REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 240 of 2003

JACKSON K. KIPTOO.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Appeal from the judgment and decree of the High court of Kenya at Nairobi (Ang'awa, J)

dated 30th July, 2003

in

H.C.C.C. NO. 422 OF 2000)

****

JUDGMENT OF THE COURT

This is a first appeal from the decision of the superior court *(Ang'awa, J)* made on 30th July, 2002, dismissing the appellant's suit on the ground that the court had no jurisdiction to entertain the claim since Section 13A of the Government Proceedings Act was not complied with. In the same decision, the learned Judge assessed liability between the parties and made orders on both special and general damages, all of which are also challenged. As it is a first appeal, we are bound to re-examine the record afresh, re-evaluate the evidence and make our own conclusions in the matter always remembering, however, and giving allowance for it, that the trial court had the added advantage of hearing and seeing the witnesses and was the best judge on credibility. As to findings made on matters of fact, this Court will only interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is demonstrably shown to have acted on wrong principles in reaching the finding - see MWANASOKONI V. KENYA BUS SERVICES LTD [1985] KLR 931.

At all times material to the suit, the appellant was a general transporter of goods for hire throughout Kenya and owned two lorries for that purpose. He was also a councilor in Eldoret Municipality. On the 21st April, 1999, one of the Lorries KZC 225, an Isuzu ten-tonner, was transporting over 2,000 empty soda crates for Coca-Cola Bottling Company from their Nairobi depot to Rift Valley Bottlers in Eldoret depot. The lorry left Nairobi at 4.30 p.m. and reached Naivasha safely at about 7.30 p.m. According to *Isaac Kibet Tomno (Tomno) (PW2)* who was employed as a loader or turn-boy in the lorry, they found some rains around Naivasha and it was misty. They had their headlights on at the time. Shortly after Naivasha, however, at a point on the Naivasha/Nakuru road, the lorry rammed into a stationary vehicle. The driver of the lorry died from injuries sustained in the accident but Tomno who was sitting beside him survived. The lorry sustained extensive damage to the engine and cabin. The stationary vehicle which they crushed into was a Mercedes Benz lorry Reg. NO. 37KA 44 owned by the Government of Kenya and assigned to the Kenya Army in the Department of Defence, Office of the President.

In his suit before the superior court, the appellant pleaded that there was negligent obstruction of the road by the driver of the Army lorry and particularized the act of negligence thus:-

"*(a) Parking the said vehicle late in the evening at dusk without any or any adequate warning of the presence thereof on a public highway.*

(b) Failing to place any warning signs on the said road.

(c) Leaving the said vehicle unattended.

(d) Causing motor vehicle registration number 37 KA 44 to obstruct the said road.

(e) Failing to have any or any due regard for other road users.

(f) Posing danger to road users when they knew or ought to have known visibility would be obscured by rain and or mist.

(g) Causing motor vehicle registration number KZC 225 to ram into motor vehicle registration number 37 KA 44.

(h) Failing to take any step to avoid the said accident."

The doctrine of *Res Ipsa Loquitor* and the Highway Code were also pleaded. As for the damage suffered, the appellant pleaded and particularized special damages as follows:-

" (a) Repair cost to vehicle exceeding…….Kshs.700,000/=

(b) Towing charges……..Kshs.5,000/=

(c) Towing charges…….... 86,000/=

(d) Assessor's charges…… 10,000/=

(e) Abstract…… 100/=

(f) Transport for Inspection…… 2,000/=

Exceeding……...Shs.803,100/="

He also prayed for damages for loss of use of the vehicle at Shs.80,000/= per round trip for the period taken to carry out repairs.

The defence to the suit was not filed within the prescribed period after the memorandum of appearance was filed, but it would appear that an attempt to have it struck out was not successful. The Attorney General denied any negligence on the part of the Army lorry driver and contended instead that it was the driver of the appellants' lorry who was negligent in:-

"(a) Driving at an excessive speed in the circumstances.

(b) Driving without due care and or attention.

(c) Failing to have any or any due regard for other road users.

(d) Failing to observe the presence of motor vehicle

(e) Failing to brake, swerve, control or take any further steps to avoid the said accident."

He also denied any loss as alleged by the appellant and challenged him to prove it.

Issues arising from those pleadings were subsequently agreed on by the parties who filed their consent as follows:-

"1. Whether the accident was caused wholly by the negligence of the deceased in driving, managing or controlling motor vehicle registration number KZC 225.

2. Alternatively whether the said accident was caused wholly by the negligence of the driver of motor vehicle registration number 37 KA 44.

3. If the answers to 1 and 2 are in the negative in what proportions did the deceased driving motor vehicle registration number KZC 225 and the driver of motor vehicle registration number 37 KA 44 contribute to the said accident.

4. Whether the plaintiffs the dependants and the estate of the deceased suffered any loss.

5. What quantum of damages is appropriate on the plaintiff's claims on the basis of 100% liability.

6. What orders should be made for he costs of the case."

It is notable at once that in those agreed issues, none of them related to compliance with *Section 13A* of the Government Proceedings Act. The issue was also not raised in the defence filed by the Attorney General although it was specifically

pleaded in the plaint that "*demand and notice to sue"* had been given to the Attorney General who had failed to comply therewith. The issue was instead raised by learned State Counsel in the process of cross-examining the appellant as to whether he knew who the driver of the Army lorry was. The appellant responded as follows:-

"*At the scene there were many officers at scene. The driver I learn (sic) was Joseph Kibor. I never told the advocate. I was not sure of the name. A notice of intent to sue was severed (sic) before suit - no name was mentioned. My advocate gave copy. The name of driver is here."*

Although no formal copy of the notice, the subject matter of the cross-examination, was produced, it is clear to us that the State Counsel had in his possession the said notice. It would otherwise be illogical for the appellant to point out the name of the driver on a document which was not visible. The learned State Counsel also raised the issue in his final submissions stating:-

"*We did have (sic) question to PW1 on issue of notice. There is no dispute of content (sic) before suit on 12.5.99. Person (sic) of basic pleading act (sic). Section 13A (1) no proceedings lie until expiry of 30 days have been served. The notice shall be in form of 3rd schedule. Such (sic) (c) - name of government department responsible and when it was entered.*

In the notice to sue accident caused by Kenya Army in parking stationery (sic) motor vehicle. It only refers (sic). It is a servant or agent without the name it did not comply with section 13A - C.

For this (sic) resns failing to comply (sic) this notice is not proper. Notice shall be in form. One has to compliance (sic) notice is not proper then subsequent suit filed doesn't lie."

Once again it is clear to us that the State Counsel was making reference to the notice served before action and his only complaint was that it was not in the proper form. Unfortunately the document was not made part of the record of the court as the Attorney General called no witnesses in the trial. Only the appellant and the loader testified. It was no wonder therefore that the appellant's counsel protested in his final submissions that it was improper to raise the issue of notice. He submitted:-

"*It was suggested in cross-examination a notice issued did not specify content (sic) particulars such as the driver and any other person joined in the suit. The driver was not joined as from the assessment (sic) report no driver was mentioned. It's the police as mentioned. It would be extra ordinary for them to allege that other people were injured in the lorry. I submit on that basis. Any insinuation (sic) issuance of notice was not proper and is incorrect. That would have been a ground to be taken. It is wrong to take it at this point, as it will infringe provisions of Order 6 rule 4 CPR that requires the defendant specifically pleads a matter that would take a matter (sic) by surprise."*

The learned Judge took up the issue as one of jurisdiction and delivered herself as follows:-

"The point raised is that the plaintiff had failed to issue a notice of intention to sue the Attorney General within the requisite time of 30 days and thus contravened section 13A of the Government Proceedings Act which is mandatory.

Although the state is permitted to raise this point it would have been of assistance if the point had been pleaded in the defence. The closest indication was para 6 which had vaguely to (sic) relevance to this point.

The court therefore has no jurisdiction to entertain this suit due to lack of jurisdiction. The plaint is accordingly rejected."

That is the main finding which aggrieved the appellant and forms grounds 1, 2, 3 & 4 in the memorandum of appeal which learned counsel for the appellant, *Mr. Wamalwa*, argued as one. The thrust of *Mr. Wamalwa's* submission on the point is that the learned Judge had no business discussing the issue of notice which was neither pleaded nor its existence denied by the Attorney General. In his view, the learned Judge misconceived the submission of the state counsel and erred in finding as a fact that there was no notice issued when there was one, thus misdirecting herself in fact and in law. There was no one from the Attorney General's Office, despite service of hearing notice, to respond to those submissions. We have considered the issue ourselves and we think it is not lacking in merit. The issue of notice was not raised in the pleadings or in the consent filed by both counsel. Ordinarily it ought to have been raised *in limine* as it goes to jurisdiction, but as jurisdiction is everything in judicial proceedings, it may be raised at any time subject only to considerations of costs. Ordinarily again, a court would be at liberty to consider and decide on any issue raised and argued before it by the parties, even if the issue does not arise from the pleadings or agreement by the parties. - See *ODD JOBS V. MUBIA [1970] EA 476* at page 478. As is clear from the extracts reproduced above, the issue of notice was raised during the hearing of the suit and submissions thereon were recorded from both counsel. It was incumbent therefore on the learned Judge to consider and adjudicate on the issue, which she did, and we see no error in so proceeding. The only issue is whether the finding and decision made on the matter was correct.

