



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Civil Appeal 59 of 2006**

**1) MUMIAS SUGAR CO. LTD**

**2) PAUL ATIRA ) ::::::::::: APPELLANTS**

**V**

**JACKSON MWANIKI :::::::::: RESPONDENT**

**JUDGMENT**

The Appellants, Mumias Sugar Co. Ltd and Paul Atira in their amended memorandum of appeal dated 11/1/2009 come to this court having been dissatisfied with the judgment of Bungoma Senior Principal Magistrate in CM CC No.482 of 2005. The appeal is limited to quantum since the parties had entered a consent on liability. The appellants relies on the following grounds:

- i) That the learned trial magistrate erred in law and fact in awarding Ksh.1,552,557.60 special damages when the same was not strictly proved by way of evidence and the same has occasioned a miscarriage of justice.*
- ii) That the learned trial magistrate erred in law and fact in awarding special damages wholly as pleaded in the plaint when there was no evidence to show or prove that the Respondent was entitled to special damages wholly as pleaded in the plaint and the same has occasioned a miscarriage of justice.*
- iii) That the learned trial magistrate erred in law and fact and disregarded the principle that damages for loss of use of a vehicle can be claimed as special damages and the loss suffered should be strictly proved and in so doing arrived at an erroneous decision which has occasioned a miscarriage of justice.*
- iv) That the learned trial magistrate erred in law and fact and disregarded evidence on record that the suit motor vehicle used to earn the Respondent income on an irregular basis as and when work arose and not daily as was alleged by the Plaintiff and arrived at a manifestly wrong decision which occasioned a miscarriage of justice.*
- v) That the learned trial magistrate erred in law and fact and disregarded the Appellants' submissions and arrived at a manifestly wrong decision which has occasioned a miscarriage of justice.*
- vi) That the Hon. Trial Magistrate erred in law and fact in amending its judgment by dating it as an after thought long after it was delivered on 29/11/2006 and proceeding to formally read the same on*

28/10/2006, almost two years later when it was *functus officio*.

vii) *That the Hon. Trial magistrate erred in law and fact in proceeding to sit on its own appeal when it was by law functus officio.*

Mr. Amboko for the Appellant submitted that the claim of the Plaintiff was a material damage claim which ought to have strictly proved. The court awarded the Plaintiff the figure of Kshs.1,764,271/=. The court awarded that figure to the Plaintiff without the claim being proved. The key witnesses PW1 and PW3 did not produce receipts to support the special damage. No loss assessment report was produced by the Respondent. On the income of the Respondent's vehicle, only a few invoices were produced which were not adequate to prove daily income. The magistrate in the judgment said that he agreed with the figure without proof. The Appellant contends that it is trite law that, loss of user of a vehicle is a special damage claim and the loss of income must be proved on daily basis.

Mr. Aboko relied on CIVIL APPEAL NO.283 OF 1996 COURT OF APPEAL NAIROBI DAVID MBAIRE VRS MARTIN OUNDI where it was held that, a loss of user claim is a special user claim which must be strictly proved. The Respondent failed to prove that his vehicle was in the garage for four months but the court conceded to award loss of user for all that period at the rate of Ksh.12,000/= per day.

Mr. Ocharo for the Respondent submitted that the vehicle was in the garage for a period of four (4) months which the Respondent proved by producing a document. The Appellant did not adduce any evidence to controvert the Plaintiff's evidence. The loss of user Mr. Ocharo relied on the case of HAHN -VRS- SCENE CA, NRB CA NO.42 OF 1983 where it was held that the decree of certainty and the particularity of proof required in his special damage claim depends on the circumstances and the nature of the case. He said that PW1 and PW3 were very particular in the evidence that the daily income was not uniform and the figure of Ksh.12,000/= was the average income which was derived from the invoices produced in court. There was no need of calling a motor vehicle assessor to produce a report because the Respondent was not claiming loss of damage to the vehicle. The documents are proving special damage were produced by consent and the Appellant cannot go back to his word.

The parties in this case entered a consent on liability at the ratio of 85:15. The only duty of the lower court was to assess damages. The relevant part of the judgment of the lower court read as follows:

*"I have gone through the documents that the counsels agreed should be put in by consent. I agree with the figure quoted in the plaint but of course subject to the contribution on liability. The sum therefore comes to this Ksh.1,552,557.60/=. Costs shall be shared on this percentage of 85% in the favour of the plaintiff against 15% in favour of the Defendant. I also award the special costs."*

It is clear from the judgment of the lower court that the magistrate did not analyse the evidence of the witnesses before awarding the sum of 1,552 557.60/= The documents produced in evidence by the Respondent were not scrutinized with a view of deciding whether the damages had been proved or not. Any judgment is supposed to consist of summary of the evidence and analysis of that evidence before the court can reach any finding. Paragraph 8 of the plaint pleaded for the following special damages:

- i) *Excess fees Ksh.250,000/=*
- ii) *Towing charges Ksh.23,000/=*
- iii) *Hire purchase penalties Ksh.5,171.*

Paragraph 9 of the plaint avers that the Plaintiff lorry was under repair in the garage four 4 months during which period the Plaintiff was deprived of its use and in consequence the plaintiff suffered loss of income. Particulars of loss of income are given as ksh.1,440,000/=.

It is evident in the plaint that, the loss of user was claimed as general damages. Although it has been held in past decisions that, loss of user should be claimed as special damages, claiming the said loss as

general damages cannot be in my opinion invalidated the Plaintiff's claim. However, the cardinal principle is that such loss must be strictly proved. In the case before me, the respondent produced several invoices showing that his vehicle was used for transportation of goods. The said invoices bear different and diverse dates between the year 2001 and 2003. The figures range from Ksh.12,000/= to Ksh.600,000/=. The Respondent did not produce records to show daily income. However, the invoices produced are sufficient proof that the vehicle was used for hire. In regard to the period that the vehicle has stayed in the garage, an invoice was produced which is not conclusive evidence to show that the vehicle stayed in the garage for 4 months. The owner of any vehicle involved in an accident is supposed to take all reasonable steps to ensure that the vehicle is back on the road within a reasonable period and specially when such a vehicle is used for business. The Respondent in this case ought to have mitigated his damages by having his vehicle repaired as soon as possible to avoid much loss. It was held in the case of RYCE MOTORS LTD AND COAST AGENCY VRS ALIAS MUROKI MBS CA NO.119 of 1995 in a case similar parts that:

*"where a profit earning chattel used by the plaintiff of business is damaged or destroyed the plaintiff is entitled to loss of profits during the period which is reasonably required to replace the lost article in the market. The cost of a substitute reasonably hired will provide the measure of damages."*

The courts have emphasized a reasonable period for payment for loss of user during the period that the motor vehicle is under repair. In the case before me, I allow the Respondent thirty (30) days for loss of user which in considered opinion is sufficient for repair of a vehicle. I wish to distinguish this case from the case of Ryce Motors Ltd where the court rejected pieces of papers showing dates and figures as inadequate proof of income. In the case before me the Respondent produced invoices showing that he hired out his vehicle for transport business. Although the invoices were of diverse dates, it is common knowledge that transport business vehicles will not get business every other day. Daily income of such business has to be assessed on average based on available records. PW1 told the court that the vehicle earned Ksh.12,000/= per day which was supported by PW3 who kept the business records. From the invoices produced in court and the evidence of the witnesses, I find that the magistrate rightly awarded average daily income of Ksh.12,000/= for 30 days the court awards the Respondent Ksh.360,000/= for loss of user.

The Respondent produced two receipts of ksh.125,000/= each for excess fee paid to the insurance. The figure of 250,000/= awarded by the magistrate for excess fee was strictly proved and I uphold the same.

Regarding the additional interest accrued on arrears paid to NIC Bank, the Respondent did not produce any receipts to proof that he paid any money to the bank. He only produced two letters from the bank notifying him of the accrued amount. Special damages must be proved per se. The figure of Ksh.51,271/= was wrongly awarded and the said award is hereby set aside. Similarly there was no receipt produced for towing charges and the lower court misdirected itself in awarding Ksh.23,000/=. The said award is also set aside.

I find that the figure of Ksh.1,764,271/= was erroneously awarded to the Respondent and it is hereby set aside and substituted with ksh.610,000/= less 15% amount to Ksh.438,500/= payable to the Respondent plus interests and costs. Each party to meet their own costs of the appeal.

**F. N. MUCHEMI**

**JUDGE**

*Dated, Delivered and Signed at Bungoma*

*this 8<sup>th</sup> day of July 2009 in this presence of Mr. Abok for appellant and Mr. Ocharo for respondent.*