REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPELLATE DIVISION

CIVIL APPEAL NO. E111 OF 2020

MORTEX LIMITED……..

…..APPELLANT

VERSUS

OSCAR KAVITA……1st RESPONDENT

PASTA ENTERPRISES LIMITED……2nd RESPONDENT

WANZAH BHARAT……3rd RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HONOURABLE D.W. MBURU (SPM) DELIVERED ON 27th DAY OF SEPTEMBER 2019 IN NAIROBI CMCC NO. E140 OF 2011)

BETWEEN

MORTEX LIMITED ……..

PLAINTIFF

VERSUS

OSCAR KAVITA .....1st DEFENDANT

PASTA ENTERPRISES LIMITED .....2nd DEFENDANT

WANZAH BHARAT.....3rd DEFENDANT

JUDGEMENT

A. Introduction

1. The Appellant through their amended plaint dated 4th July 2011, did sue the respondents and stated that at all material times relevant to the suit they were the registered owner of Motor vehicle registration Number ***KAV 208A, make Mercedes Benz Actros 1840 Prime mover and Trailer registration Number ZC 3613 (hereinafter referred to as the 1st suit motor vehicle)*** the 1st respondent was described to the driver/employee of the 2nd defendant, who owned motor vehicle registration Number ***KBE 908L Mercedes Benz and trailor registration Number ZC 9895 (hereinafter referred to as the 2nd suit motor vehicle),*** While the 3rd defendant was captured as being the registered owner of motor vehicle registration Number **KAV 033D- Toyota Premio Saloon**.

2. On or about the 7th day of January 2011 at about 1400hrs the Appellants authorized driver, servant and/or agent

was lawfully driving the 1st suit motor vehicle along Mombasa -Nairobi Road at Mnangoni area near Taru, when the 1st respondent so carelessly and/or negligently drove , managed and/or controlled the 2nd suit motor vehicle and caused it to violently collide with the 1st suit motor vehicle . In the alternative the Appellant averred that it was the 3rd suit motor vehicle which was recklessly driven, managed and/or controlled and this lead to the said accident occurring, for which the 3rd respondent was vicariously liable.

3. As a result of the said accident the 1st suit motor vehicle was extensively damaged and was written off. They therefore pleaded to be awarded special damages to recover the value of the 1st suit motor vehicle, associated assessment costs and for loss of business/ use of the said motor vehicle at **Kshs.30,000/=** per day for 90 days. The total amount claimed as Special damages was **Kshs.4,058,600.00/=.**

4. The 1st and 2nd respondent did filed their amended statement of defence dated 13th July 2011 wherein they admitted that the said accident did occur, but blamed the 3rd respondent driver for causing the same, when he veered off his lane into the path of the 2nd suit motor vehicle and caused the 3rd suit motor vehicle to collied with the said 2nd suit motor vehicle. As a result of the said collusion, the 2nd suit motor vehicle had lost control,

overturned across the road and collided with the 1st suit motor vehicle. As a result of the aforegoing , they could not be blamed for causing the said accident and urged the court to find that it was the 3rd respondents driver mistake that lead to the said accident. In the alternative they also pleaded that the Appellants driver contributed to the causation of the said accident by driving negligently and without proper outlook for other road users.

5. The 1st and 2nd respondents thus prayed that the suit against them be dismissed with costs. The 3rd respondent on his part also did file his Amended statement of defence and counter claim dated 19th December 2013, wherein he denied occurrence of the said accident and all particulars of negligence alleged on the part of his driver and put the Appellant and other respondents to strict proof thereof. In the alternative he did aver that if the said accident did occur then it was caused and/or substantially contributed to by the Appellant and 2nd respondent respective drivers and put them to strict proof to the contrary.

6. Under the principal of subrogation, the 3rd respondent on behalf of GA Insurance Co Ltd did file his counterclaim, where he averred that on the material day, the 3rd suit motor vehicle was being lawfully and carefully being driven by his son, ***Mr Nikesh Bhanji Wanzah***, when the 2nd respondent driver so negligently , carelessly and recklessly drove the 2nd suit motor vehicle and cause it to

collide with the 3rd suit motor vehicle causing it extensive damage thereto and resulted in him losing his son and daughter in law. Contemporaneously and in the alternative to the foregoing, the 1st suit motor vehicle was also carelessly driven, and/or managed by its driver thereby causing the said 1st suit motor vehicle to collide with the 2nd suit motor vehicle.

7. As a result of the said accident, he suffered material damage and his insurer had paid him **Kshs.479,000/=** as compensation for the salvage value of the said motor vehicle. Despite demand and notice of intention to sue, both the Appellant and the 2nd respondent had ignored the same and urged the court to enter judgment jointly and severally for the sum claimed against them. He also prayed to be awarded costs of the said suit and counterclaim.

8. Both the Appellant and 1st and 2nd respondent did file their defence to counterclaim dated 17th September 2014 and 29th January 2014 respectively, wherein they denied the particulars of negligence attributed to them and/or the loss alleged to have been suffered by the 3rd respondent in repairing his motor vehicle.

B. TRIAL

9. **PW1 Henry Matta**, the assessor confirmed that he was tasked by the Appellant to assess the damage on the 1st suit motor vehicle and found that its cabin, engine damaged and front mechanical partes were extensively damaged. He determined that the said motor vehicle was written off and assessed its pre accident value of **Kshs.1,800,000/=**, less salvage value of **Kshs.500,000/=** leaving a net value of **Ksh.1,300,000/=**. He produced his report dated 13.01.2011 plus receipt of **Kshs.12,000/=** paid to him for the work done.

10. **PW2 PC Joshua Muchesia** from Taru police station confirmed that the said accident did occur on 07.01.2011 involving the three suit motor vehicles and was reported at Taru police station-Traffic base. He did visit the scene and from the investigation done, it was established that the driver of the 2nd suit motor vehicle was to blame for causing the said accident. He was subsequently charged with the offence of ***causing death by dangerous driving contrary to Section 46 of the Traffic Act*** at Mariakani Principal Magistrate court and was condemned to pay a fine ***of Kshs.10,000/=*** or in default to serve 3 months imprisonment.

11. ***PW3 Ahman Kabare Sambia***, confirmed that he was an employee of the Appellant and was the one driving the 1st suit motor vehicle on the material day of the said

accident. He adopted his witness statement as his evidence in chief , where he stated that; he was driving on his lane from Nairobi to Mombasa, when he observed the 2nd suit motor vehicle coming downhill from the opposite direction, overtaking another trailer's and simultaneously the 3rd suit motor vehicle also overtook him and managed to come back to its correct lane. Unfortunately the 2nd suit motor vehicle did not get the opportunity to return to its lane and violently collided with the 3rd suit motor vehicle and even though he tried to swear the said 2nd suit motor vehicle also crushed into his motor vehicle/ cabin and caused him serious bodily injuries.

12. He blamed the driver of the 2nd suit motor vehicle for overtaking four other motor vehicles in a raw, when it was not safe to do so, **PW4 Richard Mwaniki** stated that he was the operation manager of the Appellant company and was informed of the said accident by their turnboy and dispatched a team to go assist their injured colleagues and also organized for a breakdown to tow their vehicle for which they were charged **Kshs.50,000/=**. They later engaged PW1 to carry out the assessment and paid him ***Kshs.8,000/=*** for his services. He also produced documents to support their claim for loss of user and urged the trial court to award them damages as pleaded,

13. The Appellant closed their case at that point and when granted an opportunity the 1st and 2nd respondent did not

call witness but recorded a consent as between them and the 3rd respondent to the effect that liability as between them on the counterclaim be settled at the ratio of 80.20 in favour of the 3rd respondent plus costs thereof. The counter claim as against the Appellant too was marked as withdrawn with no orders as to costs. The 1st and 2nd respondents then opted to close their case.

14. The 3rd respondent on their part called Simon Laviak, a legal officer at GA insurance, the insurer of the 3rd suit motor vehicle. He adopted his statement wherein he confirmed that the 3rd defendant had taken out an insurance policy number **P20101090019586** for the said motor vehicle and upon assessment after the said accident it was adjudged to be written off and the salvage value would only fetch **Kshs.100,000/=**. As a result, they did pay the 3rd Respondent's compensation of **Kshs.420,000/=**plus incurred costs for investigation fee and towing charges and thus sought compensation to the tune ***of Kshs.479,500/=*** plus costs of the counterclaim***.***

15. The learned trial Magistrate upon considering the pleadings filed, evidence adduced and the parties' submissions did hold that ;

a) The 1st and 2nd Respondent were jointly held to be 100% liable for the said accident.

b) Special damages of Kshs.1,358,600/= was awarded to the appellant for net value of the

1st suit motor vehicle, breakdown charges and assessors fee, but the trial court <u>rejected their claim for special damages pleaded for loss of use of motor vehicle</u> on the basis that it was not adequately proved.

c) ***The Appellant was awarded cost and interest of the suit as against the 1st and 2nd respondent, but the suit as against the 3rd party was dismissed with no orders as to costs***.

