**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, GATEMBU, MURGOR JJ. A)**

**CIVIL APPEAL NO. 92 OF 2012**

**BETWEEN**

**RUBANGURA ROSE…….……..……APPELLANT**

**AND**

**PETROCOM S.A. (RWANDA)……...……RESPONDENT**

***(Appeal from the Judgment and Decree of the High Court of Kenya at Kisumu Karanja J.R. J.) dated 10th December 2010***

**in**

**Kisumu H.C.C.A. NO. 9 of 2005)**

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**JUDGMENT OF THE COURT**

***The appellant, Rubangura Rose,*** has appealed against the judgment of the High Court which found that both herself, and the respondent were liable for the accident that occurred on 8th July 2008 between Motor Vehicle RAA 774N belonging to the appellant, and Motor Vehicle registration no. RAA 123G belonging to the respondent.

On 8th July 2008 when the appellant's motor vehicle was parked along Gor Mahia Road in Kisumu town, the driver of the respondent's motor vehicle caused it to violently collide into the appellant's motor vehicle, thereby causing it extensive damage. As a result of the accident, the appellant stated that she incurred repair costs amounting to Kshs. 1,234,430/- and suffered loss of user of the motor vehicle at the rate of Kshs.1 million per month as the appellant was unable to hire out the motor vehicle to transport petrol and petroleum products from Kenya to Rwanda whilst it was under repair.

The appellant filed suit in the High Court and claimed damages for the cost of repairs and loss of user following the accident. The particulars of negligence alleged were that the respondent failed to engage the hand brake mechanism; driving a vehicle with a defective hand break mechanism and failing to ensure that the motor vehicle was sufficiently stationary before leaving it unattended.

The High Court declined to find culpability on the part of either the appellant or the respondent, and dismissed the suit with costs to the respondent.

The appellant was dissatisfied with the decision of the High Court and appealed to this Court on grounds that the High Court misdirected itself when it considered unpleaded issues, and took into account extraneous matters, and in so doing reached an erroneous conclusion; and that the High Court wrongly found that the claim for loss of user was not proved; and that the High Court took into account extraneous matters in arriving at its conclusion.

In his submissions, learned counsel, ***Mr. P. Karanja*** for the appellant advanced the appeal on two grounds, firstly, that the learned judge determined the suit on the basis of an unpleaded issue, and secondly, that the learned judge wrongly concluded that loss of user was not proved.

On the first issue, counsel contended that from the facts of case, the respondent's motor vehicle was parked on a slope without engaging the hand brake or any other effective braking system and as a result, it rolled backwards and rammed into the appellant's motor vehicle. Despite evidence on that negligence, the court found that both parties were negligent as both their motor vehicles were parked in the wrong place. Counsel submitted that no such issue was placed before the court for determination and there was no evidence to show that the area was a "No Parking" zone. On the issue of the loss of user, counsel submitted that if liability was established, then damages for loss of user should have been awarded as prayed. According to the pleadings, it was contended that the motor vehicle earned Kshs. 200,000 per month on trips to Uganda. The driver provided evidence to support this claim. Counsel concluded that the High Court was therefore wrong to conclude that no evidence was submitted to support a claim for loss of user. See ***Great Lakes Transport Co. Ltd vs Kenya Revenue Authority (2009) eKLR.***

There was no appearance for the respondent despite service of the hearing notice upon their counsel on 28th August 2015.

Having considered the pleadings, the judgment of the High Court and the submissions of learned counsel for the appellant, we find that the issues for our consideration are whether the learned judge determined the suit on the basis of an unpleaded issue, and whether or not the appellant was entitled to the claim for loss of user.

Our duty as a first appellate court, is to re-evaluate and analyse the evidence that was before the court below and to reach at our own independent conclusion, always appreciating that we have not seen or heard the witnesses to be able to assess their demeanor. This principle was succinctly enunciated in the old case of ***Selle vs Associated Motor Boat Company (1968) EA 123 page 126,*** where the predecessor of this Court stated that in a first appeal:

> ***"...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it shall always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect..."*** *See also Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425".*

We begin by stating that the issue of whether the lower court took into account an unpleaded issue must be discerned from the facts that were before the court. The appellant's complaint is that in the judgment, the learned judge concluded that culpability could not be established on the part of the respondent as, ***"… both the plaintiff and the defendant are equally to blame for the accident for reason that they had parked their vehicles at the wrong place."***

The driver of the appellant's motor vehicle, ***Ndavarasha Erashe,*** who was ***(PW 1)***, testified that he had parked the motor vehicle along Gor Mahia road. The respondent's motor vehicle was parked on a slope in front of his motor vehicle, but on the opposite side of the road. Unexpectedly, the respondent's motor vehicle, on its own, rolled backwards and collided into another motor vehicle before also colliding into the appellant's motor vehicle. ***PC Paul Chai, (PW 2),*** who is based at Traffic base Kisumu Police Station produced the police abstract and stated that the accident had occurred along Gor Mahia Street in Kisumu

town. No other evidence was presented to the court on the manner in which the accident occurred, and the respondent did not participate in the hearings.

From the witness testimonies there was no reference to the motor vehicles having been parked in the wrong place or in a "No Parking" zone. As a consequence, we agree with counsel for the appellant that the court erred in taking into account extraneous matters which were not pleaded and were not part of the record. Accordingly, we find that the lower court misdirected itself when it found that liability was not proved on the basis of that extraneous view that both motor vehicles were parked in the wrong place.

We find support for this view in the words of Scrutton L.J in ***Blay vs Pollard and Morris (1930) 1 K.B.682;***

> ***"Cases must be decided on the issues on record; if it desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."***

On this account therefore, we find that we must interfere with the judgment of the High Court.

Given our finding, on the basis of the evidence that was before the court, was liability proved?

The evidence showed that the respondent's motor vehicle which was parked on a slope suddenly rolled backwards and collided into the appellant's motor vehicle.

In our view this is a classic case of *res ipsa loquitar* where the plaintiff only needs to show that the inexplicable occurance of the accident leads to the inevitable conclusion that it was due to the defendant's negligence. In the case of ***Wahindi vs Pharmaceutical Manufacturing [1994] KLR page 206***, this Court citing ***Charlesworth & Percy on Negligence 7th edition at page 350*** outlined the pre requisites for invoking the maxim *res ipsa loquitar* and stated thus;

> ***"(1) on proof of the happening of an unexplained occurrence;***
>
> ***(2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and***
>
> ***(3) the circumstances point to the negligence in question being that of the defendant rather than any other person."***

When the maxim *res ipsa loquitar* is aptly invoked, the burden of proof shifts to the defendant to show that the accident did not occur due to its negligence.

In this case, there is no doubt that an accident involving the two motor vehicles occurred. There is also no doubt that the respondent's motor vehicle which was parked on a slope inexplicably rolled backwards on its own and rammed into the appellant's motor vehicle. It is most unusual, and out of the ordinary for a truck and tanker to roll backwards on its own without negligence on the part of somebody. The circumstances were such that the appellant could not in any way be held to be responsible for, or explain this strange phenomenon.

The only conclusion we can reach is that the maxim *res ipsa loqutar* was applicable, and pointed to the respondent as the owner of the uncontrolled as being responsible for the accident. Since the respondent did not testify, there was no explanation provided to rebut the inference of negligence on the respondent's part. In the result, the only finding that we can reach is that the respondent was liable for the accident.

Having disposed the issue of liability, we now wish to turn to claim for damages.

In the prayers for damages, the appellant has claimed for the cost of the repairs of the motor vehicle

registration no. RAA 774 N of an amount of Kshs. 1,234,430/-. Such a claim would come under the heading of special damages.

This Court has variously held that it is trite law that special damages must be specifically pleaded and proved. In the case of ***Hahn vs Singh 1985 KLR 716***, this Court stated thus:-

> ***"…special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves".***

From the amended plaint the appellant had specifically pleaded for the "…*Cost of repairs of the motor vehicle reg No. RAA 744N- Kshs. 1,234,430/-*…" the equivalent of Ug.shs. 24,688,600/-." During his evidence Ndavarasha Erashe produced a loss and assessment report by Junex Agencies in respect of the repairs and a receipt from Mohammed Masoud of P.O. Box 23772, Kampala, Uganda dated 2nd August 2005 evidencing payment from the appellant of Ug. Shs. 24,688,600 for panel beating and spares. As the respondent did not testify, the costs together with the supporting documentation remained uncontroverted. This being the case, we are satisfied and find that the cost of repairs as pleaded was specifically proved by the appellant.

The second issue, was that the High Court declined to award damages despite the weight of the evidence showing that the appellant suffered loss of use of the motor vehicle whilst it was undergoing repairs.

It was claimed that the appellant's motor vehicle transported petrol and petroleum products from Kenya to Rwanda. As a result, the appellant claimed the loss of user for the 5 month period whilst the motor vehicle was under repair of an amount of Kshs.1,000,000/-. In his evidence, Ndavarasha Erashe stated that twice a month the motor vehicle made trips to Rwanda and earned Kshs.200,000/- per trip.

This is also a special damage claim. As this Court stated in the case of ***Marshalls East Africa Limited vs Osoro*** ***[1993] KLR 18,***

> ***"Loss of user is an ascertainable item of loss, or put another way a special damage. As the learned judge held that in the absence of evidence of special damage he had no basis upon which to award any, he could not substitute general damages for it. ".***

No documentary evidence by way of accounts or delivery notes for past deliveries was produced to support this claim. Consequently, we decline to award the amount claimed.

Accordingly, the appeal partially succeeds, and we find it necessary to interfere with the decision of the High Court. We therefore allow this appeal, set aside the decree of the High Court and substitute therefore the following orders:

1. That the appellant is awarded the cost of repairs of motor vehicle registration no. RAA 774 N in the sum of Kshs. 1,234,430/.
2. The appellant shall have the costs of this appeal and those of the suit in the High Court.

We so order.

***DATED and delivered at Kisumu this 17TH day of NOVEMBER, 2015.***

**D.K. MARAGA**

**….....**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**….....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**….....**

**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**