



IN THE COURT OF APPEAL AT NAIROBI

CORAM: KARANJA, KIAGE & M'INOTI, JJ.A.

CIVIL APPEAL NO. 310 OF 2005

BETWEEN

ABDI ALI DERE ..... APPELLANT AND

FIROZ HUSSEIN TUNDAL

ASIF HUSSEIN ADAM (*BOTH TRADING AS TUNDAL  
TRANSPORTERS*)

MWABIRE CHIDZAO KADUNGO ..... RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J) dated 22nd September, 2005

in

MKS HCCC NO. 1406 OF 2003)

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JUDGMENT OF THE COURT

This appeal arises from a motor accident that occurred on 31st July 2002 on Mombasa Road near a place called Machinery. The accident involved two vehicles, Registration Nos. KAH 141H-ZA 5542, Mack semi trailer tanker and KXW 371, Mitsubishi lorry. The former was owned by the appellant, *ABDI ALI DERE*, and was being driven by Hussein Muhammad Abuke who died in the accident. The latter was driven by the 3rd respondent, *MWABIRE CHIDZAO KADUNGO*, though the capacity in which he was driving as well as the owner of the lorry, were hotly disputed. Following the accident, the 3rd respondent was on 8th August, 2002 charged before the Resident Magistrate's Court, Makindu in Traffic Case No 5 of 2002, with causing death by dangerous driving contrary to *section 46 of the Traffic Act, Cap 403 Laws of Kenya*. On 29th April, 2003 he was convicted as charged and sentenced to a fine of KShs.4,000/- or 9 months imprisonment in default. In addition, he was banned from driving any motor vehicle for a period of 6 months. No appeal was preferred against that judgment.

On 28th July 2003, the appellant filed a suit in the High Court of Kenya at Nairobi against the 1st and 2nd respondents as owners of KXW 371 and the

3rd respondent as the driver. He claimed KShs.3,486,850/- made up as follows:

<i>Pre-accident value of KAH 141H-ZA 5542</i>	-	2,600,000
<i>Less value of salvage</i>	-	<u>(270,000)</u>
		2,330,000
<i>Breakdown and labour charges</i>	-	272,510
<i>Loss of user @Kshs 292,780 per month</i>		
<i>for 3 months</i>	-	<u>884,340</u>
<i>Total</i>	-	<u>3,486,850</u>

The appellant also pleaded that the 3rd respondent had been convicted in a traffic case arising from the accident and sought to rely on the proceedings and judgment relating to that conviction.

On 6th August, 2003 a statement of defence was filed on behalf of all the three defendants. The 1st and 2nd respondents denied that they were the owners of KXW 371 or that the 3rd respondent was their driver. They also denied that the said motor vehicle was involved in an accident as pleaded or at all, as well as the particulars of negligence and the loss alleged to have been suffered by the appellant. In the alternative, the respondents pleaded that if there had been an accident, it had been caused or substantially contributed to by the negligence of the plaintiff or his driver.

Another statement of defence dated 7th August, 2003 was filed on behalf of the 1st defendant by a different law firm from the one that had filed the earlier defence. The second defence closely mirrored that filed on 6th August,

2003, but with the additional pleading that at the material time the 1st respondent had sold and transferred all his rights and interest in KXW 371 to a bona fide purchaser, who was not named or disclosed. Subsequently, with the leave of the court, the statement of defence filed on 6th August, 2003, was amended to make it the defence of only the 2nd and 3rd respondents.

The suit was heard by Wendoh, J. Three witnesses testified for the appellant while the respondents called no witness. On 22nd September, 2005, the learned judge dismissed the suit with costs, thereby provoking this appeal.

The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal, in our view, turns on the following five issues only:

- 1. Whether the learned judge erred by holding that the 3rd respondent was not the driver, servant or agent of the 2nd respondent;*
- 2. Whether the learned judge erred in her finding on the cause of the accident;*
- 3. Whether the learned judge erred in holding that payment vouchers that were produced by the appellant were not evidence of payment of money;*
- 4. Whether the learned judge erred in excluding and disregarding the report of the assessor on the damage and loss of KAH 141H- ZA 5542; and*
- 5. Whether the learned judge misdirected herself regarding the burden of proof on the appellant.*

At the hearing of this appeal, learned counsel, Mr S. Wachira and Mr H. Kiarie appeared for the appellant while Mr G. Mahugu appeared for the 2nd and 3rd respondents. Messrs Mwangi Kengara & Company Advocates for the 1st respondent, though served with a hearing notice, did not attend the hearing of the appeal.

As this is a first appeal, we are expected to reconsider the entire evidence, evaluate it, make our own findings and draw our own conclusions, but at the same time making allowance for the fact that we did not have the

opportunity to see or hear the witnesses. (See SELLE V ASSOCIATED MOTOR

BOAT COMPANY LTD, (1968) EA 123, 126 paras H-I, KENYA PORTS

AUTHORITY V KUSTON (KENYA) LTD, (2009)2 EA 212 and PIL KENYA LTD

V OPPONG, (2009) KLR 442).

The first issue raised in this appeal was whether the 3rd respondent was the driver, servant or agent of the 1st respondent. The court found that at the time of the accident, the motor vehicle KXW 371 was owned by the 1st respondent. The court also found that at the time of the accident, that vehicle was being driven by the 3rd respondent. No direct evidence was led to show the capacity in which the 3rd respondent was driving the 1st respondent's vehicle.

The learned judge absolved the 1st respondent from liability in the following terms:

*“The next issue to consider is whether the 1st defendant was the employer of the 3rd defendant. The 3rd defendant did not testify in this case. There is no evidence in support of his defence therefore. The plaintiff alleged that 3rd defendant was driving motor vehicle KXW 371 as a servant or agent of the defendants. However, no evidence was adduced in support of this allegation... Apart from the fact that the*

*3rd defendant was driving the vehicle at the time of the accident there is no evidence of the relationship between the 3rd defendant and the 1st defendant. I believe 3rd defendant conveniently kept off and did not testify to avoid an explanation of how the accident occurred and his relationship with the defendants... [T]his court has no evidence as to whether the 3rd defendant was acting on behalf of the 1st defendant or for his benefit and vicarious liability can therefore not attach as against the 1st defendant.”*

The indisputable fact is that at the time of the accident the first defendant was the owner of the motor vehicle involved in the accident and the 3rd respondent was the driver. Mr Wachira invited us to make an inference that the 3rd respondent was an agent of the 1st respondent because the latter had not disowned him as a person who was driving the motor vehicle unlawfully or illegally.

Mr Mahugu was of the contrary opinion, relying on ANYANZWA V

GASPERIS, CIVIL APPEAL NO. 31 OF 1981 (Unreported) to make the

proposition that in order to establish vicarious liability it must be shown that the agent was at the material time acting on behalf of and for the benefit of the owner. ANYANZWA V GASPERIS is easily distinguishable from the present

case because at the time of the accident in that case, the appellant had hired out his vehicle to a firm which was using its own driver to ferry passengers in the vehicle. The appellant contended, which the court agreed with, that to be liable to those injured, it must be shown that the driver was the appellant's servant. The court concluded that “an owner who hires out his car to a person to be used for purposes in which the owner has no interest or concern escapes liability.” The Court also found as a fact that the driver was not driving the vehicle at the owner's request, express or implied.

In this appeal there is no evidence, and it has not been suggested, that the 1st respondent had hired out his vehicle to an independent party or that the

3rd respondent was acting for a party other than the 1st respondent. In

HEWITT V BONVIN & ANOTHER, (1940) 1KB 188, which was cited with

approval by the Court of Appeal in ANYANZWA V GASPERIS, du Parcq, LJ, at

194-195 stated that:

*“The driver of a car may not be the owner’s servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner’s behalf.” (Emphasis added).*

In VYAS INDUSTRIES V DIOCESE OF MERU, (1982) KLR 1, one of the issues

was whether the owner of a motor vehicle could be held liable for damages where it had not been proved that the driver of the vehicle was his employee. On that point, Law, VP delivered himself as follows:

*“The plaintiff did allege ownership and negligence which is sufficient to raise a presumption that at the time of the accident, the lorry was being driven by a person for whose negligence the defendant was responsible and to that extent, it disclosed a cause of action”.*

In arriving at that conclusion, Law VP relied on two pertinent authorities. The first was HEWITT V BONVIN & ANOTHER where du Parcq LJ stated.