C. **<u>THE APPEAL</u>**.

16. The appellant, being dissatisfied by this decision, did file their memorandum of appeal and raised the following two (2) grounds of appeal;

i. The learned Trial Magistrate erred in law and in fact in his judgment dated the 27th of September 2019, in holding that the Appellant had failed to establish and/or discharge its burden of proof for its claim for loss of user..

ii. That the learned trial Magistrate erred in law in his judgment dated 27th September 2019 in holding that the Appellant had failed to establish and/or discharge the burden of proof for its claim for loss of user

17. The Appellant thus prayed that this appeal be allowed, the decision of the trial magistrate be set aside and their special damages claim for loss of user be allowed.

D. PARTIES SUBISSIONS.

(I) The Appellants Submissions

18. The Appellant relied on their written submissions dated 26th January 2025, where they recapped the facts and faulted the trial magistrate for failing to award them special damages for loss of user, when the same had been specifically pleaded and proved. Specifically the learned trial magistrate had wrongly imputed that they could not rely on consignment notes, delivery notes, release orders and customs forms generated from the business transacted using other vehicles in their fleet, yet the comparison was valid as the 1st suit motor vehicle had been written off as a result of the said accident and a reasonable presumption could be drawn on the business generated from similar long haul tracks, which the company operated.

19. Secondly it was the appellants' contention that loss of user had been held to be a claim of general damages, which could be proved on a balance of probabilities. Reliance was placed in various authorities ***Samuel Kariuki Nyangoti Vs Johaan Distelberger , Civil Appeal No 59 of 2017 KECA 691 (KLR), Ryce Motors & Another Vs Elias Muroki, Civil Appeal No 119 of 1995 (Mombasa),(1996) Eklr, Team for Kenya national sports complex & 2 others Vs Chabari M'ingaruni (Civil Appeal No 293 of 1998) and Peter Njuguna & another Vs Ann Moraa (Civil Appeal No***

23 of 1991) where an award of loss of user had been granted although no supporting documents had been provided.

20. The Appellant also reiterated the holding of the court of Appeal in ***Samuel Kariuki Nyangoti Vs Johaan Distelberger (Supra)***, where it was held that loss of business profits and loss of future earning capacity are usually in the nature of general damages and not special damages and thus where liability had been established as against the defendant, the plaintiff had to be accorded the benefit of every reasonable presumption as to the loss suffered.

21. In the present case, it was established that the 1st suit motor vehicle was being used for commercial purposes and had been extensively damaged and written off after the said accident. They had provided adequate documentation to support their claim for loss of user and thus urged this court to reverse the trial courts finding on this issue and proceed to award them damages under this head.

(ii) **The 1st and 2nd Respondents Submissions**.

22. The 1st and 2nd respondents submitted that this court could only interfere with the trial courts judgment, where there was misdirection or non-direction, that is, if the trial

judge has taken into account a factor he should not have or failed to take into account something he ought to have taken into account, or if the award is so high or so low that it amounts to an erroneous estimate of the quantum awarded. Reliance was placed in ***Kitavi Vs Coastal Bottlers Limited (1985) KLR 470 & Kimatu Mbuvi T/A Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko (2006) KECA 130 (KLR)*** to emphasize on this point.

23. Secondly despite calling their witnesses, it was the respondent's contention that the appellant never proved that the 1st suit motor vehicle was being used for transportation of consignments and they had therefore failed to discharge the requisite evidential burden placed on them, which would justify the award of loss of user. Reliance was placed on ***Hahn Vs Singh (1985) KECA 129 (KLR), UAP Insurance Company Limited Vs Maina & Ano (2024) KECA 392 (KLR) Daniel Otieno Migore Vs South Nyanza Sugar Co Ltd (2018) KEHC 5465 (KLR) & Guardian Coach Limited Vs Matunda (Fruits)Bus Limited (2024) KEHC 5793 (KLR)*** all of which advocated for strict proof of special damages.

24. Finally, the Appellant had also failed to lead any evidence to guide the court on the duration necessary to repair the 1st suit motor vehicle and also had a duty to mitigate its losses or to guide the court in the context of a

substitute hired during the period before restoration. Reliance was placed in the case of ***African Highlands Produce Limited Vs John Kisorio (2001) KECA 364 (KLR).***

25. In the alternative, if this court were to find for the appellant, the 1st and 2nd respondent submitted that a sum of ***Kshs.15,000/=*** for a period of 30 days would be reasonable compensation in the circumstance taking into account the fact that no evidence was lead to demonstrate that the 1st suit motor vehicle would transport consignments both to and from their destination for the entire period pleaded.

26. The 1st and 2nd respondent urged this court to find that this Appeal has no merit and be pleased to dismiss the same.

E. ANALYSIS AND DETERMINATION

27. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for

decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. ***See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.***

28. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of **section 78 of the civil procedure Act** a court of first appeal can appreciate the entire evidence and come to a different conclusion. See ***Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316***

29. I have considered the entire record of appeal and pleadings filed, the grounds of appeal raised, the submissions filed by both parties, and the cited authorities. The only issue that arise for determination is whether this court should disturb the trial court's finding on the claim for loss of user.

30. It is common ground that as a result of the said accident which occurred on 07.01.2011, the 1st suit motor vehicle was extensively damaged and was written off. PW4 testified that the said motor vehicle was a commercial trailer used to haul goods from Mombasa to Kampala and on average would make **Kshs 30,000/=** per day. He presented invoices, consignment notes, delivery notes, release orders and customs forms to prove that the same, but the trial court held that no single document was provided to show income generated from the said commercial activated and thus held that the said claim and not been strictly proved

31. In the court of appeal decision in ***Samuel Kariuki Nyangoti versus Johaan Distelberger (2017)eKLR,*** the court of appeal held that a claim for loss of use falls under general damages and not special damages as is normally assumed. Particularly, the court held that;

> "***The appellant claimed both special and general damages. The special damages which did not include loss of user were particularized. The respondent in his defence denied that eh vehicle was a public service vehicle that it warned the appellant the alleged sum per day and that appellant was entitled to damages for loss of earnings. 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 of ascertainment by 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 is such claims is on balance of probabilities and the principle of restitution in integrum is applied in such cases."

32. **Justice W. Musyoka** was faced with a similar predicament in **Martin Gicimu Kamanga versus Board of governors, St. Anne's Juniro School, Lubao (2021)eKLR.** He had the rare but challenging opportunity of hearing the rival arguments presented by parties and making a decision thereon. From the outset, the honourable judge captured the conflicting legal positions thus;

"There is court of Appeal authority which the High Court had followed to the effect that loss of user is in the nature of general damages, proved on a balance of probabilities. The position was pronounced in Peter Njuguna joseph and another versus Ann mora C.A No. 23 of 1991 (unreported) and Samuel Kariuki Nyangoti versus Johaan Distelberger (2017) eKLR (Githinjui, Karanja and Kantai JJA). The appellant submits that based on those decisions, the trial court was in error in holding that loss of user was a claim in special damages and in failing to grant it. There is on the other hand, other authority from the Court of Appeal to the contrary. It was said in David Bagine

versus Martin Bundi (1997) eKLR (Gicheru, Shah and Pall), for example, that loss of user could only be special damage, for it is a loss which the claimant suffers specifically and which could not be equated to general damages. The High Court weighed in in such cased as in Summer Limited Meru versus Moses Kithinji Nkanata (2006) eKLR (Lenaola J), where it was said that earnings from a matatu business were not a matter that could be left to judicial discretion for it was related to special damage which had to be specifically proved."

33. Faced with the conflicting position, the court proceeded to trace the conflicting decisions based on their age and conclude that the current legal position is that a claim for loss of user is a claim for general damages. In arriving at this conclusion, the court observed that;

"***It would seem from the judicial authorities above that the law is settled on the matter. however, the decisions in David Bagine versus Martin Bundi (1997) eKLR Gicheru, Shah and Pall) and Summer Limited Meru veruss Moses Kithinji Nkanata (2006)eKLR (Lenaola J) are a later dated and it would appear that there has been a shift in jurisprudence sine then going by the positions taken in Wambua vs. Patel and another (1986) KLR 336 (Apaloo J) and Jebroke Sugarcane Growers Co. Limited vs Jackson Chege Busi Civil Appeal no. 10 of 1991 (Kisumu) (unreported), 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 and is no ground for awarding only***

normal damages. That position appears to have led to <u>Samuel Kariuki Nyangoti vs Johaan Distelberger (2017) eKLR (Githinji Karanja and Kantai JJA)</u> where the plaintiff did not keep books of account or records, given the nature of their business. The correct law, therefore appears to be that stated in <u>Samuel Kariuki Nyangotu vs Johaan Distelberger (2017)eKLR (Githinji, Karanja and Kantai JJA)</u> and adopted by the High Court in such diecision as <u>Jackson Mwabili vs Peterson Mateli (2020)eKLR (Mwita J) and Mac master limited vs Onesmus mutuku Muia (2018) eKLR (DK Kemei J).”

34. While this position is a clear and a rare departure from the English Common Law, it is more progressive and appropriate in the Kenya circumstances. While previous cases have not provided a clear rationale for this departure, Justice Musyoka made a justification for this departure in **<u>Martin Gicimu Kamanga (Supra)</u>** thus;

“***Of course, under English common Law, loss of user or profits is strictly a special claim, as stated in David <u>Bagine vs Martin Bundi (1997) eKLR (Gicheru, Shah and Pall) and Summer Limited Meru vs Moses Kithinji Nkanata (2006) eKLR (Lenaola J).</u> it would appear, however that English approach to loss of user works injustice in Kenya where African Communities despite high levels of literacy, still operate in the pre-literate mode, where record keeping is not part of the African psyche and consciousness, for information is kept mentally and is transmitted orally. Operating in the pre-literate mode is part of African nature and mentality. It is just part of the African way of life and modern education has***

not done much to change. The decisions in <u>Wambua vs Patel and another (1986)KLR 336(Apaloo J)</u> and <u>Samuel Kariuki Nyangoti vs Johaan Distelberger (2017) eKLR (Githinji Karanja and Kantai JJA)</u> take cognizance of that. The matatu business culture evolved out form that environment given that the matatu business is strictly an indigenous African model and not an import from elsewhere and applying the English Common Law approach to assessment of damages for loss of user or profits in respect of that business, in the circumstances would only work injustice. There is a whole paradigm shift is jurisprudence here, where what is strictly a special damage under English Common Law is now treated as general damage under Kenya Common Law."

35. Finally in ***<u>Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal No. 23 of 1991),</u>*** the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced. Also ***<u>(see also Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi,(Civil Appeal No. 10 of 1991).</u>***

36. The appellant sought for loss of profit at **Kshs.30,000/=** per day for 90 days. In light of the clear exposition in law as explained above, the 1st respondent was entitled to be awarded damages under this heading, though it must be recognized that there is the possibility of the 1st suit

motor vehicle having breakdowns, off days, and/or the fact there are days when it would be off the road due to lack of consignment to transport. The appellant also had the duty of mitigating his loss by hiring other tracks to cover for the shortfall and retain business. See ***African Highlands Produce Limited Vs John Kisorio (2001) KECA 364 (KLR).***

37. Taking into consideration all these factors, I do therefore find that the trial Magistrate erred in failing to award the appellant loss of user for a reasonable period, within which their insurer would be able to compensate them for the loss suffered. Doing the best possible I award them the sum of **kshs.30,000/=** for a period of 20 days per month for two months. (**Kshs.30,000 x 20 x 2 = Kshs.1,200,000/=)** under this heading.

F. DISPOSTION

38. This Appeal therefore has merit and the same is allowed.

39. The judgment and decree of the ***Hon D.W. Mburu (Senior Principal Magistrate*** dated 27th September 2019 delivered in ***Nairobi Milimani Civil Suit Case No 1383 OF 2017*** is partially set aside and the appellant is awarded **Kshs.1,200,000/=**for loss of user plus interest on the said sum at court rates calculated from the day the suit was filed.

40. The Appellant will also have the costs of this Appeal, taxed at **Kshs. 250,000/=** all inclusive.

41. Stay of execution 60 days.

42. It is so Ordered.

Judgement written, dated and signed at Marsabit this ……11th …day of MAY 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this ……11th … day of MAY 2026.

In the presence of;

N/A ……for Appellant

N/A ……for Respondent

JARSO ……Court Assistant