REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 283 of 1996

DAVID BAGINE ……..……. APPELLANT

AND

MARTIN BUNDI ……..……. RESPONDENT

(An appeal from the Judgment and decree of the High Court of Kenya at Meru (Hon. Mr. Justice Alex Etyang') dated 17th July, 1996

IN

CIVIL SUIT NO. 159 OF 1994)

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JUDGMENT OF THE COURT

On 7th August, 1993 the respondent's motor vehicle registration number KWN 637 (an Isuzu Lorry) was involved in an accident with a motor vehicle registration number KSH 625 (a Nissan) belonging to the appellant. The respondent sued the appellant in the superior court seeking general and special damages for losses allegedly suffered by him as a result by him as a result of the accident.

The question of liability of the appellant is not the subject- matter of this appeal as none of the grounds of appeal raise this issue.

We are only concerned with the awards of damages. The superior court (Etyang' J) awarded special damages in the sum of shs. 227, 750/= as cost of repairs to the respondent's vehicle and a sum of shs. 540,000/= as damages for loss of user.

It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Shabani V. City Council of Nairobi (1982-88) 1KAR 681 at page 684:

"…….Special damages in addition to being pleaded, must be strightly proved as was stated by Lord Goddard C. J. in Bonham Carter Vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

"Plaintiffs must understand that if they bring actions for damage it is for them to prove damage, it is

not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it'

We also refer to the cases of Ouma vs. Nairobi city Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235.

The evidence before the learned judge on the question of loss of user was just "thrown at him". The respondent had stated that his profit margin was Kshs. 5000/- to Kshs.9000/- per day from the sale of potatoes. Although the learned judge said that there was not a single receipt to show or prove those figures, the learned judge nevertheless proceeded to treat the damages under the heading of "loss of user" as general damages and said:

"In my view doing the best I can, I will assess his daily profit margin at shs.500/=. I enter judgment for the plaintiff in the sum of Khs. 500/= per day as general damages from the date of the accident i. e. 7th August, 1993 i. e. Ksh. 540,000/=.

The learned judge proceeded to assess "loss of user" damages as general damages although the same were claimed as special damages " to be proved at the hearing of the suit ". In doing so the learned judge erred.

We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs. The learned judge quite erroneously proceeded to award general damages at the rate of K. shs. 500/= per day from the date of accident until date of judgment.

The award of Kshs. 540, 000/= was made in total disregard of the principles for assessing special damages and we have no alternative but to set it aside in toto.

We come now to the issue of special damages award for Kshs. 277,750/= for repair costs. Counsel for the appellant argued that the respondent could properly only have claimed such sum as he actually spent towards repair of his lorry and that he could not have claimed on the basis of an estimate of costs of parts to be replaced. It was indeed on the basis that the parts damaged could cost Kshs. 277,750/= that the respondent claimed such sum in the super court. No evidence by any expert was called to prove the exact repair costs. Nor was there any evidence to show what was the pre-accident value of the lorry and the salvage value (if the lorry was indeed a wreck). There was nothing to show if the sum of Kshs. 277,750 could have properly been spent to put the lorry back on the road. It is for the claimant to prove his damage. In this case the claimant simply produced to court an estimate. He said he had not at all repaired the vehicle as he could not afford it. This seems far-fetched. If he was earning, as he said, shs.5,000/= to shs. 9, 000/= a day he could easily have repaired the vehicle and put it back on the road. The best evidence in this respect could have been supplied by an automobile assessor. But as we have no such evidence we have no choice but to also set aside that award in its entirety. We are not saying that the respondent did not suffer damage. We are saying he did not prove it.

This appeal is therefore allowed and the judgment of the superior court in so far as it relates to assessment of damages is set aside in its entirety. The appellants will have costs of this appeal but both parties will bear their own costs in the superior court. These are our orders.

Dated and delivered at Nairobi this 21st day of November, 1997

J. E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL