Bajaber v Abdulrahman & another (Civil Appeal 87 of 2019)
[2024] KECA 1736 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1736 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 87 OF 2019

SG KAIRU, S OLE KANTAI & PM GACHOKA, JJA

DECEMBER 6, 2024

BETWEEN

MUZAHIM SALIM MOHAMED BAJABER ..... APPELLANT

AND

ABUBAKAR AHMED ABDULRAHMAN ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court at Nairobi (J.K. Sergon, J.) delivered on 20th July, 2018 in H.C. Civil Suit No. 1246 of 2004)

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Nairobi (Sergon, J.) delivered on 20th July, 2018. It is our duty as a first appellate court to re-evaluate the evidence and reconsider the case but must give allowance to the fact that we do not have the advantage that the trial Judge had of seeing and hearing witnesses, we must give allowance for that – Selle vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where the mandate of the Court on a first appeal was identified thus: -

> "...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

2. In the plaint filed by the 1st respondent Abubakar Ahmed Abdulrahman against Muzahim Salim Mohamed Bajaber and the Attorney General (2nd respondent) it was claimed that the 1st respondent was at the material time a car dealer importing and selling motor vehicles from Dubai in the United

Arab Emirates into the Republic of Kenya; that the appellant was an agent who engaged in clearing and forwarding of cars for car dealers at the port of Mombasa and other customs entry points in Kenya; that in 2002 the 1st respondent imported the following six motor vehicles into Kenya from Dubai:

i. Toyota Prado

Chassis No. KZJ95 038936 Engine No. 1KZ 0705564 Model: 1999

Colour- Silver

ii. Toyota Aristo Saloon Chassis No. JZS 161-00131222 Engine No. 27J-0639969 Model: 1999

Colour – Black

iii. Toyota Land Cruiser Chassis No. HDJ101 – 0011356

Engine No. 1HD 0169983 Model 1999

Colour – White

iv. Toyota Prado

Chassis No. KZJ95 0125426 Engine No. 1KZ – 0669545 Model: 1999

Colour – white, Silver

v. Toyota Land Cruiser Chassis No. HDJ101-0009145 Engine No. 1HD – 0163142 Model: 1999

Colour – White

vi. Toyota Prado

Chassis No. KZJ95 – 0090875 Engine No. 1KZ – 0580730 Model: 1998

Colour –Blue

3. It was averred in the plaint that the said motor vehicles arrived at the port of Mombasa and that the 1st respondent instructed the appellant to undertake clearance of the motor vehicles from Kenya Ports Authority; that the 1st respondent released to the appellant relevant importation documents to enable him clear the motor vehicles; that the appellant cleared the motor vehicles but thereafter proceeded to register, sell and dispose of the same to third parties contrary to instructions given by the 1st respondent; that on 15th August, 2002 the 1st respondent lodged a complaint of theft by agent against the appellant to Criminal Investigations Department ('CID') where the 1st respondent recorded a statement; that on 5th September, 2002 the 1st respondent was informed by the police that they were awaiting information on the vehicles from the Commissioner of Motor Vehicle Registration. Further, that on 9th September, 2002 the 1st respondent wrote to the Director, CID furnishing particulars of motor vehicles as:

i. Motor vehicle registration make KAM 855V mark Toyota Prado colour silver.

ii. Motor vehicle registration make KAN 108K mark Toyota Aristo saloon colour black.

iii. Motor vehicle registration make KAN 555E mark Toyota Land Cruiser colour white.

iv. Motor vehicle registration make KAM 527M mark Toyota Prado colour silver.

v. Motor vehicle registration make KAN 458K mark Toyota Land Cruiser colour white.

vi. Motor vehicle registration not established mark Toyota Prado colour blue.

4. Further that the CID wrote to the 1st respondent in May/June 2002 confirming that motor vehicle registration mark KAM 527M had been recovered and impounded from one Mr. Kim Evans who had bought the same from Karen Motor Mart; motor vehicle registration mark KAM 855V had been recovered from Kingsway Motors while motor vehicle registration mark KAN 458K had been recovered from Magadi Soda Company Limited; the vehicles had been impounded and were at CID headquarters.

5. When the 1st respondent went to the said CID headquarters he was asked by one Mr. Wangah to enter into a settlement agreement with the appellant but that when he refused he was arrested and detained at Kileleshwa Police Station; that after 2 days he was taken to CID headquarters where he agreed to settle the matter where an agreement was entered but that it was through intimidation; the agreement was drawn by a lawyer under supervision of an Assistant Commissioner of Police and was duly witnessed; that agreement provided that motor vehicle KAM 527M was worth Kshs.1,900,000 to be paid by stated instalments; the first instalment of Kshs.500,000 was paid on 27th June, 2003 but the balance was not paid. The 1st respondent alleged that he was similarly made to enter into agreement regarding motor vehicle KAM 855V; on 30th June, 2003 the 1st respondent signed an agreement with one Abbas Hatim Ali. "... who had acted as the agent of the first Defendant in selling the said motor vehicle to Kingsway Motors." According to the terms of that agreement:

> "...the plaintiff was given motor vehicle registration number KAM 121T and was paid Kshs.500,000 and the complainant regarding the second vehicle KAM 855V Toyota Prado, No. KZJ was subsequently withdrawn ..."

6. The 1st respondent further stated that the motor vehicle KAN 458K remained impounded by the CID at the headquarters; that motor vehicle KAN 555E was later traced by CID and impounded which vehicle the appellant had sold to Hon. Job Omino; motor vehicle KAN 108K was traced in Mombasa and impounded; the last vehicle the unregistered one was never traced. The 1st respondent was then required by the police to furnish statements from the original consignees of the motor vehicles to enable arrest of the appellant; he submitted statement from one Mohammed Abdul Kadir Hashim who stated that he was the original consignee of motor vehicle KAN 555E, a statement from one Fatuma Haji Khamis Abdu, original consignee of the unregistered motor vehicle (Toyota Prado); a statement from one Umar Farouk Mohammed Hasham, original consignee of motor vehicle KAN 458K; that CID officers refused to accept the said statements although they had been notarized in Dubai and endorsed by the Kenyan Embassy in Abu Dhabi; that to expedite processing of the complaint the 1st respondent facilitated travel to Kenya of the 4 original consignees to enable them rewrite the said statements to police; that the said Fatuma Haji Khamis Abdu recorded a statement at CID, Mombasa while Umar Farouk Mohammed Hasham, Mohammed Abdul Kadir Hashim and Khadijabhai Abdurahman recorded theirs at CID headquarters, Nairobi but that despite all those efforts the CID refused to act and the appellant was not arrested. The 1st respondent continued to say that:

> "... the plaintiff avers that subsequently, all the original consignees have required him to compensate them for the loss of the said motor vehicles and thereafter effected transfer of ownership of the same to the plaintiff ..."

7. Further, that the CID had frustrated his attempts to obtain justice against the appellant, had released all the said motor vehicles to third parties who had illegally bought the same from the appellant and refused to arrest the appellant; that the joint actions of the appellant and the 2nd respondent were illegal and unconstitutional causing the 1st respondent loss and damage; that the appellant was

receiving special attention from the Government of Kenya; that the appellant had committed the tort of conversion and the crime of theft; that he had suffered damage as particularized as follows:

a) 2 Land Cruisers KAN 55E and KAN 458K @4,000,000 each 8,000,000

b) 2 Toyota Prado KAM 527M and Unregistered Motor Vehicle -@3,000,000 each 5,500,000

Less Kshs.500,000 paid on 27th June 2003

c) Loss incurred in settlement of oyota Prado KAM 855V 1,400,000

d) 1 Toyota Aristo Saloon KAN 108 K 2.400,000

19,300,000

e) Loss incurred in the settlement on Toyota Prado KAM 855V 1,400,000

f) Transport Nairobi-Mombasa round trip @ 10,000-fuel

3,500-boarding per day average 5 days -17,500 500 –food per day average 5 day -2,500

30 trips

Total – Fuel - 300,000 Boarding - 525,000

Food - 75,000

g. 5 airline tickets -1 Nairobi-Dubai –Nairobi 4 Dubai-Nairobi-Dubai

@ $ 500 per ticket - $2,500

h. Cost of witnesses in Kenya for 30 days at Kshs.4,000 each per day - 480,000

i. Two trips between Mombasa and Nairobi for witnesses – Kshs.20,000

j. Loss of business due of loss of reputation @Kshs.200,000 p.m. from August 2002 till October 2004 - 5,250,000

k. Expenses incurred in Dubai for 30 days @15,000 per day - 450,000

8. The 1st respondent therefore prayed for judgment for:

i. Ksh.24,350,000/- being special damages.

ii. USD 2,500 being special damages

iii. General damages for harassment, false imprisonment, mental distress and anguish, conversation and breach of trust and care.

iv. Interest on (i), (ii) and (iii) as the court will order.

v. Costs of this suit.

