



- i) *N.M. Mwangi instructed by Anne W. Kimani & Co Advocates  
for appellant/original defendant*
- ii) *S.B. Luseno instructed by Manjanja Luseno & Co Advocates  
for respondent/original plaintiff*

### **Editorial Summary**

1. *Civil Appeal*

2. *Subject of Subordinate Court case*

#### **TORT**

2.1 *Running down cause*

2.2 *Material loss claim*

2.3 *Subrogation claim*

2.4 *Motor vehicle collision between two vehicles*

*KAK 801W and KAN 122K along the*

*Iten-Eldoret road.*

2.5 *Hon. Magistrate held*

i) *Liability at 30% - 70% in favour of the  
plaintiff against the defendant.*

ii) *Quantum claim not proved.*

*suit dismissed 5<sup>th</sup> April*

*2007.*

3. *Appeal by original plaintiff filed 4<sup>th</sup> May 2007*

*Hon. Magistrate erred in law and fact*

3.1 *Finding failure of the motor vehicle assessor to*

*attend court to produce assessment report was fatal.*

3.2 *...appellant failed to prove its claim*

3.3 *... failing to avail motor vehicle assessors.*

3.4 *...failing to consider overall evidence adduced by appellant.*

3.5 *...disallowing ....entire claim despite there being sufficient proof to support the same.*

3.6 *Other grounds.*

4. *Submissions:*

i) *By Appellant:*

4.1 *Appeal only on quantum*

4.2 *Liability agreed at 30%:70% ratio as decided by court.*

4.3 *Issue of documentary evidence not relied upon by trial court.*

4.4 *Payments and receipts cast doubt*

i) *Assessors fee – fees paid.*

ii) *Police abstract Ksh. 100/- should have been accepted without receipt. Not fatal*

iii) *Pre accident value claim honoured and discharged. No need of proof.*

iv) *Failure to produce receipts.*

ii) *By Respondent:*

i) *Main issue is that of quantum.*

ii) *Liability of 30%”70% ratio was not opposed.*

iii) *The trial magistrate was right.  
No proof made of claim.*

iv) *Assessor did not attend court.*

- v) *Claim can only be supported by assessors report.*
- vi) *Discharge voucher alone is not proof of payment.*
- vii) *No receipts issued for Ksh. 100/- for abstract fee report*
- viii) *No evidence fees received.*
- ix) *Probable award, if found successful (which is denied) would be Ksh. 950,000/- of which they would be entitled to only 30% - namely Ksh. 300,000/- or so.*

5. *Held:*

- i) *Appeal practically allowed.*
- ii) *Findings of liability not disturbed.*
- iii) *Ksh. 100/- police abstract claim dismissed.*
- iv) *Retrial for rest of material loss claim.*

6. *Case Law:*

- i) Summer Limited Men

Vs  
Moses Kithinji Nkamela  
 Meru CA 80/2004  
 Lenaola J

7. *Advocates :*

- i) *N.M. Mwangi instructed by Anne W. Kimani & Co Advocates for appellant/original defendant*
- ii) *S.B. Luseno instructed by Manjanja Luseno & Co Advocates for respondent/original plaintiff*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**Civil Appeal 306 of 2007**

**RIFT VALLEY BOTTLERS LTD .....**

**APPELLANT/ORIGINAL DEFENDANT**

**VERSUS**

**POPULATION SERVICES INTERNATIONAL ..... RESPONDENT/  
ORIGINAL PLAINTIFF**

*(Being an appeal from the judgment and order of the Chief Magistrate*

*E.N. Maina in Civil Suit No. 12071 of 2003 dated 5<sup>th</sup> April 2007 at*

*Milimani Commercial Courts)*

**J U D G M E N T**

**I. INTRODUCTION**

1. This appeal arises from a running down cause that was filed in the subordinate court at Milimani Commercial Court, Nairobi on the

21<sup>st</sup> November 2003. Two motor vehicles were involved in a collision along the Iten/Eldoret Road. The two vehicles, registration

No. KAK 801W belonging to the appellant/original plaintiff namely

M/s Rift- Valley Bottles Ltd and motor vehicle registration No. KAN 122K belonging to the respondents herein/original defendants, were damaged.

2. The appellant filed suit claiming a material loss claim against the respondents. This claim had been pleaded in the plaint as follows:

<b>i) Pre accident valued</b>	<b>Ksh. 1,000,000/-</b>
<b>ii) Towing charges</b>	<b>Ksh.16,400/-</b>
<b>iii) Investigators fees</b>	<b>Ksh. 13,400/-</b>
<b>iv) Police abstract</b>	<b>Ksh. 100/-</b>
<b>Total</b>	<b>Ksh. 950,000/-</b>

3. The plaintiff all along claimed compensation of Ksh. 950,000/-, the costs of the suit and interest.

4. The respondent on the other hand filed defence but two years after the suit had been filed he wished to put in a counter claim. An application to strike out the counter claim was successfully applied. This was because the claim was brought after the limitation of actions and without first seeking leave to bring such claim out of time.

5. Upon a trial being heard on the main suit, the Hon. Trial magistrate came to the conclusion that there was no dispute that a collision occurred. What the issue was, was whom of the two drivers to blame for the said collision. The issue of liability between the parties was appointed at a ratio of 30% against the plaintiff and 70% against the defendant/respondent.

6. The issue of liability between the parties was accordingly accepted. This court would not interfere

with this decision by the trial magistrate.

7. What was in contention was the issue of quantum. The trial magistrate dismissed the claim on the material loss damage as having not been proved.

8. Being aggrieved, the appellant/original plaintiff appealed to this High Court.

## **II APPEAL**

9. The appellant claimed that he was paid damages for his vehicle in full by the insurance company. The insurance company, through its subrogation rights would wish to have a refund of this amount paid from the respondent who had been found liable (partially) for the accident.