*“It is true that if a plaintiff proves that a car was negligently driven and that the defendant was its owner and the court is left without further information, the negligent driver was either the owner thereof or some servant or agent of his.”(emphasis added)*

The second was KARISA V SOLANKI, (1969) EA 318, where at page 322 Sir

Charles Newbold observed:

*“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.”*

We have come to the conclusion that the learned judge erred in absolving both the 1st respondent as the owner of the motor vehicle and the 3rd respondent as the driver thereof, from liability for the damage suffered by the appellant.

The second issue in this appeal is whether the learned judge erred in her finding on the cause of the accident and liability for that accident. The appellant had pleaded that the accident was caused by the 3rd respondent, who was driving KXW 371. The particulars of negligence were pleaded. The appellant had also pleaded that the 3rd respondent had been charged, convicted and sentenced for causing death by dangerous driving arising from the accident. The proceedings and judgment in the traffic case were produced as exhibits. At the hearing before the High Court, PW2, David Ngovi, who was the turn boy travelling in KAH 141H-ZA 5542 testified on behalf of the appellant on how the accident occurred.

On their part, the respondents did not call any witness at all to prove the pleading in their defence that the accident was caused by the sole negligence or was substantially contributed to by the deceased driver of KAH 141H-ZA 5542. Even the 3rd respondent who was the driver of KXW 371 did not testify. The learned judge resolved the issue of responsibility and liability for the accident in the following terms:

*“It is however not in dispute that the accident occurred. The 3rd defendant was convicted in traffic case which is evidence of his guilt. The fact of conviction is however not evidence that he was solely to blame for the accident. The evidence of PW2 the only eye witness seemed questionable of what exactly happened. At one time he said motor vehicle KXW hit their trailer from the rear but later changed the story to say their vehicle was hit on the cabin when the driver of KXW sighted an oncoming lorry and swerved to the left hitting KAH 141*

*H. The vehicles were said to be descending or going downhill. No evidence has been led as to how the deceased driver of KAH 141 H attempted to avoid the accident at all. There is no evidence that he braked or tried to swerve early enough on sighting the oncoming vehicle whereas another was overtaking. The court should have been told what that driver tried to do as a prudent driver, to try to avert the accident. It seems he did nothing and must have therefore contributed to the accident to some extent. In my assessment I would apportion liability at 30% as against the driver of the plaintiff and 70% as against the 3rd defendant.”*

With all due respect, from the facts of the case, we are unable to agree with the above finding by the learned judge. The 3rd respondent had already been charged, convicted and sentenced by a court of competent jurisdiction for causing the accident in question. That fact was pleaded and the proceedings and judgement were exhibits before the court. The judgment had not been appealed, let alone set aside or otherwise varied. Under the Evidence Act therefore, the determination of the criminal court was conclusive on the cause of and liability for the accident. *Section 47 A of the Act provides as follows:-*

*“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”*

In *Chemwolo & Another vs Kubende (1986) KLR 492*, this Court considered

the effect of the above provision of the Evidence Act. At page 498, Platt JA

stated:

*“Now, it was correct for the learned judge to refer to Mr. Chemwolo’s conviction because section 47A of the Evidence Act (cap 80) declares that where a final judgement of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in civil proceedings which are contemplated, Mr Chemwolo’s conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter. Because it may also be that Mr Kubende was guilty of carelessness, and if it were to be so, then the position would be as explained in *Queens Cleaners and Dyers Ltd vs E A Community**

*& Others...and despite Mr Chemwolo’s conviction, the issue of contributory negligence may still be alive if the facts warrant it.”*

There was no evidence from which the High Court could have concluded that the deceased had contributed 30% to the accident. The respondents did not offer any evidence of how the deceased contributed to the accident. The court made a finding in the judgement that the 3rd respondent had conveniently kept away from testifying to avoid explaining how the accident occurred. Instead of making the irresistible inference from that finding, the court instead opted to blame the deceased on the basis that it had not been told what he had done to avert the accident. The court postulated that the deceased did nothing and therefore he must have contributed to the accident.

Section 47A did not leave room for the learned judge to find contributory negligence on the part of the deceased driver as she did, absent any evidence of culpability on his part. We are of the opinion that the circumstances

contemplated in CHEMWOLO VS KUBENDE did not exist in this appeal and

the learned judge misdirected herself on that score.

The third issue raised in this appeal relates to the rejection by the learned judge, of the appellant's claim for breakdown and labour charges of Kshs 272,510. The appellant was claiming special damages under this limb of the claim and was therefore obliged to plead and prove the same strictly. In

BANQUE INDOSUEZ V D J. LOWE & COMPANY LTD, (2006) 2 KLR 208, at

222, this Court expressed itself as follows on special damages:

*“It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and 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 acts themselves.”*

The claim for special damages was pleaded in paragraph 7 of the plaint and at the hearing the appellant produced a bundle of cash sale receipts and payment vouchers to prove the claim. The learned judge dismissed the claim in the following terms:

*“The plaintiff also claims breakdown and labour charges amounting to Kshs 272,520/-(sic). At the time of PW1's testimony the receipts and vouchers intended to be produced did not have revenue stamps. The court allowed counsel to go and get the same and he did. He produced the receipts and vouchers as a bundle Exhibit No 7. In the bundle there are only 2 receipts issued to the plaintiff which are transport of the wreckage and one is dated 15/8/02, while the other is dated 2/2/03. The variation in dates is not explained. The other documents in the bundle are vouchers. Vouchers are not evidence of payments. They can be made by the plaintiff without there being any payment. The documents did not support the claim at all.”*

In our opinion, the trial court, once again did not properly consider the evidence that the appellant had presented to prove special damages. The court rejected all the evidence in the bundle exhibit 7 without addressing each and every piece of evidence as was expected of it. The appellant had pleaded breakdown and labour charges, namely the costs incurred in towing the wreckage and related labour charges. He produced a receipt dated 15th August, 2002 issued by Abdiziz Ali Shire for “transport of trailer ZA 5542 (wreckage)”. The payment was KShs.20,000/-. A second receipt issued by the same Abdiziz Ali Shire was dated 2nd February, 2003 for “transport of wreckage of KAH 141 H” from Makindu to Nairobi. The payment was for KShs.40,000/-. The last receipt dated 3rd April, 2003 was from Msamaria Mwema Nairobi- Mombasa Road Breakdown Services for Kshs.30,000 for recovery and towing.

We cannot understand how this evidence could be disallowed on the basis that “the variation of dates is not explained.” A simple glance at the loss assessment report and the photos of the wreckage that were attached to it show that the wreckage of the lorry KAH 141H-ZA 5542 comprised three parts, the prime mover, the trailer and the tank. The receipts were clear enough that the appellant was paying for breakdown services for the transportation of different parts of the wreckage from the scene of the accident on different days.

The appellant also produced an invoice from Beyond Horizon Assessors for KShs.12,600/- for motor vehicle assessment and valuation together with a receipt of payment of the said amount dated 28th August, 2002. He also produced a receipt from the Kenya Revenue Authority in respect of the search for the owner of KXW 371 at the office of the Commissioner of Motor Vehicles.

In our opinion it is not correct to say, as the trial court did, that in all and sundry cases a payment voucher cannot be evidence of payment. The term “voucher” derives from the word “vouch”, meaning

“to confirm or assure”. The term “voucher”, in regard to payment, has at least two distinct meanings. It can mean a written authorization to pay or disburse money. It can also mean confirmation of payment. In the latter sense, a payment voucher is not any different from a receipt. In many daily and official transactions, payees do not walk around with receipts to issue in acknowledgement of payment. They merely counter sign the payment voucher to signify payment. This is particularly the case where the payees are casual workers engaged to undertake short term assignments. In the present appeal, some of the payment vouchers that the court rejected related to payment to watchmen and other providers of labour hired after the accident.

In GREAT LAKES TRANSPORT CO. (U) LTD V KENYA REVENUE

AUTHORITY, (2009) KLR 720, this Court, considered how proof of payment,

in a claim for special damages may be established and distinguished an invoice from a receipt in the following terms:

*“Although the claim was pleaded at paragraph 7(b) of the amended plaint and prayed for in the prayers, the proof advanced in respect of it did not meet the required standard. There was no receipt produced to show that actual cash was paid, or any payment made for the alleged purchase of tyres. A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have been proved very easily by producing either a receipt from M/s General Tyres Sales Limited which was alleged to have supplied the alleged tyres or a witness from that company to confirm that indeed money changed hands when the alleged new tyres were acquired by and delivered to the appellant... [T]here was no evidence that the appellant bought new tyres for the subject vehicle. Mr Gikandi has endeavoured to show that an “invoice” is different from a “proforma invoice” and has made effort to persuade us that an invoice should be treated as a “receipt”. With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word “paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of the goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case, neither of the two documents amount to a receipt.”*

In the present appeal, only one invoice was produced by the assessor. That invoice was accompanied by a receipt showing payment of the assessor’s charges of KShs.12,600/-. All the other documents that the appellant produced to prove his claim were receipts and payment vouchers. After due consideration of the evidence, in our view the appellant appropriately proved the following special damages:

Transportation of KAH 141 H wreck	-	40,000
Transportation of Trailer ZA 5542 wreck	-	20,000
Towing and recovery	-	30,000
Gas Forklift charges	-	15,000
Assessor’s charges	-	12,600
Labour charges	-	33,000
Search on owner of KXW 371	-	500

The fourth ground upon which the judgment of the High Court was assailed was the rejection and exclusion of the motor vehicle loss assessment report dated 22nd August, 2002, which the appellant relied upon to prove the loss of his lorry. That report was included in the appellant's list of documents dated 20th August 2003, which was filed in court and served upon the respondents. It was number 4 in the appellant's list of documents in the High Court. At the trial, the appellant testified that after the accident, he appointed

Beyond Horizon Assessor, a firm of licensed insurance surveyors, motor assessors and valuers, to assess the damage to his lorry. The assessors prepared a report which concluded that the lorry was a complete wreck because it was extensively damaged and could not be restored to its pre- accident condition. He put the lorry's pre-accident value at KShs.2,600,000/- and the value of the salvage at KShs.250,000/-. The salvage was ultimately sold for a slightly higher amount of KShs.270,000/-.

The report was addressed to the Managing Director Norbixin (K) Ltd, attention A. A Dere. The reason for that, the appellant explained, was because he was a director of Norbixin (K) Ltd. The report was produced in court by the maker, Michael Mwangi Runjugi (PW3) as exhibit 5, without any objection by the respondents. PW3 testified that he was instructed to prepare the assessment report by "Mr Abdi Dere of Norbixin (K) Ltd", that is the present appellant.

The learned judge rejected the appellant's claim for loss of his lorry, to say the least, on spurious and questionable grounds. In the words of the learned judge:

*"The assessment report produced by PW3 was made to the managing director, Norbixin Ltd and attention of A. A. Dere. Norbixin Ltd is not a party to this suit. The plaintiff seems to be contending that he is a director of Norbixin Company but there is no evidence to that effect. Even if he were director, the plaintiff did not tell the involvement of Norbixin in this suit. Norbixin is a legal entity and so is the plaintiff. The two should not be mixed up. The log book for Motor Vehicle KAH 141-H*

*1542 (sic) is in the name of the plaintiff but not Norbixin*

*Ltd. There is no nexus between the plaintiff, Norbixin and this case. The valuation report is therefore not relevant to this case. It is the property of Norbixin Ltd."*

If we pause here first, there was before the court indisputable evidence of the log book of KAH 141-H ZA 5542 (exhibit 1) showing that it is registered in the name of the appellant. There was also the evidence of both the appellant and the assessor that it was the appellant who had instructed the assessor to assess the damage to the vehicle. The assessor testified that he knew the appellant to be 'of' Norbixin (K) Ltd. The appellant himself had explained that he was a director of Norbixin (K) Ltd, which was not seriously challenged by the respondents who opted not to call even a single witness. It was never suggested by the respondents that the A.A. Dere to whose attention the report was marked was not the appellant. The log book, in the name of the appellant, showed the address of the appellant to be P.O. Box 22425 Nairobi, which was the same address to which the assessor's report was addressed. Even the records from the Commissioner of Motor Vehicles which disclosed that the KXW 371 was at the material time registered in the name of the first respondent were addressed to Norbixin (K) Ltd through the same address.

In view of the evidence before the court, as well as the standard of proof required in a civil case, we cannot fathom how the learned judge could find that the loss assessment report was the property of Norbixin (K) Ltd and not of the appellant; that there was no nexus between the appellant and Norbixin (K) Ltd and that the report was irrelevant. It is also worth noting that the learned judge had no problem relying on the records from the Commissioner of Motor Vehicles addressed to the same Norbixin (K) Ltd (Exhibit 2(a) and 2(b)), to hold that the Motor Vehicle KXW 371 was at the material time owned by the 1st respondent. If the assessment report was irrelevant because it was addressed to Norbixin (K), how could the records of the Commissioner of Motor Vehicles be so relevant as to form the basis of a

central finding in the case, yet they were also addressed to the same Norbixin (K) Ltd?

Unfortunately the determination of the learned judge to find grounds for rejection of the loss assessment report did not end there. The court latched on an additional and equally lame reason as follows:

*“In addition to the above, the report was addressed on a without prejudice basis. It can only be used in this case if both the parties reached an agreement on it otherwise it was meant for the use of Norbixin alone. It is not admissible in evidence by virtue of Section 23 of the Evidence Act. The sum of this is that there is totally no evidence in support of the claim for the value of the plaintiff’s motor vehicle.”*

Section 23 of the Evidence Act provides as follows:

*“23. (1) In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.*

*(2) Nothing in subsection (1) shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 134.”*

With all due respect, section 23 of the Evidence Act had no application to the facts of the case before the trial court. That provision, as the marginal note makes clear, relates to without prejudice admissions made between the parties to a civil dispute on the express or patent understanding that the admission shall not be relied upon in court. There must, therefore, be an admission and an express or implied understanding that such admission shall not be relied

upon in court by any of the parties to the litigation. (See KAGGWA VS NEW

VISION PRINTING AND PUBLISHING CORPORATION AND OTHERS, (2012) 2

EA 187, a persuasive authority of the High Court of Uganda, interpreting section 22 of the Uganda Evidence Act, which is materially similar to our section 23).

In the present case, the respondents had not made any “without

*prejudice*” admissions to the appellant which he was seeking to rely upon. If there was a party which could possibly have raised an objection under section

23, it could have been the assessor. However, the assessor had no objection;

in fact he is the one who actually produced the report in court. To make matters worse, there was glaring evidence before the court that the assessment report was produced by the appellant with the consent of the respondents. The record of the court for 14th April, 2005 when the report was produced by the assessor reads as follows:

*“(Assessor): I wish to produce the report as evidence in court. Ms Mwangi (for 1st defendant): No objection*

*Mr Ngome (for 2nd and 3rd defendants): No objection. (Court) Report produced as Exhibit 5.”*

We find that this additional reason that was used to reject the loss assessment report had absolutely no legal basis or merit.

In our opinion, the appellant had proved on a balance of probability that he was entitled to claim from the first and third respondents the value of his

written-off lorry. In KENYA INDUSTRIAL INDUSTRIES LTD VS LEE ENTERPRISES LTD

(2009) KLR 135, this Court addressed the issue of

compensation for damaged machinery which was alleged to have been rendered obsolete. The Court stated as follows:

*“Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitutio in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction.”*

The Court further added the general principles of restitution would be inappropriate if they produced an absurd result and that in such a case, the correct measure of damages will largely depend on the facts of each case.

In the present appeal, the assessor had put the pre-accident value of the appellant’s lorry at Kshs 2,600,000/- less Kshs 270,000/- which was recovered from the sale of the salvage, leaving a claim of Kshs 2,330,000/- which is what the appellant would have required to replace his lorry at the date and time of the accident.

The last ground related to burden of proof. The burden on the appellant was to prove his case on a balance of probability, not beyond reasonable doubt. We are of the opinion that there was sufficient evidence presented before the High Court upon which the court, properly addressing its mind, would have come to the conclusion that the appellant had proved his case to the required standard.

We accordingly allow the appeal and set aside the order of the High Court dismissing the appellant’s suit. We enter judgment for the appellant against the 1st and 3rd respondents for KShs.2,481,000/-, being KShs.2,

330,000/- pre-accident value of KAH 141-H ZA 5542 and KShs.151,000/- special damages. The said sum of KShs.2,481,000/- shall attract interest from the date of filing suit till payment in full. The appellant shall also have the costs of this suit in this Court and in the High Court.

Those are our orders.

Dated and delivered at Nairobi this 20th day of September, 2013.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

wg