9. The appellant delivered a statement of defence where he denied the claim. He denied that the 1st respondent was a car dealer importing and selling motor vehicles from Dubai to Kenya, he denied being an agent in clearing and forwarding cars for the car dealers at the port of Mombasa or customs entry points in Kenya; he denied that the 1st respondent was the consignee importer or owner of the motor vehicles listed in the plaint; he stated that there was no privity of contract between him and the 1st respondent; he denied receiving any documents from the 1st respondent for clearing of any motor vehicles at the Mombasa Port and averred, without prejudice, that any motor vehicles cleared at that port did not belong to the 1st respondent; that motor vehicle KAM 527M, belonged

to one Jaffar Mohamed Atuffa; that the 1st respondent instructed police to impound motor vehicles sold to the appellants clients on the pretext that they were stolen and he (the 1st respondent) lodged a complaint with the 2nd respondent (the Attorney General) for harassment and claims over the motor vehicles in contention; that there was a Civil Suit No. 10516 at Principal Magistrates Court, Milimani Commercial Courts dealing with the same matter. It was denied that the 1st respondent was maliciously arrested, detained or confined unlawfully; it was denied that the 1st respondent had been compelled to enter into an agreement or settlement with the appellant or any person without his consent. Particulars of loss and special damages were denied and it was prayed that the suit be dismissed.

10. In denying the claim the 2nd respondent in a statement of defence took the position that police received and recorded a complaint from the 1st respondent in pursuance of their mandate; that thorough police investigations followed; that the plaint was bad in law as it pleaded matters of evidence. The 2nd respondent denied that the 1st respondent was ever maliciously arrested, detained or unlawfully confined; it was denied that the 1st respondent was compelled to enter any agreement or settlement without his consent; it was denied that officers of CID acted under the direction of the appellant it being stated that the 2nd respondent or its officers were not obliged in law to assist the 1st respondent settle his commercial obligations. It was denied that the appellant had received any protection from police it been stated without prejudice that if any of the 1st respondent's motor vehicle had been impounded by police it was done lawfully in furtherance of statutory mandate. Particulars of special damages were denied and it was taken as a defence that the suit was statute barred and offended the mandatory provisions of Public Authorities Limitations Act and the suit should be dismissed.

11. In testimony before Sergon, J. the 1st respondent stated that he was a shopkeeper in Mombasa and he knew the appellant as a businessman dealing with motor vehicles who he met in Dubai and they discussed and agreed that the appellant should undertake the business of importing motor vehicles on behalf of the 1st respondent's clients. He imported the motor vehicles enumerated in the plaint and produced invoices relating to those imports and deeds of assignments. When the appellant failed to deliver the motor vehicles he (the 1st respondent) reported a case to CID. According to him all the motor vehicles except the 6th one had been traced; they were impounded but were released when the appellant visited CID headquarters. He visited Kileleshwa Police Station where he was arrested and detained for 2 days and was only released after agreeing to enter into an agreement with the appellant. The appellant only paid the first installment as per agreement but had failed to pay the balance. The 1st respondent entered into another agreement with Abbas Hatim in respect of the value of one of the motor vehicles and the terms of that agreement were met as Abbas Hatim paid for the motor vehicle as agreed.

12. In respect of KAN 108K it was impounded in Mombasa but was released as per a court order. The 1st respondent later went to Dubai and obtained written statements from those who had sold the motor vehicles and he handed the same to CID but no action was taken. He produced various documents into evidence some of which were objected to by the appellant and the 2nd respondent. The objected ones were marked for identification and a ruling on the same deferred; ruling was not delivered but formed part of the final judgment of the High Court.

13. The 1st respondent stated in cross-examination that the importers of the motor vehicles did not get their vehicles and he was "...forced to repay the importers their money given to me..." and the 6 motor

vehicles were worth "... over Kshs.10 million..." Challenged in some of the special damage claims he stated:

> When the 1st respondent's case was closed the 2nd respondent indicated that they were not calling any witness.

14. The appellant testified that he knew the 1st respondent as a shopkeeper in Mombasa; the 1st respondent had harassed him using CID; the 1st respondent had never given him any motor vehicle to sell; complaints were made by various people to police on how their imported motor vehicles had been handled; he had been charged with a criminal offence at the Magistrate's Courts, Kibera, but the charge was withdrawn. He denied signing the agreement drawn at Kileleshwa Police Station and denied being in Dubai in the year 2000.

15. Shadrach Orieny, Chief Executive Officer, Chief Magistrates' Court was called by the appellant in respect of the file on Criminal Case No. 465 of 2005. He testified that the file had been destroyed as allowed in law. According to records that criminal case had been withdrawn and the accused (appellant) discharged.

16. That was the case made out by both sides and upon consideration the Judge entered judgment in favour of the 1st respondent against the appellant and the 2nd respondent as follows:

"a) As against the 1st Defendant

i. General Damages for harassment, Mental distress and anguish and conversion Ksh.2,000,000/-

ii. Special Damages Ksh.24,350,000/-

iii. Special Damages USD.2,500/-

(The exchange rate of Ksh.100/- per dollar

(100 x 2,500.00 =250,000.00) Ksh.250,000/-

iv. 75% costs of the suit.

v. Interest on (i), (ii) and (iii) above at court rates from the date of judgment until full payment.

b) As against the 2nd Defendant

i General Damages for breach of duty, harassment and false imprisonment Ksh.2,000,000/-

ii. 25% Costs of the suit

iii. Interest on (i) above at court rates from the date of judgment until full payment.

NET TOTAL Ksh.28,600,000/-"

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17. Those are the findings that provoked this appeal through Memorandum of Appeal drawn for the appellant by his lawyers M/s Ogola Okello & Company Advocates where 12 grounds of appeal are drawn which we can summarize as: the Judge erred in law and fact in finding that items 1-10, 15 -18 and 26 - 30 were primary documents and admissible as exhibits under section 35(1) of the *Evidence Act*; that the Judge erred in law and fact in finding that the appellant had been engaged by the 1st respondent as

a clearing agent; that the Judge erred in law and fact in finding that the motor vehicles belonged to the 1st respondent; that the Judge erred in law and fact in finding that the appellant took and converted the 1st respondent's 6 motor vehicles; that the Judge erred in law and fact in finding that the 1st respondent was entitled to Kshs.15,108,000 being claim for loss of 6 motor vehicles; that the Judge erred in law and fact to find that the 1st respondent made 120 trips between Nairobi and Mombasa for Kshs.3,600,000 without any proof; that the Judge erred in law and fact in finding that the 1st respondent flew in 4 witnesses from Dubai to Kenya at Kshs.250,000 without proof; that the Judge erred in law and fact in finding that the 1st respondent incurred Kshs.550,000 prior to flying in the witnesses as he stayed in Dubai looking for consignees; that the Judge should not have awarded general damages for harassment, distress and anguish and conversion in the sum of Kshs.2,000,000. The Judge is said to have erred in awarding special damages Kshs.24,350,000 and it is said that the Judge improperly exercised discretion in awarding 75% cost to the 1st respondent. It is prayed that the judgment be set aside; that the plaint at the High Court be dismissed and costs be awarded to the appellant.

18. There is a Notice of Cross-Appeal by the 1st respondent against part of the judgment where it is said that the Judge, having found the police liable to the 1st respondent as pleaded in the plaint erred in law and fact in failing to find the 2nd respondent liable for special damages suffered by the 1st respondent on the same footing as the appellant, that the Judge erred in law in treating the 2nd respondent less culpable than the appellant for the damages suffered by the 1st respondent; that the Judge erred in law in failing to award the 1st respondent's interest on special damages Kshs.24,350,000 as against the appellant from the date of filing suit; that the Judge erred in law in failing to award the 1st respondent's interest on special damages USD 2,500 (Kshs.250,000) against the appellant from the date of filing suit. The 1st respondent prays that we review the judgment and pass judgment against the 2nd respondent for Kshs.24,600,000 being special damages; that the sum of Kshs.24,350,000 and USD 2,500 special damages be paid with interest from 17th November, 2004, the date of filing suit; that we review the judgment and order that the appellant and 2nd respondent are jointly and severally liable to satisfy the decree; costs of appeal and cross-appeal be awarded to the 1st respondent and we make such further orders as we may deem fit to grant.

19. When the appeal came up for hearing before us on 15th May 2024 learned counsel Mr. Ochieng appeared for the appellant;

> learned counsel Mr. Mwangi appeared for the 1st respondent while learned counsel Mr. Munene appeared for the 2nd respondent. All counsel had filed written submissions and in a highlight of the same Mr. Ochieng submitted that it was wrong for the Judge to admit witness statements without calling the makers as this denied the appellant the opportunity to cross examine those witnesses. According to counsel the 1st respondent was not competent to produce those statements and there was a possibility that those witnesses could have given evidence adverse to the 1st respondent. Counsel submitted, on the claim for conversion, that the same was not proved as the 1st respondent did not prove that the motor vehicles belonged to him. There was no proof either, submitted counsel, that the 1st respondent had made the round trip Nairobi- Dubai-Nairobi or that he had incurred any expenses; there was no assessment by a valuer on the value of the motor vehicles. He cited the case of David Bagine vs. Martin Bundi [1997] eKLR in support of the proposition that the best evidence on the value of the motor vehicles could have been through production of a valuation report to support a claim for special damages.

20. Mr. Mwangi did not agree. On production of witness statements and other documents counsel submitted that the *Evidence Act* permitted a court to look at evidence and decide whether to believe it or not. He submitted that the 1st respondent had produced evidence to prove importation of motor

vehicles; he had proved that he had placed the same in the hands of the appellant; he had proved that he had complained to police who instead of assisting him had assisted the appellant to escape liability. According to counsel the best evidence under section 35 of the *Evidence Act* would be to call the maker unless the maker was dead, could not be found, or there would be a delay or unnecessary expenses would be incurred if the maker was called. Counsel thought that the Judge was right in those circumstances to hold that to call 4 witnesses from Dubai would have been expensive. Counsel submitted on cross-appeal that having found that police had assisted the appellant to escape liability the Judge should have held the Attorney General liable.

21. According to Mr. Munene the issue before the Judge was who to blame for the loss of motor vehicles. The Judge found that the appellant had acted improperly when he had registered the motor vehicles and transferred them to himself. On the role of police in the whole matter counsel submitted that it had been proved that the first motor vehicle had been sold to Job Omino for Kshs.4,000,000; motor vehicle KAN 458K was still held by police (upon being impounded) when the claim was filed in court where the appellant had been charged for stealing. Counsel submitted that it had not been proved whether the 1st respondent still held this motor vehicle. On motor vehicle KAN 527M counsel pointed out an agreement on record on settlement of the claim between the appellant and the 1st respondent. On whether the police had failed in their mandate after receiving a complaint from the 1st respondent counsel pointed to a letter at page 81 of the record where the 1st respondent informed director, CID, that he was pleased with progress made on investigations after he had lodged a complaint with the office. Counsel therefore thought that it was wrong for the Judge to find liability against the Attorney General and award damages. Counsel also thought it was wrong for the Judge to award special damages which counsel submitted had not been proved as required in law.

22. Counsel for the appellant in a rejoinder submitted that the issue was that the appellant was always entitled to cross-examine makers of statements as even dates of entry of motor vehicles to Kenya was questioned. According to him, on special damages, oral evidence could not replace proof of the same. The cross-appeal should be dismissed.

23. We have considered the whole record, submissions made and the law and this is how we propose to deal and dispose of this appeal.

24. The grounds of appeal raised in Memorandum of Appeal run across; they are intertwined and it may not be necessary to deal with them separately.

i. Section 35 of the *Evidence Act*.

25. The complaint here is that the Judge held invoices, witness statements and other documents to be primary documents and admitted them into evidence without calling the makers. The record shows that at the tail end of his evidence in chief the 1st respondent sought to produce all the documents in his list of documents but this move was objected by the appellant and the 2nd respondent. The 1st respondent specifically objected to production of documents listed as items 1-10, 15, 16, 17, 18, 21, 29 and 31, a position that was supported by the 2nd respondent. The documents were then marked for identification and the Judge ordered that he would take arguments for and against production of same before the 1st respondent closed his case. When that time came counsel for the appellant submitted that the objected documents comprised agreements and statements recorded by third parties at a police station and elsewhere; that no basis had been laid why the makers of the documents were not being called and that the 1st respondent had been unable to explain discrepancies in those documents, that:

> " ... the best evidence rule should be used to come with a fair decision in the matter."

26. That position was supported by counsel for the 2nd respondent who added:

> " Most of the documents sought to be relied are undated and unsigned."

27. In answer to the objections counsel for the 1st respondent stated that documents 1- 4 were invoices for purchase of 4 motor vehicles and were in their original form; that the documents were in his possession by virtue of transfer of ownership of the motor vehicles to him; that documents 5 -10 were deeds of assignment and acknowledgement of ownership executed by owners of motor vehicles given to him and according to him all these documents were admissible under section 35(1) and (2) of the *Evidence Act*. On a letter dated 9th September, 2002 counsel submitted before the Judge that it was being produced as a secondary document by virtue of section 68 of the *Evidence Act* because he had served 2 notices to produce in the case. Counsel submitted before the Judge that the 1st respondent was entitled in law to produce counterpart documents as primary documents; that witnesses were based in Dubai and it was difficult to secure their attendance in court.

28. Counsel for the appellant responded that it had not been shown that it was difficult to secure witness attendance from wherever they were and the 2nd respondent responded that a basis had not being laid to produce documents without calling the makers.

29. The 1st respondent made a further application to be allowed to bring new records relating to 2 other cases involving him which application was objected to by the appellant and the 2nd respondent. No ruling was delivered on this and as in respect of the objections which we have gone into details the Judge made his ruling in the final judgment.

30. The appellant and the 2nd respondent submit that it was wrong for the Judge to admit witness statements and other documents when proper basis for doing so had not been laid by the 1st respondent.

31. This is all that the Judge said in respect of the objected to documents in the judgment at paragraphs 7-12 (inclusive):

> "7. I have carefully considered the rival arguments and carefully perused documents No. 1 – 4 in the Plaintiff's list of documents. They are basically invoices in their original form in respect of four motor vehicles purchased. They are, therefore, primary documents whose contents the Plaintiff has stated are within his knowledge. Pursuant to the provisions of Section 35(1) of the *Evidence Act*, the foresaid documents are admissible.
>
> 8. The other relevant documents the Plaintiff sought to produce in evidence as exhibits are documents Nos. 5 to 10 in the Plaintiff's list of documents. After a careful perusal of the aforesaid document, it is clear that they are deeds of assignment and acknowledgment of ownership executed by the owners of the motor vehicles imported by the Plaintiff. Those who executed the aforementioned documents are namely; Fatuma Haj Khamis Abdul, Omar Farouk Mohammed, Khatijbai Omar Abdurahman, Mohammed Abdul Kadir Hasham, Jaffar Mohammed Tufa and Laila Abdulhakim Dhabaan. It is apparent that the aforesaid documents are primary documents, therefore the Plaintiff is allowed to produce them as exhibits under Section 35(1) of the *Evidence Act*.

9. The Plaintiff further sought for leave to produce the letter dated 9th September, 2002 as an exhibit in evidence. It is a letter the Plaintiff wrote to the Director, Criminal Investigations. The Plaintiff had served the 2nd Defendant two notices to produce. Pursuant to the provisions of Section 68 of the *Evidence Act*, the letter is admissible as an exhibit as secondary evidence.

10. The document listed as Nos. 26 are agreements executed the Plaintiff and between Abbas Hatim Ali. It is a document in its primary form, therefore, the Plaintiff is entitled to have it produced as an exhibit under Section 35(1) of the *Evidence Act*.

11. The Plaintiff further sought to have the statements recorded before a Notary Public in Dubai by Khadijabhai Abdulrahman Umar, Farouk Mohammed Hasham, Mohammed Abdul Kadir Hashim. They are documents numbers 29–34. These are primary documents duly executed in counter- parts. What the Plaintiff seeks to do is to produce the original counter parts. I am convinced he is entitled to do so. In any case, most of the statements were recorded by the Plaintiff. I am satisfied that if those who executed the documents are summoned to appear to produce those statements, considerable delay may arise since the makers of those statements are based in Dubai. In the circumstances, I allow the Plaintiff to have the documents produced as exhibits in evidence.

8. In the end I find no merit in the objections raised by the Defendants. Consequently, I admit documents Nos. 1 – 10, 15 – 18 and 26 – 30 as P.Exhibit Nos. 1 – 10, 15-18 and 26-34."

32. The title to section 35 of the *Evidence Act* is"Admissibility of documentary evidence as to facts in issue." The said section 35 provides in detail how documents and statements are to be produced in civil proceedings. They are to be produced by the makers except in exceptions allowed by the said section. This Court had this to say on admissibility of statements without calling the maker inParkar & Another vs. NQ & 2 Others (Civil Appeal No. 139 of 2020) [2023] KECA 908 (KLR):

> Much of the perceived complexity in this area of the law can be avoided if the rationales for the hearsay rule, and the basic rationales, which underpin the exceptions to it, are kept in mind. As the following excerpt suggests:
>
> > "It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."
>
> Per Dickson J, in The Queen vs O'Brien (1977), 38 CR N,S 325, at p 327, 35 CCC (2d) 209, at p 211 (SC C), and see the locus classicus, Subramaniam v Public Prosecutor, [19561 1 WLR 965 (PC)."

33. Maraga, J. (as he then was – he rose to be Chief Justice of the Republic of Kenya) stated the issue very emphatically in Joao Francis Quadros vs. Sdv Transami Kenya Ltd [2005] eKLR:

> Section 35(1) of the *Evidence Act* Cap 80 of the Laws of Kenya is quite clear. Documents have to be produced by the maker except where the maker is:-
>
> > "...be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."

34. The 1st respondent did not lay any basis in law for not calling the makers of statements and documents that were admitted in the case. It was not shown that any or all were dead or could not be found, or were incapable of giving evidence or that their attendance could not be procured without unreasonable delay or expense. The 1st respondent's testimony was that he knew where they were either in Kenya or Dubai. He had been in contact with them; his case was that he had travelled to Dubai and met them; that he had later flown them either to Mombasa or Nairobi to record statements. It was not demonstrated why he could not procure their attendance in court to produce documents and statements and in the case where no basis was laid for the proviso to section 35 *Evidence Act* to apply. We think it was wrong for the Judge to overrule the objections taken in the case. The 1st respondent was not in the circumstances entitled in law to rely on secondary evidence.

ii. Whether the appellant was engaged by the 1st respondent as a clearing agent.

35. The Judge considered this issue and held that the appellant and the respondent knew each other very well after the 1st respondent had been introduced to him by the appellant's brother and former business partner one Swaleh Salim Mohamed. We agree that the two knew each other and had business dealings exemplified by an agreement made between the appellant and the 1st respondent whose date is not clear and is at page 76 of record of appeal. By that agreement the appellant acknowledged that he owed the 1st respondent a sum of Kshs.1,900,000 in respect of a transaction involving motor vehicle KAM 527 Toyota Prado. This is one of the motor vehicles that the 1st respondent claimed to have imported from Dubai. The appellant acknowledged the debt and proposed payment by instalments and it was admitted in the plaint that the appellant had made the first instalment of kshs.500,000 on 27th June, 2003.

36. There is also the evidence of Shadrack Orieny, Chief Executive Officer at Chief Magistrate's Court showing that the appellant had been charged in Criminal Case No. 465 of 2005 which charge was later withdrawn. That charge related to a charge of stealing by agent after the 1st respondent had reported the case involving the motor vehicles to CID.

37. There is no doubt that the appellant was engaged by the 1st respondent to deal with motor vehicles imported from Dubai to the port of Mombasa but the terms of such an engagement were not given to the Court.

iii. Whether the motor vehicles belonged to the 1st respondent and whether the appellant converted the same.

38. We have shown that invoices and other documents produced by the 1st respondent in support of his assertion that he had imported motor vehicles to Kenya were improperly admitted in evidence by the Judge. That answers the question because without production of proper documents, the 1st

respondent did not prove that the motor vehicles belonged to him at all. Without proof of ownership the tort of conversion could not apply or be proved.

iv. Award of Kshs.15,108,000.

39. This is how the Judge dealt with this issue in the said judgment:

> 54. On the claim for loss of the six motor vehicles, the Plaintiff has tendered evidence in form of invoices as follows: -KAM 527M Kshs.1,400,000.00KAN 108K Kshs.2,395,000.00KAN 555E Kshs.4,711,500.00Unregistered motor vehicles belonging to Fatuma Khamis Kshs.2,389,500.00Total Kshs.15,108,00.00"

40. As we have seen apart from disputed invoices no evidence was tendered to prove this claim.

41. We have discussed the issue relating to motor vehicle KAM 527 where the appellant and the 1st respondent entered into an agreement where the said motor vehicle was agreed as valued at Kshs.1,900,000 and that sum was to be paid by instalments.

42. Then there was the case of motor vehicle KAM 855V which according to the averment in the plaint and the 1st respondent's testimony- there was an agreement between the 1st respondent and one Abbas Hatim Ali where the 1st respondent was given another motor vehicle (as compensation) registration mark KAM 121 and was paid Kshs.500,000 leading to withdrawal of the complaint by the 1st respondent to CID. These issues were not taken into account by the Judge including not giving credit for the two motor vehicles where the 1st respondent was compensated after reaching agreement with the appellant. The appellant submits, and we agree, that the claim was not proved as required in law. The 1st respondent did not produce any valuation reports in respect of the motor vehicles or call an expert who could testify in that respect. The claim of the said sum of Kshs.15,108,000 was in the nature of special damages which as has been held by this Court in many decisions special damages must not only be pleaded but must be proved. This is what this Court stated inDavid Bagine vs. Martin Bundi (supra):

> 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 Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> > "....special damages in addition to being pleaded, must be strictly 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 damages 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.""

43. This claim was not proved to be required standard and should not have been awarded by the Judge.

v. 1st Respondent made 120 trips to Mombasa at Kshs.3,600,000.

44. According to the Judge the 1st respondent informed the Court that he incurred expenses while pursuing the appellant in Kenya and on trips to Dubai to look for consignees of motor vehicles to record witness statements. The Judge held:

> "The Plaintiff stated that in whole saga (sic)he made 120 trips, Mombasa – Nairobi and back and claimed a sum of Kshs.3,600,000/-. I find the claim justified. Consequently, the Plaintiff is awarded the same."

45. There was no proof of this claim at all and being a special damage claim it required to be proved as pleaded (David Bagine vs. Martin Bundi (supra).

vi. 1st respondent flew in 4 witnesses from Dubai at Kshs.255,000 and other expenses – Kshs.550,000.

46. Again, as appears at page 373 of the record, all that the Judge received was the 1st respondent's oral evidence on these alleged expenses. The Judge held that:

> "The Plaintiff was also able to convince this court that he incurred other expenses in the sum of Ksh.550,000/- Prior (sic)to flying, the witnesses to Dubai, he flew to Dubai to look for the original consignees where he stayed for a month."

47. There was no evidence in proof of any of these alleged expenses. The same were special damage claims which needed to be proved as the 1st respondent made no attempt to do so the Judge erred in law and fact in awarding the same.

vii. General damages for harassment, distress and anguish.

48. Apart from the allegation by the 1st respondent that he was detained by police and forced to enter into an agreement with the appellant on settlement on a claim relating to a motor vehicle there was no evidence led through any other or independent witness that the appellant was held by police at all. There was no indication that the agreement he made with the appellant was made in any other but a free atmosphere. The agreement according to his testimony, was drawn by a lawyer and was duly witnessed and acted upon because he (the 1st respondent) received part of the sum agreed in their agreement. No attempt was made to lead evidence on when, if at all, he was arrested or when he was released. There was no evidence led on alleged harassment, distress or anguish that the 1st respondent allegedly suffered and it was, with due respect, wrong for the Judge to hold as he did. No material was placed before him on which he could make that finding and there was no basis for the award of general damages in those circumstances where the 1st respondent had addressed the Director, CID, in a letter dated 2nd May, 2003 as follows:

> ... Kindly allow me to register my sincere appreciation in the way you received me in your office in the matter of my six (6) vehicles which disappeared mysteriously since 2001, from the hands of Mr. Mzahan Salim.
>
> As of now the investigation is going on well under the command and direction of Mr. Wangah ..."

49. In another letter to the said office dated 9th September, 2003 the 1st respondent stated.

> ... in the matter of Disappearance (sic) of six (6) vehicles notified to your good office earlier, I am pleased to confirm that settlement of two (2) is in progress under the guidance of your senior officers ..."

50. This was not a man who was harassed or in distress or suffered any anguish. He had reported a matter to the police and he was satisfied how it was being handled.

viii. Special damages Kshs.24,350,000.

51. As we have shown these were not proved at all and it was wrong for the same to be awarded.

52. The 1st respondent did not prove any case and the suit should have been dismissed with costs.

53. The cross–appeal has no merit in those circumstances and the less we say about it the better.

54. We allow the appeal, dismiss the cross-appeal and award costs to the appellant and the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR