

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E018 OF 2025

MALACHITE LIMITED.....
.....APPELLANT

VERSUS

PATRICK SHITUKHU ADEMA.....
RESPONDENT

**(Being an appeal from the Judgment and Decree of Hon. Wilson Rading (PM)
in Naivasha CMCC No. E008 of 2024 delivered on 23rd January, 2025)**

JUDGMENT

Background of the Appeal

1. By an undated plaint filed in court on 19th January 2024, the respondent sued the appellant for the value of motor vehicle registration number KBZ 174T in the sum Kshs. 430,000/-, assessment fees of Kshs. 5,500/-, and fees for a certificate of official search of Kshs. 550/-, making an aggregate of Kshs. 435,550/-. The respondent further claimed loss of user of the motor vehicle at the rate of Kshs 3,000/- per day from 13th July 2023 to 6th December 2023, totaling Kshs. 492,000/-, following the motor vehicle being written off. Additionally, the respondent sought towing charges of Kshs. 56,000/-, costs of the suit, and interest thereon at court rates.

2. The respondent's case was that on or about 13th July 2023, along the Gilgil-Nakuru Road at Soysambu area, he was lawfully driving motor vehicle registration number KBZ 174T when the appellant, and/or his driver, agent, or employee, negligently and recklessly drove and suddenly turned motor vehicle registration number KCX 272Z onto a feeder road into Soysambu without notice. The action blocked the path of the respondent's vehicle, causing a collision and a resultant extensive damage that rendered the vehicle beyond economical repair, and it was thus treated as a total loss.
3. In a statement of defence dated 2nd February 2024, the appellant denied ownership of motor vehicle registration number KCX 272Z and disputed the occurrence of the accident. The appellant further averred that, if the accident did occur as alleged, it was caused, or substantially contributed to, by the negligence of the respondent, who was purportedly driving without due care and attention to other road users.
4. By its judgment delivered on 23rd January 2025, the learned trial magistrate entered judgment in favor of the respondent as follows:
 - a) Liability to be shared between the parties in the ratio of 80:20 in favor of the respondent;
 - b) The respondent was awarded special damages for total loss of motor vehicle registration number KBZ 174T in the sum of Kshs 360,000/-

- c) The respondent was awarded incidental special damages in the sum of Kshs 61,000/- being the cost of towing and other expenses, and
 - d) Loss of use in the sum of Kshs 135,000/-; plus
 - e) Costs of the suit and interest on the damages at court rates.
5. Aggrieved by the decision, the appellant lodged the present appeal by way of a Memorandum of Appeal dated 21st February 2025, seeking orders that the appeal be allowed, that the judgment of Naivasha CMCC No. E008 of 2024 delivered on 23rd January 2025, particularly the award for loss of user, be reviewed and/or set aside, and that he be awarded costs of the appeal.
6. The appeal faults the judgment only on the finding and award of loss of use of the motor vehicle. Even though the fault is singular, the attack is mounted on four grounds that: -
- a) THAT the learned magistrate erred in law and fact by awarding the respondent damages for loss of user which award was not specifically proven as per the requirements in law.**
 - b) THAT the learned trial magistrate erred in law in disregarding previous court precedents on award of loss of user being a special damage that ought to be specifically proved.**

c) THAT the learned trial magistrate's award for loss of user was entirely unsupported by law, as the respondent's motor vehicle had been declared a total write off resulting in double compensation which constitutes a miscarriage of justice in the circumstance of the case.

d) THAT the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions and authorities guiding the court on assessment of loss of user claim.

7. As directed by the court, the appeal has been canvassed by way of written submissions filed by both sides which may be summarized as below.

Appellant's Submissions

8. The appellant isolates two issues for determination by the court. The first is whether the claim for loss of user was specifically pleaded and strictly proved. On this issue, it is submitted that the respondent did not adduce any documentary evidence, such as receipts or rental agreements, to verify the alleged damage, thus making the claim and the award for loss of user speculative. It contends that a claim for loss of user is a special damage claim, which must be specifically pleaded and strictly proved. In support of this proposition, it refers the court to the decision by the Court of Appeal in **David Bagine v Martin Bundi [1997] eKLR, Civil Appeal No. 283 of 1996** for the leaning that loss

of use must in all circumstances be treated and remain special loss to be specifically pleaded and strictly proved.

9. The second issue is whether the award of Kshs. 135,000/- for loss of user is justified. On this issue, the appellant submits that claims for loss of user generally involve profit-making chattels. It cites **Samuel Kariuki Nyangoti v Johaan Distelberger, as referenced in Jackson Mwabili v Peterson Mateli [2020] eKLR**, where the Court of Appeal held and said:

“[16] The damages claimed by the appellant were in the nature of pecuniary loss, which the law does not presume to be the direct, natural, or probable consequence of the accident, since it is subject to ascertainment by the court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. 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. The standard of proof in such claims is on a balance of probabilities, and the principle of restitutio in integrum is applied in such cases.”

10. The appellant argues that the respondent’s evidence shows he used the vehicle to commute to work, confirming that its use was personal and not commercial, which falls outside the scope of a claim for loss of

user. It further contends that, once a vehicle is written off, loss of user is not payable. In support, it refers the court to **Permuga Auto Spares & Another v Margaret Korir Tagi [2015] eKLR**, where the court held that, where a vehicle has been written off, the proper compensation is limited to the pre-accident value, less salvage, and other strictly proven consequential costs, such as towing or assessment fees. The court in that case rejected claims for loss of user in total loss situations, citing them as a form of double compensation. Based on such submissions, the appellant therefore asks the court to find the award for loss of user unjustified and to set it aside.

Respondent's Submissions

11. The respondent opposes the appeal and contends that, following his motor vehicle being written off, he was forced to hire a car to facilitate his movement at the rate of kshs. 3,000/- per day from the date of the accident, being the 6th December 2023. He claims that, for this reason, he is entitled to loss of user.
12. He argues that, in any event, the salvage value was deducted from the initial amount of kshs. 430,000/- and in accordance with the 20% liability apportioned to the appellant.
13. In support of his entitlement to loss of user, the respondent refers the court to the decision in **Kaniu & Another v Tipper Hauliers Limited (Civil Appeal 43 of 2019) [2022] KEHC 16980 (KLR)**, where the court held:

“From the above authorities, it is clear that a plaintiff whose chattel is destroyed beyond repair and/or is a write-off is entitled to claim both the pre-accident value of the chattel destroyed by the defendant’s tortious act as well as loss of user. In the instant case, it is not disputed that the respondent’s motor vehicle became a write-off as a result of the accident. This is supported by the evidence of the motor vehicle assessor PW2, who testified that the said motor vehicle was a total loss. In the circumstances, I find that the trial court was not misdirected in awarding the respondent both the pre-accident value of the motor vehicle and loss of user.”

14. He further cites the decisions in **Rapid Kate Services & Another v Fredrick Ringera [2019] eKLR** and **Ryce Motors Ltd & Another v Elias Muroki [1996] eKLR** for the proposition that, where a vehicle is written off, the plaintiff is entitled to loss of user until such time as the pre-accident value of the vehicle is received.

15. He argues that this is the reason why the trial court awarded him Kshs. 3,000/- per day for 45 days, instead of the 143 days he initially sought.

16. He contends that the award of loss of user was specifically pleaded and proved, with the proof emerging during his cross-examination, where he testified that he used alternative means of transport, namely a taxi.

17. He supports the decision of the trial court.

Issues, Analysis, And Determination

18. Having considered the record of appeal and the rival submissions of the parties, the court identifies the sole issue for determination to be; whether the learned trial magistrate erred in awarding the respondent Kshs. 135,000/- as damages for loss of user. This is informed by the fact that the finding on liability and awards made in respect of the total loss of the motor vehicle and incidental special damages are not contested.

19. As a first appellate court, this Court is under a duty to re-evaluate the evidence on record and arrive at its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. **(See Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123).**

20. The principles governing the interference by an appellate court with an award of damages are well settled. Such interference is justified where the trial court proceeded on a wrong principle of law, misapprehended the evidence, or arrived at an award so inordinately high or low as to constitute an erroneous estimate. **(See Butt v Khan [1981] KLR 349).**

21. The appellant contends that the claim for loss of user is in the nature of special damages and, although specifically pleaded, was not strictly proved. It is argued that no documentary evidence, such as receipts or

rental agreements, was tendered to substantiate the alleged daily expenditure of Kshs. 3,000/-.

22. The determination of this issue turns on the legal character of the claim. A distinction must be drawn between loss of user of a profit-generating vehicle and actual expenditure incurred in hiring alternative transport.

23. Where the damaged vehicle is a profit-making chattel, courts have treated loss of user as a claim in general damages, provable on a balance of probabilities. **(See Samuel Kariuki Nyangoti v Johaan Distelberger, as cited in Jackson Mwabili v Peterson Mateli [2020] eKLR).**

24. The respondent relied on **Kaniu & Another v Tipper Hauliers Limited (Civil Appeal 43 of 2019) [2022] KEHC 16980 (KLR)** in support of his entitlement to loss of user. A review of that decision shows that the motor vehicle in question was used for commercial purposes, and documentary evidence was tendered demonstrating income generated from the vehicle. The Court observed, inter alia:

“The next issue is whether the respondent proved the claim for loss of user to the required standard. It is not in dispute that damages for loss of user are in the nature of special damages and thus must be pleaded and proved. PW4, the respondent’s legal officer, produced statements of profit and loss made from the respondent’s motor vehicle for the months of July, August and September

2015... The respondent made Kshs 1,176,822/- in July, Kshs 1,325,763/- in August and Kshs 1,322,400/- in September from the said transport business.”

25. Likewise, in **Ryce Motors Limited & Another v Elias Muroki [1996] eKLR**, the motor vehicle in issue was a matatu engaged in an income-generating activity.

26. The present case, however, is materially distinguishable. The respondent's own evidence establishes that the subject motor vehicle was used solely for personal commuting. There is no evidence that it was engaged in any commercial enterprise or that it generated income.

27. The respondent pleaded loss of user at the rate of Kshs. 3,000/- per day and testified that, following the accident, alternative transport was hired. The pleaded daily rate therefore represents actual expenditure allegedly incurred on taxi services. In these circumstances, the claim assumes the character of special damages. Even then it is also the law that specific proof must not only be by way of receipts. see **Jacob Ayiga Maruja vs Simon Obayo (2005) eKLR**

28. Awarding damages on evidence other than documentary evidence does not contravene the settled position of the law that special damages must be specifically pleaded and strictly proved as settled by the Court of Appeal.

29. In the present matter, the fact that the respondent testified to hiring alternative transport without production of receipts for such hire cannot be the sole reason for finding that he was not entitled to an established

loss. The court is satisfied that the loss was established because the damages and consequential total loss has not been challenged. That position makes it axiomatic that the respondent was deprived of his deserved means of transport. It was thus not farfetched to expect him to hire an alternative means to transport himself. When he did so, he was entitled to be compensated by the wrongdoer who the court obliges to take his victim as he found him. He found him with own means of transport and was not expected to consign him, by the wrongdoing, to a means of transport different from what he enjoyed before.

30. In coming to this conclusion, the court is guided by the decision of the Court of Appeal in **Jebroek Sugarcane Growers Co. Limited v. Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu)** (unreported) where the court in allowing a claim for general damages for loss of user of a lorry relied on p.226 para 394 of Halsbury's Laws of England Vol. 11 3rd Edition which stated thus:

“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 and is no ground for awarding only normal damages” ...

“Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done

with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess...”

31. Having read the proceedings and judgment of the trial court, as the trier of facts, the court is satisfied that there was proof of damages by the respondent and that the court having evaluated the evidence and applied the apt binding decided cases to come to the accurate position of the law for which this court sitting on a first appeal should not disturb. The court notes that the trial court not only addressed its mind to the law applicable on damages for loss of use but also the duty of a claimant to mitigate own losses. The trial court did a spending judge craft that invites commendations and not interference.

32. Arising and flowing from the foregoing discussions and conclusions the appeal is adjudged meritless with the inevitable consequence that it is dismissed with costs and the award by the trial court upheld.

33. It is so ordered.

Dated, signed and delivered at Lodwar this 20th day of February 2026

Patrick J O Otieno

Judge