



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 80 OF 2015

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITIES..... APPELLANT

AND

DANEVA COMPANY LIMITEDRESPONDENT

*(Being an Appeal arising from the judgment and decree of the High Court of Kenya at Mombasa
(Kasango, J) dated 20th March, 2014*

in

H.C.C.Case No.18 of 2013)

JUDGMENT OF THE COURT

The respondent was at the time material to this appeal the registered owner of a motor vehicle (lorry) Registration Number, KAY 240 S, make Mercedes Benz which was engaged in the business of road transport. On 18th February while so engaged, and transporting wheat to Kampala from the Port of Mombasa, the vehicle which was being driven by Christopher Bossa, (PW1) was weighed at various weighbridges along the highway from Mombasa to Webuye, that is, at Mariakani, Athi River, Mai Mahiu, Gilgil and Webuye to ascertain its weight and to ensure it was within the legal maximum weight of 46,000 Kgs.

From the Port of Mombasa, through to Mai Mahiu the lorry was found to be within the permitted weight limit. The gate pass issued upon exit from the Port indicated the weight as 43,740. The tickets issued by the various weighbridges after the vehicle left Mombasa reflected the following weights.

Mariakani - 43,540 Kg

Athi River - 43,480 Kg

Mai Mahiu - 47,220 Kg

Gilgil - 40,655 Kg

It was only at Mai Mahiu that the vehicle was found to have excess weight. It is the events at Mai Mahiu that gave rise to the respondent's grievance. According to PW1 he was surprised when he was told at Mai Mahiu that the load on the vehicle was in excess of the permitted weight. He requested that the lorry be weighed for the second time. He waited for about 30 minutes for his turn to re-weigh the vehicle when an official from the weighbridge flagged him to proceed with his journey. On the way the vehicle was weighed at Athi River and Gilgil and found to be within the permitted weight limit. But when he got to Webuye, although the vehicle was once again weighed and found to be within the weight limit, he was informed that the vehicle would be detained for the reason that he had driven the vehicle away when it ought to have been impounded at Mai Mahiu for being overloaded.

He was again surprised because in his honest opinion the vehicle could not have been overloaded only at Mai Mahiu and not at any other weigh bridge, and secondly he noted that the vehicle for which he was being detained for overweight was KAU 240 S and not the one he was driving, KAY 240 S.

On the other hand, Roy K.Yegon (DW1) the officer who dealt with PW1 at Mai Mahiu, insisted that the vehicle's weight was beyond the permitted limit; that PW1 insisted that it was not possible since he was certain the load on the vehicle was within the weight permitted; and that PW1 demanded a re-weigh. He asked him to bring the vehicle for that purpose. He waited for PW1 for over 1 hour but he never returned. The vehicle was thereafter intercepted and detained at Webuye weighbridge.

The respondent instituted an action on 18th March, 2013 against the appellant claiming that, by the latter's action of unlawfully detaining the vehicle, the former had been deprived of its use resulting, in turn, to loss of profit and business; that as the vehicle was loaded with perishable goods, the respondent was exposed, by the continued detention of the vehicle, to liability in damages to the consignee; and finally that the respondent having purchased the vehicle through a hire purchase arrangement with Stanbic Bank, Uganda, was likely to lose the vehicle if it was to default in the monthly payment of the loan.

For these reasons the respondent prayed for an order of interlocutory injunction to restrain the appellant from continuing to detain the vehicle, mandatory injunction to compel the appellant to restore the vehicle to the respondent, "damages", costs and interest. The appellant by its defence denied the above averments maintaining that the vehicle was indeed loaded with excess weight in contravention of **section 55** of the Traffic Act; that PW1 escaped from lawful custody pending prosecution; that since the vehicle was detained by the police, the respondent ought to have sued the police and not the appellant.

The dispute was tried in the High Court by Kasango, J. who, upon evaluation of the foregoing evidence, framed for her determination three issues as follows;

- i. Whether the respondent's vehicle was lawfully detained.
- ii. Whether the appellant was properly sued
- iii. Whether the respondent is entitled to damages.

Answering the first question, the learned Judge, on a balance of probabilities held that the vehicle that ought to have been detained was KAU 240 S and not KAY 240 S; that there was no evidence that the latter vehicle was overloaded, hence its detention for 10 months was unlawful.

Regarding the second issue, the learned Judge cited **section 22 (1) (a), (2) (e) (i)** of the Kenya Roads Act and held that the power to withdraw, prohibit, control and regulate the usage of any vehicle on any road is vested in the appellant; and that the police merely implement the direction of the appellant, while the Director of Public Prosecutions (DPP) has no role in matter.

The learned Judge, after drawing a distinction between general and special damages answered the last question by holding that the respondent's claim was in general as opposed to special damages; and that the respondent was entitled to Kshs.2,500,000 in general damages. The learned Judge also ordered, by a mandatory injunction that the vehicle be released to the respondent with immediate effect. She awarded

costs to the respondent.

It is that determination that has provoked this appeal, which has been brought on 11 grounds but which we have condensed to be considered as follows;

- i. that the respondent failed to discharge its burden of proof with regard to in the claim for general damages;
- ii. that the learned Judge misdirected herself by finding that the prohibition leading to the detention of KAY 240 S was issued erroneously and that the vehicle was not lawfully seized;
- iii. that the award of economic loss was made in error as they were neither pleaded nor proved;
- iv. that the principles for award of damages were not appropriately applied; and
- v. that the learned Judge misdirected herself in issuing an order of mandatory injunction requiring directing that the vehicle, which was not in the appellant's possession but that of the police, be released by the appellant to the respondent.

These ground (and the response thereto) were canvassed through written submissions, and in support thereof counsel representing the parties relied on a number of authorities which we shall consider in the course of this judgment.

The two limbs to this appeal are whether liability of the appellant was proved and whether the respondent was entitled to an award of general damages. In determining these questions we are expected to evaluate afresh the evidence on record in order to draw our own independent conclusion, bearing in mind that we did not see or hear the two witnesses. See **Sumaria & another v Allied Industries Ltd** (2007) KLR 1.

The respondent, as we have already stated at the beginning of this judgment was the registered owner of the vehicle whose registration number was confirmed by the Kenya Revenue Authority's registration book No.R0964279K as KAY 240 S, white in colour. The motor vehicle that was said to have transgressed was KAU 240 S.

In his evidence at the trial DW1 was categorical that the motor vehicle whose weight was found to be over the allowed scale was KAU 240 S. DW1 was the only witness summoned by the appellant.

He was not himself involved in the weighing of motor vehicles. He testified that he only received a ticket and the delivery note that reflected the registration number as KAU 240 S. He did not say who handed over those two documents to him. But he also confirmed that he saw the vehicle and even talked to PW1.

The second and perhaps the most critical issue is with regard to the weight. This question is directly related to the foregoing question on the registration number of the vehicle. PW1 was emphatic that all the way from the Port of Mombasa up to Webuye the vehicle had a load which was within the allowed limit and wondered why that weight was only excess at Mai Mahiu. His surprise and shock was expressed by his insistence that the weight be taken afresh for the second time at Mai Mahiu. This fact was confirmed by DW1 when he explained the reaction of PW1 to the trial court as follows;

"...he said that no way (sic) his vehicle had exceeded weight ...He requested for a re-weight (sic) .. The driver said it was KAY 240 S that was the number on delivery note. ... It was not detained. I do not know what happened and later I was informed it was detained at Webuye ... The gross weight it had was 47,220 Kg. That was beyond the limit by 1,220 Kg... The only violation was in Mai Mahiu. I have noticed then the gross weight is consistent. There was no violation at Webuye."

In cross-examination the witness continued to state that;

"I did not say it was in excess. It was the one who weighed. Yes, defendant said it was overloaded and ordered for its

detention. The vehicle weighed at Mariakani was KAY 240 S. At Athi River was KAY 240 S, at Mai Mahiu, KAU 240 S. At Gilgil KAY 240 S, Webuye KAY 240 S. The vehicle that was sought to be detained was... KAU 240 S. That was the vehicle

I ordered to be detained ..The vehicle detained at Webuye is KAY 240 S. There is no valid detention order for KAY 240 S”

When asked to show the court any document showing that KAY 240 S was overloaded, the witness responded that there was none.

From this clear evidence we are not in any doubt that the appellant failed to demonstrate before the court below any justifiable reason for the detention of the vehicle, and the trial court properly so held.

As one of its functions under **section 4 (2) (d)** of the Kenyas Road Act, the appellant is empowered to;-

“4 (2) (d) ensure adherence to the rules and guidelines on axle load control prescribed under the Traffic Act (CAP 403) and under any regulations under this Act.”

In addition, **section 62** of the Act vests in the appellant the power to detain any vehicle to secure compliance with the provisions of the Act or any regulations made thereunder. The appellant was therefore properly sued.

The registration system of motor vehicles under the Traffic Act, ensures that at no time one registration number can be shared by more than one vehicle, hence under **section 6 (5)** once a vehicle has been registered, the licensing officer will assign it a registration number, **“which shall be the identification mark of the vehicle”**

Although the appellant is clothed with enormous powers to ensure only the authorized axle load is permitted on the highways, and to detain those vehicle in contravention, that power must be exercised responsibly.

On a preponderance of the evidence, we are in agreement that the seizure and detention of the vehicle was not justified and therefore wrongful. The appellant’s liability was proved.

The respondent, as we have already noted merely sought from the court “damages”, perhaps deliberately so, to avoid strictures associated with proof of special damages. Specifically the respondent averred that the vehicle was being used in the transport business; and that its detention deprived it (the respondent) of its use resulting in **“loss of user, profit and business”**

In **Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority**, Civil Appeal No.106 of 2006 relied on by the respondent, this Court (Waki, Onyango- Otieno and Visram, JJA) found that, although the appellant did not prove special damages for loss of user, the trial court was in error for holding that it was also not entitled to any kind of compensation at all even after making definite determination that the seizure and detention of the appellant’s vehicle was illegal, and that the respondent in that appeal was liable. This is how the Court explained what the trial court ought to have done;

“..this is a rare case in which the superior court, having found that the respondent was liable to the appellant for illegal seizure and detention of the appellant’s vehicle for 15 months,

nonetheless did not award the appellant anything and, as if that was not enough, went ahead to order the offended appellant to pay costs of the suit. The learned Judge did that on grounds, according to him, that the only two claims pleaded which were for special damages, to wit a claim for loss of use of the motor vehicle (pleaded) and claim for refund of Kshs.910,000 used to buy tyres to replace the tyres that had become

unroadworthy as a result of the length of detention.

As we have stated above, we agree with the learned Judge of the superior court on his finding on liability. There is no appeal on the issue of liability and that is no longer our problem in this judgment. The issue before us is whether or not damages, special or general, should have been awarded to the offended appellant.

The upshot of all the above is that the appellant did not strictly prove special damages as relates to the prayers set out in the plaint. But, in our view that could not be the end of the matter. The learned Judge, having found that the special damages were not proved, dismissed the case “as there was no claim for general damages.” This Court has, in several decisions made it clear that a court has no power to grant a relief a party has not specifically prayed for – see the case of Malindi Air Services and another vs Halima A. Hassan, Civil Appeal No.69 of 2000. However, in this case the position is to an extent different. General damages was pleaded at paragraph 8 of the amended plaint and specifically denied at paragraph 8A of the amended defence as we have indicated above. It was unfortunately not made one of the prayers, but clearly the appellant in raising evidence on its losses which were special damages was sending in effect one main message which was not disputed at any stage, that his vehicle was in active business. Indeed even at the time it was seized, it was carrying goods for transport to Tanzania.”

We have quoted this passage in *extenso* because of the similarity of facts and therefore provides the answer to the question of the award of general damages in this appeal.

A claim for Loss of user is a claim in special damages, which, as settled, must be pleaded and proved with evidence. See Macharia Waiguru v Muranga Municipal Council & Another Civil Appeal No.25 of 2013 and Siree v Lake Turkana El Molo Lodges, (2002) 2 EA 521.

In the appeal before us the learned trial Judge was of the mind that the respondent did not claim (or plead) special damages, and that “damages” pleaded in the plaint meant general damages. The award of Kshs.2,500,000 was therefore for general damages, not for loss of user, but for wrongful seizure and detention of

the vehicle. We agree that although the plaint alluded to loss of user, profit and business, which would ordinarily constitute special damages, the claim in its entirety was, first and foremost based on the wrongful seizure and detention, attracting an award of general damages. See D.T.Dobie & Co.Ltd v Joseph Muchina & another (1982) KLR 1.

This Court will not disturb an award of damages by the court below unless it is demonstrated that the judge proceeded on a wrong principle or that he misapprehended the evidence and arrived at a figure that was inordinately too high or too low. See Jivanji v Sanyo Electrical Company Ltd (2003) KLR 425.

The learned Judge was not guilty of any those exceptions. She, in our view, properly considered the period the respondent was deprived of the use of the

vehicle, the award in case of Great Lakes (*supra*) and the reckless action of the appellant in impounding the vehicle.

This appeal, for all these reasons must fail. We accordingly order its dismissal with costs to the respondent.

Dated and delivered at Malindi this 1st day of July, 2016

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

... ..

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR