REPUBLIC OF KENYA
IN THE COURT OF APPEAL
NAIROBI
(CORAM: AKIWUMI, TUNOI & BOSIRE JJ.A)

CIVIL APPEAL NO. 178 OF 1997

AMIRALI KARMALI ..... APPLICANT
AND
SHOBHAG CHANDRA RATILAL SHAH ..... RESPONDENT

(An appeal from the judgment of the High Court of
Kenya at Nairobi (Mr. Justice Juma)
delivered on the 15th day of May, 1997
in
H.C.C.C NO. 2726 OF 1995)
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DRAFT JUDGMENT OF THE COURT

The Appellant's large vehicle, a prime mover with a tanker trailer, was on 21st June, 1994, involved in an accident with the Respondent's vehicle, a semi-trailer tanker.

The Appellant, alleging negligence on the part of the Respondents driver who at the time, was driving the Respondent's semi-trailer tanker, sued the Respondent for damages for the extensive damage done to his large vehicle and for the resultant loss suffered by him. In this respect, the Respondent sought special damage, inter alia, for the cost of repairs and the pre-accident value of his large vehicle, and for loss of user for the three weeks that it took to repair the large vehicle at the rate of kshs.25,000/- per day making a total of Kshs.525,000/-. Subsequently, it was agreed by consent, that apart from the Respondent being liable in full for the cost of a Police Abstract of Kshs.100/- and the Investigators fees of Kshs.13,939/-, the Respondent be only liable for 80% of the proved damages sustained.

Kenneth Karike, an advocate from Kampala who was employed as the legal adviser and general administrator of the Appellant's business, was the only one who gave evidence at the trial held by Juma J. The purport of his evidence was to establish the average income which prior to the accident, the Appellant's large vehicle earned per month, and upon which, the Appellant's claim for loss of user, could be based. He said that this was between US$9000 and US$9,100. In support of this, he produced without any objection by the Respondent or the learned Judge two invoices respectively, for trips made by the large vehicle between 22nd February, and 17th March, 1994, and during April, 1994. He also produced copies of the two letters from the Appellant acknowledging receipt of the payments made in respect of the invoices. The validity of these invoices and the letter of acknowledgement of payment were not challenged. After this, the matter was stood over by consent to 21st April, 1997, for the assessment of damages. On that date, the Respondent applied for an adjournment which the learned Judge dismissed in the following significant

> w"Tohred s:hearing date was obtained by consent. It appears the defendant is not serious with this case. Previous applications for adjournment were at the request of the defendant. Application for

adjournment refused.".

After this ruling, the learned Judge upon the application of the Appellant, dismissed the Respondent's counterclaim for non-attendance by the Respondent. Counsel for the Appellant then made his submissions and with respect to the loss of use, draw attention to the invoices and the letters of acknowledgment and to the current rate of exchange of the US Dollar to Kenya Shillings namely, Kshs.56/- to the US Dollar.

According to him, the first and second invoices and their corresponding letters of acknowledgement demonstrated respectively, a loss of use at the rate of Kshs.24,128/- and Kshs.24,656 a day. He then asked for Kshs.25,000/- a day for three weeks namely. Kshs.3,814,600/- less 20% by way of agreed contributory negligence on the part of the Appellant. Counsel for the Respondent does not seem to have made any submissions in reply.

The matter was then stood over for judgment on 15th May, 1997. On that day, the learned Judge dismissed the Appellant's claim for special damages for loss of use and income. The pertinent part of his judgment is as follows:

> "To prove his claim for loss of income the plaintiff produced his invoice to Penisular Oils Ltd and his letter of acknowledgment to the said company confirming payment. Whereas I agree that the plaintiff's said vehicle was used in transporting cargo from Mombasa to Kampala, I am not persuaded as to the cost of hiring the vehicle. There was no sufficient evidence in this respect. One cannot expect the court to rely on documents solely produced or authorised by the plaintiff. There was no Hire Agreement produced between the plaintiff and his customers. One would have expected at least a document from the customer either forwarding payment or acknowledging the invoice. On the evidence before me I hold that the plaintiff has failed to prove on a balance of probability his claim for loss of use and income. That aspect of the claim is therefore dismissed.".

It is against this part of the judgment of Juma, J. that the Appellant has appealed. The main ground of the appeal is that the learned Judge, having regard to the evidence given at the trial, erred in dismissing the Respondent's claim for special damages for loss of use and income. We are aware of the celebrated case of Mbogo and Another V. Shah (1968) E.A 93 where it was held that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result, there has been injustice.

It is clear from the evidence adduced before the learned Judge that the documentary evidence produced by the Appellant to prove its claim for special damages for loss of use and income in respect of its damaged and undeniably commercial vehicle, which was not challenged, was prima facie evidence as to the special damages suffered by the Appellant. These documents it is true, were produced by the Appellant, but that does not mean that they must be unreliable because of this. These documents also show that the Appellant had received money for the hire of its vehicle which is taxable. Something which in normal circumstances, one is unlikely to openly admit when one has not really received such money. Indeed, this is why we find the following categorical principle expressed by the learned Judge to be a clear misdirection:

> "One cannot expect the court to rely on documents solely produced or authored by the Plaintiff.".

But apart from that, it is manifest from the case as a whole - the uncontested admission, or challenge of the veracity, of the invoices and letters of acknowledgment produced by the Appellant; and indeed, the behaviour of the Respondent as already referred to by the learned Judge, in not really caring what happened in the case - that the learned Judge was clearly wrong in the exercise of his discretion in rejecting the unassailed documentary evidence of the Appellant, and which is our view, resulted in an injustice.

We have considered all the authorities cited in this appeal and have come to the conclusion that in

particular circumstances of the case, the Appellant was able to establish that on an average, the special damages claimed for loss of use and income for the three weeks, and taking into account the agreed Appellant's contributory negligence of 20%, amounted to Kshs.525,000/-. We, therefore, allow the appeal and order that the Respondent pays to the Appellant the sum of Kshs.525,000 by way of proved special damages for loss of use and income plus interest at court rates. The Appellant will also have its costs of this appeal.

Dated and delivered at Nairobi this 26th day of May, 2000.

A.M. AKIWUMI

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JUDGE OF APPEAL

P. K. TONUI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL