

**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: MURGOR, LAIBUTA & NGENYE,
JJ.A.) CIVIL APPEAL NO. E078 OF 2023**

BETWEEN

CARLOS MUEMA FRANCIS.....APPELLANT

AND

MASH EAST AFRICA LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (F. Wangari, J.) delivered on 17th March 2023

in

Appeal No. E034 of 2020)

**JUDGMENT OF THE
COURT**

1. This is a second appeal from the judgment of the High Court of Kenya at Mombasa (F. Wangari, J.) dated 17th March 2023 in Civil Appeal No. E034 of 2020. The genesis of the appeal is the suit filed by the appellant (Carlos Muema Francis) in Mombasa CMCC No. 4 of 2018 against the respondent (Mash East Africa Limited) by way of a Plaint dated 19th December 2018.

2. The appellant's case was that he was the owner of a motorised rickshaw (*tuktuk*) registration No. KTWB 720P, while the respondent was the registered or beneficial owner of motor vehicle registration number KBX 050S Scania Bus; and that, on 12th October 2018 at Coast Bus offices along old Nairobi-Mombasa Road, he was injured and his *tuktuk* damaged in a road traffic accident involving the respondent's bus. The appellant claimed that the respondent's authorised driver negligently drove or controlled the respondent's bus in such a manner that it collided into the appellant's *tuktuk* from the rear knocking it over, thereby inflicting severe injuries on the appellant and extensive damage to the *tuktuk*. He sought judgment against the respondent for special damages in the sum of Kshs. 152,320; general damages for pain, suffering and loss of amenities; and costs of the suit and interest. The sum claimed as special damages included Kshs. 67,500 for loss of income while the *tuktuk* was off the road for 45 days from 12th October 2018 to 27th November 2018.

3. In its Statement of Defence dated 28th January 2019, the respondent denied the allegations set out in the appellant's
Plaint

and averred that, if the accident occurred, it was caused by the appellant's sole and/or contributory negligence. The respondent prayed that the appellant's suit be dismissed with costs.

4. At the trial, the appellant testified that he earned between Kshs.

1,500 and 2,000 per day from operating the *tuktuk*; and that, as a result of the accident, he sustained injuries, and that the *tuktuk* was damaged, thereby resulting in losses due to his inability to operate it. On cross-examination, he conceded that he did not keep any record of his daily earnings from the operations of his motorised rickshaw.

5. In addition to his testimony, the appellant called a police officer to testify on the outcome of the police investigation into the accident, and to produce an inspection report; a medical doctor who examined him and prepared a medical report; and a motor vehicle assessor, who produced an assessment report. On cross-examination, the assessor estimated that the *tuktuk* repair would take six days to complete.

6. In its judgment dated 16th November 2020, the trial court (E. Muchoki, RM.) found that the *tuktuk* was indeed hit from behind and, based on the testimonies and accident assessment, held the respondent wholly liable for the accident. With regard to the special damages sought, the trial court awarded the appellant Kshs. 71,920 on account of the pleaded cost of repairs of the *tuktuk*, and an additional Kshs. 4,000, being the cost of preparation of the motor vehicle assessment report. However, the trial court declined to award Kshs. 67,500 claimed as loss of user of the *tuktuk* for 45 days, having found that the claim was not proved with the required particularity.

7. In addition to the reliefs aforesaid, the trial court also made additional awards of: Kshs. 2,000 on account of the medical report; Kshs. 4,350 for medical expenses; Kshs. 5,000 on account of the doctor's court attendance fees; Kshs. 550 for motor vehicle search fees; and Kshs. 5,000 for the assessor's court attendance. For general damages, the court awarded the appellant Kshs. 180,000 for pain, suffering and loss of amenities. All in all, the trial court entered judgment in favour of the appellant in the total sum of Kshs. 272,820 together with costs of the suit and interest.

8. Dissatisfied with part of the trial court's judgment, the appellant moved to the High Court on appeal in Mombasa HC Civil Appeal No. E034 of 2020 on the sole ground that the learned trial Magistrate erred in law and in fact in holding that the appellant had not proved his claim for Kshs. 67,500 for loss of income on account of the alleged loss of user of his *tuktuk*.

9. In its judgment dated 17th March 2023, the High Court (F. Wangari, J.) held that the appellant's claim for loss of user was in the nature of special damages and observed that, although the amount of Kshs. 67,500 was specifically pleaded in the plaint, it was not strictly proved. The learned Judge referred to the appellant's own testimony in which he admitted having no documentary evidence to prove his income or business operations.

10. The court further observed that damages for loss of user must be treated as special damages, and that they cannot be awarded on a general or speculative basis. According to the learned Judge, even if the claim for loss of user had been proved,

the appellant would only

have been entitled to loss of user for six days in accordance with the assessment report. The court concluded that the trial Magistrate was not at fault in law or fact in rejecting the claim for loss of user and, consequently, upheld the trial court's judgment and dismissed the appeal with costs to the respondent.

11. Still dissatisfied, the appellant has filed the instant appeal, vide a Memorandum of Appeal dated 25th May 2023 faulting the learned Judge for: failing to appreciate that a claim for loss of user is akin to a claim for general damages, and for treating it as a claim for special damages *stricto sensu*; holding that the appellant had not proved his claim for loss of user to the required standard; and for failing to appreciate the *ratio decidendi* in the binding decision of **Samuel Kariuki Nyagoti v Johan Distelberger** [2017] eKLR. He prays that the impugned judgment be set aside; that judgment be entered in his favour for Kshs. 67,500 as loss of user plus costs and interest from the date of the trial court's judgement; and that he be granted costs of the instant appeal and of the appeal in the High Court.

12. In support of the appeal, counsel for the appellant, M/s. Jengo Associates, filed written submissions together with a list and digest of authorities dated 26th June 2023. On their part, counsel for the respondent, M/s. Oloo & Company, filed written submissions dated 28th May 2025.

13. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the Civil Procedure Act provides that:

72. Second appeal from the High Court

(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

14. In Stanley N. Muriithi & another v Bernard Munene Ithiga

[2016] eKLR, this Court held that:

“We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the Civil Procedure Act, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.”

15. In the same vein, this Court held thus in **Kenya Breweries Ltd v Godfrey Odoyo** [2010] eKLR that:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:

‘We would agree with the view expressed in the English case of

Martin v Glywed Distributors Ltd (t/a MBS Fastenings)
1983 ICR

511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

16. To our mind, only one issue commends itself for our determination, namely: whether the learned Judge erred in holding that the appellant had not proved his claim for loss of user to the required standard.

17. Counsel for the appellant took issue with the learned Judge’s observation that loss of user is a special damage claim, which has to be specifically pleaded with particularity and strictly proved. In his judgment, the learned Judge had this to say:

“13. I have looked at the plaint dated 19th December, 2018. At paragraph 5 (g), I note that there was a specific prayer for loss of

income for forty – five (45) days. To this end, I hold that the figure of Kshs. 67,500/= was specifically pleaded. Was it strictly proved?

14. Comparing this case with the case of Samuel Kariuki Nyangoti (supra), for the Lower Court to award this figure, the Appellant was required to demonstrate the number of trips (if any), expenses incurred and any other outgoings so that the court would make an informed decision on the figures pleaded. In the present case, though it was pleaded, I am afraid that the same was not strictly proved to the required standards”

18. The learned Judge went on to observe -

*“15. ... the claim for loss of user is a special damage claim. I am fortified in this finding by the reasoning of the Court of Appeal in **David***

***Bagine v Martin Bundi** [1997] eKLR (Gicheru, Shah & Pall, JJ. A). The Court held as follows: ‘... 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’ Thus, on the first issue, I have no reason to impeach the Lower Court’s judgement on the ground of loss of user. Even if the Appellant had proved loss of user, he was only entitled to six (6) days as per the assessment report produced as exhibit 7. In*

Samuel Kariuki Nyangoti (supra), it was held that the Appellant was required to mitigate his losses.”

19. Having considered the judicial authorities cited by counsel for the appellant, the learned Judge took to mind the fact that, in **Mitchell Cotts (K) Ltd v Musa Freighters** (supra), the amount of Kshs. 29,000 which was awarded had been specifically pleaded; and that the Respondent had admitted the amount as claimed, which explains the reason why the superior court made the award, and why the Court of Appeal upheld it. To our mind, the claim was allowed on account of the admission without which it ought to have been strictly proved.

20. With regard to the case of **Samuel Kariuki Nyangoti v Johaan Distelberger** [2017] eKLR, the learned Judge observed that:

“... though no documentation was produced, the Court of Appeal was satisfied that the Appellant gave evidence of the routes he was operating, the number of trips per day, the vehicle’s earnings per trip, expenses incurred including cost of fuel and the fees he was paying for the stage”

21. On their part, learned counsel for the appellant submitted that, because loss of user entails a projection into the future of what would have happened if the accident had not occurred, such loss cannot be quantified precisely, and that it constitutes damages at large; that, for this reason, loss of user cannot be particularly provided, and is to be assessed by the court doing the best it can from the evidence at hand; and that the correct standing is that a claim for loss of user is a prescript of general damages.

22. Counsel cited, *inter alia*, the case of **Samuel Kariuki Nyangoti v Johaan Distelberger** [2017] eKLR where this Court held that, in personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages, and submitted that the loss of use of a profit making chattel such as a lorry or *matatu* through an accident is similarly a claim in general damages; that the standard of proof in such claims is on balance of probabilities; that the principle of *restitutio in integrum* is applied in such cases; and that the standard of proof of loss of user is therefore proof on a balance of probabilities.

23. Citing an array of other judicial authorities, counsel invited us to find for the appellant on various evidential matters of fact that go beyond our remit on 2nd appeal.

24. On the authority of **Issa Transporters Limited v Tsama** [2021] KECA 296 (KLR); and **Ryce Motors Limited & Another v Elias Muroki** [1996] eKLR, counsel contended that failure to cross-examine a witness on a material part of his evidence or at all may be treated as an acceptance of the truth of that part of his evidence; that the appellant had proved his case on a balance of probabilities, his evidence having remained uncontested in respect of the length of time which the *tuktuk* remained off the road or the reasonableness of the loss claimed at Kshs. 1,500 per day for a period of 45 days; and that the evidence in that regard was not challenged in cross-examination.

25. On the authority of **Samuel Kariuki Nyangoti v Johaan Distelberger** (supra) counsel submitted that the fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying

damages for his breach of duty; that the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered; and that the court may have to form conclusions on matters on which there is no evidence and make allowance for contingencies, even to the extent of making a pure guess.

26. In rebuttal, learned counsel for the respondent submitted that the main issue in the instant appeal as regards loss of user and the pertinent legal principles regarding the award of damages were properly addressed by the trial court and subsequently evaluated and affirmed by the High Court.

27. We take to mind the submission by counsel for the appellant that, indeed, the appellant failed to adduce books of accounts or other related documents to substantiate what he used to earn each day. In our considered view, the holding in the case of ***Jacob Ayiga Maruja & another v Simeon Obayo*** [2005] eKLR (which counsel for the appellant cited for the proposition that the production of documentary evidence is not the only way of proving earnings) did not by any means negate the immutable principle at common law

that a claim for special damages, as was the case here, need to be specifically pleaded with particularity and strictly proved. Neither does the respondent's failure to cross-examine the appellant's testimony on loss of user amount to an admission or otherwise shift or negate the appellant's burden of strict proof of loss of user, which is in the nature of special damages, and which cannot be awarded on the basis of guesswork or mere presumption as counsel appears to suggest.

28. With regard to the question as to whether loss of user is classified as falling under general damages or special damages claims, this Court in ***Kiiru t/a Kinamba General Supplier's & Transport v Kenya Ferry Services & another*** [2025] KECA 664 (KLR) considered the divergent jurisprudence on the issue as set out in ***David Bagine v Martin Bundi (supra)***, where this Court stated that damages which are claimed under the title "loss of user" are special damages which must be strictly proved; and ***Ryce Motors Limited & Another v Elias Muroki (supra)***, where this Court stated that a claim for loss of user must be supported by acceptable evidence. On the authority of the afore-cited decisions, the claimant is obligated to demonstrate by factual evidence, and with specificity, the justification upon which he/she claims those damages. In principle, it is not enough to make a sweeping statement that this or that figure was the daily or periodic income earned from

the business, and that it was lost due to the misfortune complained of.

29. We find nothing to suggest that the learned Judge was at fault in upholding the trial court's decision to decline the appellant's claim for loss of user, which was not strictly proved at the trial. Moreover, the appellant admitted that he had no records of his alleged income or any evidence, other than his word for it, on which his claim was founded.

30. We take to mind the immutable principle that special damages must be specifically pleaded and strictly proved with particularity and certainty as they represent actual, quantifiable, out-of-pocket expenses, not foreseeable consequences that may be inferred from the incident (see: **David Bagine v Martin Bundi** [1997] KECA 54 (KLR); **Herbert Hahn v Amrik Singh** [1985] KECA 68 (KLR); and **Easy Coach Limited & another v Omondi** [2025] KEHC 888 (KLR), which emphasize that evidence, such as receipts or assessor reports, is required to substantiate these claims, as a claimant must prove the damages, not merely present them.

31. The same applies to claims for loss of user in respect of which the appellant was obligated to strictly prove the sums claimed as having been lost in consequence of the accident. Having considered the record of appeal, the ground on which it was founded, the rival submissions and the law, we find that the appeal fails and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Mombasa this 30th day of January 2026

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

***I certify that this is a
True copy of the
original***

Signed

DEPUTY REGISTRAR