The finding by the learned Judge was that there was no notice issued under *section 13A* of the Government Proceedings Act. With respect, there was no basis in fact or in law for that finding since the existence of the notice was not challenged. Only the form of it which the state counsel submitted did not accord with the prescribed form in the third schedule to the Act pursuant to section *13A (2)*. Unfortunately the document was not produced in evidence by the Attorney General who sought to challenge its form and therefore there was no basis for making a finding on the document. *Section 13A (1)* of the Act simply provides as follows:

"13A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings."

Subsection (2) then provides for the contents of that notice and the form prescribed under the third schedule.

In our judgment, there was a notice issued and served on the Attorney General by the appellant's counsel and the Attorney General was able to obtain instructions from the parent Ministry and to file a defence. In our view, the leaned Judge was in error in finding that she had no jurisdiction in the matter and in striking out the appellant's suit on that basis. We allow the appeal on that issue and set aside the order striking out the suit.

Having so found, we now deal with the finding made on liability which arose in issues numbers 1 and 2 above. The learned Judge would have found the Army lorry driver wholly liable for the accident and assessed liability against him at 100%. The finding was based on the testimony of *Tomno,* the loader, who was the only eye witness to the accident. The Attorney General did not find it necessary to call any evidence in rebuttal of the evidence of *Tomno* or to prove the allegations made against the driver of the appellant's lorry as pleaded in the statement of defence, particulars of which are reproduced above. We have re-assessed the evidence on record ourselves and we are satisfied that there was a proper basis for assessing liability at 100% against the driver of the Army lorry. We do not intend to disturb that finding, and in any event, there is no cross appeal.

As for special damages, the particulars of which are reproduced above, the onus as usual was on the appellant to prove them strictly. In his evidence, the appellant testified that he organized for the damaged lorry to be towed from the scene to Naivasha town on 21st April, 1999 and was charged Shs.5000/=. He produced the receipt issued to him by *M/S. B.J.* Breakdown Services for that amount which was marked MFI 5(a). He also had the lorry towed by the same people from Naivasha to Eldoret and he paid Shs.86,000/= for that service on 26th April, 1999. The receipt was marked MFI 5(b). The appellant then obtained a police abstract report at Shs.100/= MFI (o) and the police also carried out an inspection of the lorry on 23rd April, 1999 and issued a report detailing the extensive damage occasioned by the accident (Exhibit PI). Subsequently he commissioned M/s. Associated Motors Ltd to carry out an assessment of the damage and provide an estimate for the repairs to be undertaken. The assessment report was issued on 7th May, 1999 giving an estimate of Shs.1,382,221 for the repairs. He paid Shs.10,000/= for the assessors report, and produced a receipt for it MFIP3. The appellant further testified that he did not have the funds to carry out the repairs at once and therefore gave it to mechanics and supplied spares over a period of almost one year up to March, 2000 when it was fully repaired. For those repairs he produced a bundle of receipts issued for various purchases, marked MFI 7(a) - (o) as follows: -

"*Date*	*Amount*
06.08.99	*19,330*
15.08.99	*37,200*
29.08.99	*4,950*
29.08.99	*2,900*
20.10.99	*4,055*
22.11.99	*30,000*
15.12.99	*456,300*
20.12.99	*40,280*
20.12.99	*7,400*
18.02.2000	*52,950*
24.02.2000	*2,200*
10.03.00	*39,000*
15.03.00	*255,000*
TOTAL	*951,565*"

All the documents produced were subjected to intense cross-examination by state counsel and the evidence therein recorded, but curiously, the learned Judge returned them to the appellant's counsel for production by the makers thereof. The state counsel particularly opposed the production of the assessor's report without calling the maker because the repairs were not carried out by the company which made out the report and the appellant's counsel conceded that the report may be excluded. The exclusion of the assessor's report was, however, latched on by the learned Judge to make a finding that the entire special damages claim was not proved and she said nothing about the exhibits offered for production by the appellant. The learned Judge stated:

"*What the plaintiff did is obtain an assessors report. This report was prepared by the maker of the document. The plaintiff did not take his vehicle to be repaired by those who gave him an assessment report. Instead, he went and took about 12 months to slowly do his repairs. At the trial when he sort (sic) to reproduce (sic) the assessors report the defendants objected to this. The maker of the document required to attend court nor did the plaintiff insist they attend because they gave the report and were expecting to undertake the repairs. Instead the plaintiff did his own repairs for a period of 12 months or more.*

The makers of the assessors report correctly refused to attend court as they would have been unable to confirm and sustain (sic) the repairs required. The document said to have gotten the repairs done could not be substituted (sic) by the plaintiff.

I would accordingly dismiss this claim as not having (sic) formally proved. I would not have made any award."

In his submissions before us, *Mr. Wamalwa* submitted that the receipts which were all marked for identification and were part of the evidence were improperly ignored although they were issued to the appellant after making payments and he was the proper person to produce them.

We think, with respect, that the complaint by *Mr. Wamalwa* is valid. The payments made by the appellant for the various purchases are certainly consistent with the damage noted by the police in the certificate of inspection issued to the appellant and produced as an exhibit without objection. The purchases are supported by proper documents and there was no reason why the appellant could not produce them in court as he sought to do. The documents were admissible and ought to have been admitted and considered by the trial court. The omission to do so invites our intervention and we allow the appeal on grounds 5 - 10. The appellant pleaded the cost of repairs at Shs.700,000/= although he stated the amount was more than that. That however is not specific pleading and there was no leave sought to amend the pleading to insert the correct figure. In the result, although the appellant has proved a higher figure for repair charges, he can only be awarded the amount pleaded at shs.700,000/= and we now do so. The other items particularized in the plaint were specifically proved and we give judgment for those amounts except for Shs.2000/= specified for "*transport for inspection"* which was not proved. The upshot is that there shall be judgment for the appellant on special damages in the sum of Shs.801,100/=.

Finally, the claim for loss of user which was summarily dismissed in one sentence:

"*I also find no (sic) claim for loss of user has been proved".*

There was no analysis of the evidence tendered in respect of the claim.

Mr. Wamalwa challenged the findings on "loss of user" in ground 11 of the Memorandum of appeal as follows:-

"*11. THAT the learned judge misdirected herself in fact and law and failed to find that claims for loss of user at the rate of 20,000/= per trip were proved and should in any event on the evidence adduced have assessed the quantum thereof whether or not she decided to dismiss the said claim of loss of user."*

"Loss of user" is a claim in special damages and ought to be pleaded and strictly proved – See *WAWERU V. NDIGA [1983] KLR 236*. As shown above, the claim was pleaded at Shs.80,000/= per round trip for the entire period the damaged vehicle took to undergo repairs. The appellant however came nowhere near proving the claim as pleaded. In his evidence the appellant produced a copy of Invoice (marked MFI P(a)) dated 26th April, 1999 from one *Christopher K. Sawe*, for Shs.26,400 and a petty cash voucher (marked MFI P(a)) dated 29th April, 1999 in settlement of the invoice. He also produced a "shipping memorandum" dated 21st April, 1999 from Coca-Cola Bottling Company of Nairobi indicating that some 2200 wooden crates were sold to Rift Valley Bottlers. It was marked as MFI P(c). The purpose of producing those documents, according to the appellant, was to show that he was earning Shs.26,400 for every trip made between Nairobi and Eldoret, and that therefore his damages for loss of user should be awarded on that basis. If such was the intention, then the appellant did not seem to have a clear idea about what he lost and what to claim. Listen to him in cross-examination:-

"*We used to look for transportation works when (sic) no contract. I have been doing this for 4 years. I sometime (sic) do this kind of work. I made profit of 20,000 after paying transport and fuel. This is Eldoret to Nairobi.*

Banking slips such as accounts. I do not have.

Advocate refers to plaint. I say I was making Ksh.80,000 for loss of use. This is what is written per round trip. I would say I made is (sic) Kshs.26,000 per round trip.What is written is Kshs.80,000 per round trip. The trip is going and coming back (sic). A round trip was Kshs.80,000. I used to make Kshs.26,000 for going and coming (sic). This Kshs.56,000(sic)? I do not understand. I have come to arrive at Kshs.80,000/-. I think my return trip of 26,200 pays (sic) 21 times. What I do not understand is the accounts. When the lorry comes from Eldoret (sic). The return is 26,000/-. I carry goods for the catering company CPC held products (sic) I used to bring sold (sic) products and return the bottles. I produced invoices to prove I used to bring their goods. Christopher Sawe was paid Kshs.26,400. He is my agent."

Apart from the agency relationship of one *Christopher Sawe* and the appellant not being clear, the evidence of the amount lost does not invite an accurate or fair assessment of such loss. We are conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of. In this case, it was possible for the appellant to tender clear evidence on the claim but did not. At any rate, the appellant was under a duty to mitigate his loss and there is nothing on record to show what attempts were made in that regard. As was stated by this Court in *AFRICAN*

HIGHLAND PRODUCE LIMITED V. JOHN KISORIO, Civil Appeal NO. 264 of 1999 (Unreported):-

"The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests, but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him minimize the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsburys Laws of England vol. 11page 289, 3rd Edition 1955"

On the whole we are not satisfied that the claim for loss of user was proved and we decline to make any award therefor. We dismiss that ground of appeal.

The appellant has been substantially successful in his appeal. There will be judgment and decree in the superior court in accordance with our findings in the appeal. The appellant shall have the costs of the appeal and the costs of the suit in the superior court.

Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 6th day of November, 2009.

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR