



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.44 OF 2012**

*(Being an appeal from the judgment and decree of Hon. L. Komingoi (SPM) in Nakuru CMCC No.86 of 2009)*

**LAWRENCE MAINA GATIGA .....1<sup>ST</sup> APPELLANT**

**ZACHARIA WACHIRA GATIGA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**DANIEL WACHIRA KARITU ..... RESPONDENT**

**JUDGMENT**

The appellants, (LAWRENCE MAINA GATIGA and ZACHARIA WACHIRA GITIGA) filed this appeal against DANIEL WACHIRA KARITU (the respondent) following judgment in **Nakuru CMCC No.86 of 2009** where the court awarded the respondent special damages of Kshs.961,784/- plus costs and interest. The background to this was a claim filed by the respondent as a result of a road traffic accident which occurred on 13/10/2008 involving his motor vehicle registration No.KAY 728Z Izuzu Canter and motor vehicle registration KBD 095f, Toyota Hiace owned by the 2<sup>nd</sup> appellant and driven by the 1<sup>st</sup> Appellant. The respondent's motor vehicle was damaged as a result.

The defendants denied liability, and after hearing the matter, judgment was entered in favour of the respondent for special damages.

In the pleadings, the respondent indicated that he had incurred a sum of Kshs.543,784/= to repair his damaged motor vehicle. The plaintiff relied on an assessment report from Automobile Association (AA) dated 10/11/2008 which detailed the state of the motor vehicle after the accident, and which recommended replacement of a fully dressed cabin. This involved removing the damaged parts and replacing them. It also meant straightening/re-jigging the chassis and repairing the cargo body, and re-spraying the affected portions to match the original colours. The costs of replacing those parts was given as Kshs.334,280/= while the cost of labour and paint totalled to Kshs.134,500/=. To this was added 16% VAT, to give a sum total of Kshs.543,784/=.

Photographs of the damaged motor vehicle were also produced.

The valuation officer from Automobile Association, (Salik Wamere Mukunyu) confirmed that the report originated from Automobile Association (AA) and that what was listed in the report were the estimates of costs.

The appellant's bone of contention is that there were no receipts or invoices produced to prove that the plaintiff indeed incurred such expenses.

Counsel relied on the decision in KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE, GATHOGO KANINI Vs A.M. LUBIA and OLIVE LUBIA C.A. No.21 of 1984 where the Court of Appeal held that the principles to be taken into consideration were whether in assessing damages, the judge took into account an irrelevant factor, or left out of account a relevant one, or that the amount awarded is inordinately low or so inordinately high that it's to be erroneous. The reason for relying on this decision is that the trial magistrate left out a relevant factor, namely the production of a receipt.

It is contended that what the court relied on were merely estimates and not actual expenses, and that in the absence of receipts, the trial magistrate had no basis for awarding the special damages.

Counsel urged this court to be guided by the English decision of RATCLIFFE V EVANS (1892) 11 QB 254 which stated that:-

**“Although special damages had been specifically pleaded by listing in the plaint the items alleged to have been stolen or damaged, the plaintiff's failure to prove such damage at trial with certainty and partiality precluded the court from making any award of special damages.”**

Counsel argues that since no receipts were produced, the court ought to interfere with the award under this head.

The respondent's counsel submitted that evidence of the damage suffered by the respondent's vehicle was plain and the cost of repair was proved by a registered reputable assessor. Further that the respondent had told the trial court he repaired the motor vehicle then replaced it with another and he surrendered all the repair documents along with the motor vehicle. His contention is that the trial court appreciated the weight and circumstances of the evidence and believed the respondent as a credible person. It is argued that the appellants did not bother to demand another assessment report that would have helped the court to determine whether to arrive at a different conclusion regarding the repair costs and there was no error.

The appellants are not contesting occurrence of the accident and the resultant damage to the motor vehicle. Their contention is that the trial magistrate used the wrong principle in awarding the respondent the repair costs. The trial magistrate took into account the fact that the road traffic accident occurred and in fact the 1<sup>st</sup> defendant was charged in court with the offence of causing death by dangerous driving, in consequence of that accident.

Photographs of the damaged motor vehicle and the assessment report were produced in court – these didn't appear to be contested and the trial magistrate took these into consideration as an important factors, as shown in the last paragraph of her judgment. It is not even disputed that the motor vehicle was repaired (which would naturally attract costs) nor is it suggested that the repairs were done without any charges.

From the submissions it would seem that the court is not being asked to deny the respondent the repair costs, but to re-assess the same. The question is, what will the court use as a basis for that re-assessment? The photos and assessment report from AA need support to demonstrate that the respondent actually incurred those expenses. I take into consideration that estimates do not necessarily mean that the sum shown is what was spent. It could be higher or lower, depending on where the repairs were done, and where purchase of the parts were made. Even if the motor vehicle was sold along with the receipts, the court is not told of any difficulty in (a) getting the receipts or invoices from the subsequent purchaser or (b) getting copies of receipts or even a letter from the repairer, confirming that so much money was spent on repairs.

Special damages must be proved because he who alleges, has the burden of proof. This proof is not satisfied by waving an estimated expenditure –nay – it is satisfied by tendering the actual receipts issued in consequence of the expenditure. I sympathise with the respondent, but legally he did not prove those

special damages. The sum awarded is set aside as having no legal basis. What is proved by way of receipt is the sum of Kshs.30,000/= paid for breakdown services as per Exhibit 5 and I so award.

The trial magistrate was also faulted for awarding the sum of Kshs.387,900/= as lost income on the basis that such a loss was not proved. The respondent pleaded lost income for three months, saying the motor vehicle was used in transport business, and at the time, was engaged in delivering potatoes to Sagana. For those services he was earning an average sum of Kshs.120,000/= after deducting expenses for the vehicle. The record shows the plaintiff produced receipts issued to customers in the past as well as invoices. The appellants' contention is that these documents intended to prove loss of user were not produced and that the record only shows production of Exhibit 8. What was Exhibit 8? From the list of exhibits it was a ledger book.

Counsel argues that since the assessment report estimated that repairs would only take 18 days then there was no basis for claim loss of user for 3 months, and such claim simply portrays extravagance on the part of the respondent. He urged court to reduce this loss to 14 days.

The respondent's counsel urges this court to consider that the respondent produced an invoice record for the period covering 8<sup>th</sup> April 2008 – 13<sup>th</sup> October 2008 and a

copy of receipt books covering 2<sup>nd</sup> August 2008 to 9<sup>th</sup> October 2008.

The sum awarded was on the basis that the applicant lost income for a period of three months. Whereas it is unlikely that given the kind of damage the motor vehicle suffered, it may not have been repaired within 7 days, what evidence is there that the repairs overshot the estimated 18 days given by Automobile Association, or that the respondent did not try to mitigate the period by ensuring prompt repairs? None was presented to the trial court.

The receipts and invoices served as a guide to the trial court regarding the earnings from the motor vehicle engagements. I don't think a financial statement is the only means of proving daily income, although it certainly is a tidier approach. The receipts and invoices are just as useful and from the court record, they were indeed presented in court but their exhibit number not given. I would think this was an error or omission by the trial magistrate because later on in the proceedings, she makes reference to Exhibit 8, after Exhibit 5 which is the record of expenses between 7/6/2008 – 6/10/2008, and in her judgment, the trial magistrate referred to the

invoices and receipt books as "*exhibit page (sic) 6 and page (sic) 7*" respect only. These documents are also referred to in the lower court's filed list of exhibits.

In my view what needs to be considered is how much the motor vehicle was realising per day. This cannot be very difficult as the sum of Kshs.120,000/= is divided with 30 days for the month of October so it is  $120,000/30 = 4000$  per day.

The 18 days estimated period of repairs is in my view not unreasonable and I accept it, so that works out to  $4000 \times 18 = 72,000/=$ .

That is the figure I award for loss of user i.e. Kshs.72,000/=. The sum awarded is this set aside and substituted with the sum of Kshs.72,000/= (seventy two thousands only).

The global sum awarded is Kshs.102,000/= (one hundred and two thousands only)

Each party shall bear its own costs.

**Delivered and dated this 16<sup>th</sup> day of May, 2014 at Nakuru.**

**H.A. OMONDI**

**JUDGE**