000. This claim as demonstrated by the proceeding in the trial court was never challenged or rebutted by the respondents. Also, there is evidence that the said motor vehicle was completely written off though the appellant stated that he sold the said wreckage as scrap metal for kshs. 60,000 but he never produced a receipt for the said kshs. 60,000.
26. In ***Khanna v. Samwel {1973} E.A. 225*** it was merely held that "***the damage to the car should be reduced by the extra amount for which the work had been sold"***. In the present case, the wreck was sold at kshs. 60,000 though there was no receipt to support that this evidence has not been rebutted and thus the damage must still be the whole of the pre-accident value i.e in this case unchallenged at kshs. 420,000 less 60,000 divided by 20% as this was the consented ratio of liability in the lower court.

That is:

Value of motor vehicle……..Kshs. 420,000

Less Scrap……Kshs. 60,000

360,000

Less ratio of liability on the appellant as per

Consent:- 20/100 x 360,000 = 72,000

Thus: 360,000-72,000= 288,000

Add police Abstract = 100

The upshot of this judgment is that the Appeal be and is hereby allowed and the judgment and decree is set aside in Migori SPM's Court Civil Suit No. 62 of 2010. There will instead be judgment in the sum of kshs. 288,100/- in favour of the appellant plus costs and interest.

Dated and delivered at KISII this 11th day of November, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Nyatundo holding brief for Kirari for the appellant

Ochwangi holding brief for Kimanga for the respondent

Edwin Mongare Court Clerk.