10. The dismissal of the claim was due to the Hon. Magistrate erred in law and fact:-

***9.1 ... in finding failure of the motor vehicle assessor to attend court to produce the assessor's report was fatal.***

***9.2 ... in finding that the appellant failed to prove its claim***

***9.3 ... in failing to avail the motor vehicle assessor.***

***9.4 ... in failing to consider the overall evidence adduced by the appellant.***

***9.5 ... disallowing ... the entire claim/dispute there being sufficient proof to appoint the same.***

***9.6 other grounds were to be produced at the appeals court but none were.***

11. The appellant prayed that the subordinate court's judgment "be partially overturned in terms of damages and judgment be accordingly entered in favour of the plaintiff against the defendant as prayed for in the plaint plus costs and interest."

12. A prayer for costs and further orders that are just and expedient in the circumstances was also prayed for.

## **III SUBMISSIONS**

i) By the appellant

13. The appeal was only on the issue of quantum. Liability assessed at a rate of 30% to 70% as decided by the court was acceptable to the appellant/original plaintiff.

14. The issue that arose on the documentary evidence. The trial court did not rely on this documentary evidence. The trial court cast doubts on the payments. This included the assessor's file, the police abstract of

Ksh. 100/-, the pre-accident value claim that was honoured and discharged. The failure to produce certain receipts.

15. The advocate for the appellant argued, for instance that whereas a claim of 100/- police abstract was made there was no need for a receipt. This is because the court should take judicial notice of the fact that police abstract receipts are issued for Ksh. 100/-

16. The other was the pre accident value claim should have been honoured as much.

17. It seems that this claim was to be proved through an assessor's report. This report was never admitted

by the parties as evidence without calling the maker thereof. The maker of the document, the assessor did not come to court for his evidence to be taken down on oath. This claim and others were dismissed.

ii) By the Respondent

18. The respondent's submission in reply was that the trial court was indeed correct in coming to the conclusion that it did. This indeed was that the assessor failed to attend court and the claim sought could only be by way of an assessor's report. The fact that a discharge voucher is alleged to have been issued is not enough to prove payment. There was never any acknowledge of funds paid by the recipient of the funds. There was no receipt issued for Ksh. 100/- abstract fee report. There was no evidence by the assessors that he in fact incurred his fee.

19. In the likelihood that the appellant would have been successful, a sum of Ksh. 950,000/- only would have been a probable award. Nonetheless, the respondent asked that the appeal be dismissed.

#### **IV OPINION**

20. In a material loss claim, that takes a form of special damages, proof of the claim must be made.

21. The pleadings must reflect the pre-accident value. This figure is obtained from the assessor who goes through all the items damaged in the vehicle, costs the same in his report and then further costs what the actual value of the vehicle would be if "sold as is" commonly known as the salvage.

22. The special damage claim, as the police abstract must be pleaded and proved strictly. I would reject the arguments that the courts take judicial notice that a police abstract costs Ksh. 100/- and therefore the appellant is entitled to this claim. I would not agree to this. The trial magistrate was correct in rejecting this claim – a police abstract must be paid for and a receipt produced. (Today I understand the fee was increased to Ksh. 200/- then, it was accordingly removed. There is no longer a fee for the police abstract.)

23. A key witness in this case was to be the assessor. He was never availed to the court to give evidence. His whereabouts was unknown. The original documents was also not availed.

24. Whereas the claim was actually under a subjugation, the proof of the case is required by law. That proof was to avail the assessor's report and the assessors together with the original documents. If the witness is not able to be traced, a party must turn to the Evidence Act Cap 80

Laws of Kenya at Section 50, to bring in a witness who is able to recognize the handwriting of the witness and who has worked with such persons for a period of time. The document itself must indeed be certified as a true copy of the original.

25. It is not the task of the court to conduct a case for the litigants but to determine what is before that court as evidence that had been presented.

26. I would find that the assessors require to come to court to give evidence or alternatively have the issue under Section 50 of the Evidence Act complied with as to witnesses.

27. I would partially allow this appeal on only four items that should go back for reassessment. These are:

- a) Pre-accident value**
- b) Less surcharge**
- c) Investigation fees**
- d) Towing charges**

28. The claim under police abstract fee of Ksh. 100/- is rejected.

29. The decision by the trial magistrate is upheld on liability at the ratio 30%:70% and would not interfere

with this findings.

**30. The decision of  
Summer Limited Men**

Vs

**Moses Kithinji Nkamela**

Meru CA 89/04

Lenaola J

is not binding to this court.

The Hon. Judge held salvage value need not be considered in material loss damage. I am not persuaded by this said decision on this position.

### **IN CONCLUSION**

31. I would make the following orders in this appeal:-

***31.1 That the appeal be and is partially allowed on appeal.***

***31.2 That this whereas High Court upholds the trial magistrate's findings on liability at a ratio of 30%:70:%***

***31.3 The claim for 100/- police abstract fee is dismissed as not having been proved.***

***31.4 That the only issue for a retrial is that of the***

- i) Pre-accident value***
- ii) Salvage value (less)***
- iii) Proof of investigations fee***
- iv) Proof of towing charges.***

32. I would accordingly further order that there be a retrial on only the above four issues.

33. The costs of the appeal at the High Court be paid by the appellant to the respondent. The costs in the subordinate court await finalization of that suit.

DATED THIS 6<sup>TH</sup> DAY OF JULY 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

*Advocates :*

- i) N.M. Mwangi instructed by Anne W. Kimani & Co Advocates  
for appellant/original defendant*
- ii) S.B. Luseno instructed by Manjanja Luseno & Co Advocates*

*for respondent/original plaintiff*