REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: ONYANGO OTIENO, VISRAM & KOOME, JJ.A.

CIVIL APPEAL NO. 70 OF 2007

BETWEEN

UNGA LIMITED

JOASH OWIDI ……..... APPELLANTS

AND

JAMES NJUGUNA NJOROGE …… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J) dated 29th May, 2006

in

HCCA NO. 36 OF 2002)

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JUDGMENT OF THE COURT

1. This is a second appeal against the judgment of the High Court (Kimaru, J) which was delivered on 29th May, 2006. The episode that gave rise to the claim for special and general damages for loss of user of a motor vehicle occurred on or about 11th February, 1995. The respondent's motor vehicle registration number *KAL 687B* was allegedly involved in an accident with the appellant's motor vehicle registration

Number *KAD 814R* along the Eldoret/Nakuru road.

2. The respondent blamed the appellant for the accident as per the particulars of negligence and the consequential damages for the repairs as well as general damages for loss of user of the motor vehicle. The appellant filed a statement of defence denying liability in total and in the alternative, pleaded that if indeed an accident occurred it was caused by the negligence of the respondent's driver.

3. After conducting a trial and considering the evidence, the learned trial magistrate arrived at the following conclusion:

"In all I have no reason not to believe the plaintiff incurred the stated KShs.134,800/- special damages

and KShs.54,000/- for was (sic) of user of his vehicle. That comes to KShs.188,800/-. To the extent I am satisfied that the plaintiff has proved his case against the defendants to the required standard. I accordingly enter judgment for him against the defendants jointly and severally for KShs.188,800/- (one hundred and eighty eight thousand eight hundred) plus costs of this suit and interest."

4. The appellant appealed against that decision in the High Court and Kimaru, J while concurring with the learned trial magistrate, dismissed the appeal. The appellant is still aggrieved and has now mounted a second appeal on the following grounds:

"1. That the learned judge erred in law, in his application of the law of evidence on the governing principle on proof of special damages to the prejudice of the appellant in the following respects:

(a) By upholding the subordinate court's finding that the respondent earned a sum of KShs.2,000/- per day from the suit motor vehicle without any proof in that behalf.

(b) By basing his decision on the failure to challenge the respondent's assertion that he earned a sum of KShs.2,000/- per day, rather than on the standard of proof required of the respondent.

(c) By finding that the respondent was entitled to the claim of loss of user.

(d) In arriving at the conclusion that the respondent was entitled to repair charges and in finding that the receipts produced in support of repair charge had proved the claim for repairs while the evidence of a photograph taken one [1] year later disproved that any repairs had been carried out at all.

2. That the learned judge erred in law in allowing to stand, damages in the sum of KShs.134,800/- despite there being no basis for this.

3. The learned judge erred in law in failing to apply the correct principles and standard of proof while re-evaluating the conflicting evidence on record.

4. The learned judge erred in law in delaying the delivery for over ten [10] months and thereby prejudiced the interests of the appellants.

5. That the decision was arrived at on consideration, to the extent that it was done, of wrong principle of law.

5. Mr Kagucia, and Mr Ikua learned counsel for the appellant and the respondent respectively, both addressed us at length on the five grounds of appeal in support of their rival prepositions. Briefly summarised, it was Mr Kagucia's submissions that the appeal raises two issues of law regarding liability and quantum. The judgment of the learned Judge was faulted for failure to apply the correct principles especially the analysis of the evidence; the conclusion that there was no evidence to support the defence was erroneous. Moreover, the judge relied on discarded evidence as the trial magistrate had made an order that the matter should start *de novo*.

6. Further, according to Mr. Kagucia, PW 1 was stepped down and he was never called back to testify nor was he subjected to cross examination and re-examination. The burden of proof was not discharged merely because the driver of the appellant was charged with a traffic offence for which he was acquitted, nonetheless, the learned judge went on to ascribe reasons for the acquittal. There were no documents to support the respondent's claim that the motor vehicle was used as a public service vehicle [PSV]. The documentary evidence relied upon was based on estimates as the vehicle was not repaired as at the time of trial, thus the claim for special damages was not proved. Similarly, the claim for loss of user which is a special damages claim was not pleaded.

7. On his part, Mr Ikua invited us to accept this being a second appeal; the learned judge properly re-evaluated the evidence and drew conclusions which have no error in principle. There was sufficient evidence to prove liability against the appellant's driver who was also charged with a traffic offence over

the same accident. Secondly, there was no evidence that by 6th February, 1996, the vehicle had not been repaired as the respondent produced receipts to support the special damages as pleaded. The loss of user was pleaded as general damages because the respondent did not have a specific claim.

8. This is a second appeal which must only turn on points of law. In the case of ***STEPHEN MURINGI & ANOTHER V R*** ***(1982-88) 1 KAR 360***, Chesoni, Ag JA (*as he then was*) posited as follows on page 366:

"We would agree with the view expressed in the English case of ***MARTIN V GLYWED DISTRIBUTERS LTD T/A MBS FASTENING)*** ***1983 ICR 511*** *that where a right of appeal is confined to questions of law only, an appellate court has loyally to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."*

9. Bringing the above principles to bear in this case, the contended issue is whether the respondent proved his case to the required standard especially with regard to the claim for special damages and the loss of user. The matter was heard first by H. Owino, SRM when Geoffrey Kariuki Kiburu (PW 1) testified on 24th April, 1997. On 5th November, 1999, there was an order made by D. Mochache, RM that the matter be heard *de novo* and PW 1 testified on 25th October, 2001, before R. K. Kirui. It is obvious from the judgment of the High Court that the judge relied on the evidence of PW 1 which was discarded especially on page 7 of the judgment where he pointed out that:

"The (sic) saw the appellant's motor vehicle did not have a ladder which was left at the scene of the accident when it came off the said motor vehicle after the collision."

10. It is for this reason we have re-evaluated the evidence before the trial court to satisfy ourselves on whether the respondent was able to discharge the burden of proof. The evidence by PW 1 and PW 2 regarding the cause of the accident was not challenged. Such that even though the learned judge regarded the evidence of PW1 which had been discarded, the evidence on the cause of accident was not challenged. What was challenged was the award of special damages for repair work because of the receipts and invoices that were produced that seemed to contradict the evidence of Peter Reuben Oremo Odonga, (PW3) regarding the time when the repairs were carried out and also the loss of user of the vehicle was an issue.

11. PW 3 assessed the damage caused on the motor vehicle on 6th February, 1996, and produced an assessment report. The accident occurred on 11th February, 1995 and according to the evidence of PW 3, by the time he assessed the motor vehicle on 6th February, 1996, the vehicle had not been repaired. Does this evidence affect the credibility of the receipts that were produced in evidence which bore the dates of March 1995? On this issue we have to determine whether the evidence of PW 1 who said the vehicle was repaired and to prove he incurred repair costs he produced some receipts that are dated:

Ø 10th March, 1995 for Kshs.38,000/-
Ø 15th March, 1995 for KShs.22,200/-

Ø Invoices for repair for KShs.41,000/-, KShs.18,000/- and KShs.1,500/-.

12. It is the trial court that saw these witnesses as they testified, these documents were admitted in evidence by consent and what we can deduce from these receipts is that they were for purchases of spare parts. It would be unfair for this Court to go into the factual findings of when the vehicle was repaired because PW 1 said in his evidence that he took his vehicle for repairs after the assessment. Granted that the accident occurred on 11th February 1995, he gave evidence before the trial court on 25th October 2001, and he was not asked when he took the vehicle for repairs, nor was he asked to explain the dates appearing on the receipts/invoices that he relied upon. No application has been made for fresh evidence to

be adduced and none can be adduced at this stage. Unfortunately, we cannot speculate that the plaintiff did not purchase the spare parts as per the receipts and invoices. The trial magistrate assessed the demeanour of the three witnesses and reached a decision that they were telling the truth. We do not have the advantage of seeing or hearing those witnesses.

13. As regards the special damages of KShs.134,800/- we have found no reason to interfere with the concurrent findings of the learned trial magistrate and the judge.

14. We now turn to the issue of loss of user and the issue before us is whether it falls under the heading of special or general damages. The plaint sought for: *"general damages for non user of the plaintiff's motor vehicle."* However, during the hearing, there was no evidence to support the contention that the plaintiff used to get KShs.2,000/- per day after all the deductions. He had no documents to prove that the vehicle was a PSV vehicle and no records like bank statements or ledger books to show the nature of the business. We agree with Mr Kagucia that the learned trial judge must have overlooked and failed to re-evaluate this aspect which falls under the heading of special damages that must not only be pleaded but proved strictly. The loss of user is a specific loss that a claimant has incurred by getting an alternative means of livelihood either through hire of another vehicle; or the amount lost due to the loss of the user if no alternative vehicle was hired should be proved through records of previous earnings by the same vehicle.

15. For the aforesaid reasons, we have no hesitation in interfering with the findings of the two courts below by allowing ground number ***1 (a), (b) and (c)*** of the memorandum of appeal.

Accordingly, the decree is interfered with and the sum of KShs.54,000/- awarded as loss of user is set aside. The rest of the judgment is not interfered with and will remain as awarded and that is KShs.134,800/- which we confirm.

As the appellant is partially successful, it is awarded $^1/_3$ of the costs in this appeal. Those shall be our orders.

Dated and delivered at Nakuru this 9th day of August, 2012.

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR