IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 88 OF 2015

BETWEEN

JOSEPH GICHUKI WAWERU.....APPELLANT

AND

TAHIR SHEIKH TRANSPORTERS LIMITED.... FIRST RESPONDENT

AWADH GHALIB.....SECOND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret ***(Githua, J.)*** *dated 22nd July, 2015*

in

CIVIL APPEAL NO. 112 OF 2014)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the judgment of the High Court in which the High Court partially allowed an appeal that was lodged by **Tahir Sheikh Transporters Limited** and **Awadh Ghalib** (who are now the 1st and 2nd respondents). The suit originated from the Chief Magistrate's Court at Eldoret.

[2] Joseph Gichuki Waweru (who is now the appellant) was the plaintiff in the trial court. He had sued the respondents for special and general damages arising out of a road traffic accident involving the appellant's truck, registration No. KAU 854G, and a motor vehicle KBN 806N, which accident was alleged to have been caused by the negligence of the 2nd respondent, a driver or agent of the 1st respondent. The trial magistrate gave judgment in favour of the appellant including Kshs.1,607,600/= as cost of repairs and Kshs2,500,000/= as loss of user.

[3] Being aggrieved by the judgment of the trial court, the appellant lodged an appeal in the High Court in which he challenged the judgment on the award of quantum of general damages.

[4] Having heard the appeal and the submissions by the parties, the learned judge upheld the judgment of the trial court on the award for loss of user, maintaining that the award was discretionary and that there was no reason to interfere with the award. However, the learned judge faulted the calculation by the trial magistrate in regard to the cost of repairs as based on estimated costs and not the actual costs. He therefore allowed the appeal to the extent of reducing the award on the special damages, cost of repairs from Kshs.1,607,600/= to Kshs.1,369,600/=.

[5] The appellant being dissatisfied with the judgment of the High Court is now before us on this second appeal. He has raised fourteen (14) grounds which can be summarized into four clusters as follows:

a) Exceeding the court's jurisdiction by delving into issues that ought to have been handled by the trial court;

b) Finding that the trial court was wrong in using the figures in the assessment report;

c) Ordering that the decretal sum attracted interest from the date of delivery and not from when the suit was instituted;

d) Failing to award the appellant costs of the suit in the Superior Court.

[6] During the hearing of the appeal, the appellant relied on written submissions made by his counsel Mr. Korir. The respondent filed written submissions that were duly highlighted by his counsel Mr. Kipkesgei Jeruto.

[7] For the appellant, it was submitted that the learned judge wrongly exercised her jurisdiction in reducing the award on cost of repairs; that she took into account irrelevant issues; that she made calculations that should have been done by the trial court thereby denying the appellant any opportunity to explain; that the receipts produced showed the total cost of repairs as Kshs.1,657,600/= and that the appellant explained in his evidence before the trial magistrate what he paid for; that the appellant's evidence was not challenged; that it was wrong for the learned judge to scrutinize receipts when the figures were not legible and when the issue should have been dealt with by the trial court.

[8] In regard to interest, the appellant faulted the learned judge for ordering that the interest be calculated from the date of the High Court judgment contrary to **section 26(1)** of the **Civil Procedure Act** which states that interest should be from the date of the suit. In regard to costs, the learned judge was also faulted for ordering each party to bear their own costs when the appellant had partly succeeded in his appeal and therefore ought to have been awarded half the cost.

[9] For the respondent it was maintained that the appellant had not raised any issues of law to justify consideration in his second appeal. It was pointed out that the substratum of the appeal was on grounds 7, 12 and 13 in the memorandum of appeal which raise issues concerning the reduction of the award in regard to cost of repairs, the failure to award costs of the appeal and the order that the interest on the decretal sum to accrue from the date of the High Court judgment instead of date of filing suit.

[10] The respondent submitted that the learned judge of the High Court was right in setting aside the award for cost of repairs as the damages were in regard to special damages which had to be strictly proved. It was pointed out that while the assessors report indicated the estimated cost of repairs as Kshs.1,607,600/=, the receipt for the repairs that was produced in evidence indicated the actual amount expended by the appellant on repairs and that was the amount that the appellant was entitled to as the damages were intended to compensate him for the actual loss suffered so as to put him in the same position he would have been had he not suffered the loss complained of.

[11] In regard to costs, it was pointed out that the learned judge of the High Court exercised her discretion in ordering each party to bear their own costs in the appeal. Reliance was placed, *inter alia,* on S***tanley Kaunga Nkarichia vs Meru Teachers College and Another [2016]*** eKLR, ***Impressor ING Furtunato Federice vs Nambwire [2002] 2 EA 383*** and section 27(1) of the Civil Procedure Act. The Court was urged that there was no basis to interfere with the exercise of discretion by the learned judge.

[12] Finally in regard to interest, the respondent referred to **section 2(1)** of the **Civil Procedure Rules** which gives the Court wide discretion in awarding interest and urged that the learned judge had properly exercised her discretion as the appellant had not pleaded for interest from the date of filing the suit and therefore left the matter to the discretion of the court.

[13] We have considered this appeal, the submissions made by the respective parties and the authorities cited. The issues raised are fairly simple. That is whether the first appellate court erred: in interfering with the discretion of the trial court in awarding damages for cost of repairs of the motor vehicle and reducing the amount awarded by the trial magistrate; in awarding interest from the date of the judgment of the High Court instead of date of filing suit; and in failing to award the appellant any cost for the appeal.

[14] This being a second appeal, we are guided by the provision of **section 72(1)** of the **Civil Procedure Act** which provides:

> ***"(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 –***
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> ***(a) the decision being contrary to law or to some usage having the force of law;***
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> ***(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."***

[15] Also worthy of note is the statement by Onyango Otieno, JA. in ***Kenya Breweries Limited vs Godfrey Odoyo [2010]*** eKLR,

> ***"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."***

[16] In this appeal, we are satisfied that the appellant has raised issues of law as evident from the issues identified for determination. In regard to the complaint, that the learned judge wrongfully exercised her discretion in interfering with the discretion of the trial magistrate, it is clear to us that the award of damages in regard to cost of repairs was dependent on the evidence that was adduced before the trial magistrate. As was stated by this Court in ***Kenya Breweries vs Geoffrey Odoyo [2010] eKLR:***

> ***"In a first appeal, the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to some independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analyzed afresh."***

[17] Therefore, contrary to the arguments of the appellant that the learned judge had no business going through the evidence, the learned judge was acting within her mandate when she re-examine the evidence placed before the court and noted the mathematical error. It was within the power of the learned judge to recalculate the amounts awarded by the trial magistrate in light of the evidence that was produced.

[18] In her judgment, the learned judge of the High Court stated in part as follows:

> ***"I have looked at the evidence on record and the judgment of the trial court. I concur with the appellants' submissions that indeed the award of Kshs.1,607,600/= was based on the estimated cost of repairs as shown in the motor vehicle assessment report and not on the actual cost of repairs. An award of damages is meant to compensate a plaintiff for the actual loss suffered and is meant to put him in the same position he would have been had the loss complained of not occurred. It is not meant to be a source of profits.***
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> **……**
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> ***In this case, the actual amount expended on the vehicles repair cost was shown in Pexhibit 8. The learned trial magistrate should not have relied on the global figure shown on the said receipt which was the same figure reflected in the repair estimates. He ought to have calculated the itemized amounts shown in the receipt in order to arrive at the actual amount expended in the repair of the vehicle. The amount arrived at after such a calculation is the amount which should have been awarded to the respondent. A calculation of those amounts gives `rise to a sum of Kshs.1,369,600/= and not Kshs.1,607,600/= which was awarded by the trial court. It is therefore clear that the learned trial magistrate fell into error when he failed to ascertain for himself the actual amount the respondent had spent in having his vehicle repaired and instead relied on the repair estimates … This is an error which this Court is duty bound to correct by substituting it with the amount the respondent was legally entitled to which is the actual amount spent as repair cost."***

[19] The learned judge cannot be faulted. The claim for damages for cost of repairs of the vehicle was special damage claim that had to be specifically proved. Having properly re-evaluated the evidence, the learned judge came to the correct conclusion that the amount awarded by the trial magistrate was the amount estimated as the cost of repairs and not the actual cost of repairs. In the circumstances, the learned judge properly substituted the correct amount of the cost of repairs which was the actual loss suffered by the appellant.

[20] As regards the interest, the appellant in his plaint, had sought interest on the damages "at such rates and for such a period as the court deemed fit" In his judgment, the trial magistrate awarded interest without any specific direction on the effective date. As the learned judge did not interfere with the order for payment of interest, it was only fair and just that the payment of interest on the decretal sum should be from the date when the interest was awarded which is the date of the trial court's judgment, and not the date of the judgment of the High Court. We would therefore allow the appeal in this regard and direct that the respondents shall pay interest to the appellant on the decretal sum from the date of judgment of the trial court.

[21] Finally, on the issue of costs, the learned judge exercised her discretion stating thus:

> ***"The respondent is awarded costs in the lower court but since the appeal has partially succeeded each party shall bear his/its own costs of this appeal."***

[22] We do not find anything to show that the learned judge did not properly exercise her discretion such as to justify our intervention. We would therefore dismiss this ground.

[23] The upshot of the above, is that this appeal succeeds only to the limited extent in regard to costs, which we allow and order the respondents to pay interest from the date of judgment of the trial court. We award the appellant half the cost of this appeal.

Orders accordingly.

DATED and delivered at Eldoret this 4th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR