Nyagunda v Mohamed & another (Civil Appeal E1491 of 2023)
[2025] KEHC 2253 (KLR) (Civ) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1491 OF 2023

TW OUYA, J

FEBRUARY 27, 2025

BETWEEN

BRIAN THOMAS NYAGUNDA ..... APPELLANT

AND

FASIL MOHAMED ..... 1ST RESPONDENT

ISMAX SECURITY LIMITED ..... 2ND RESPONDENT

(Being an appeal against the judgment and decree of Honourable F.C. Ng'etich, Adjudicator, delivered on 27.11.2023 in the Small Claims Court in Nairobi SCCC No. E2767 of 2023)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 27.11.2023 in Nairobi SCCC No. E2767 of 2023. The suit was commenced by way of the statement of claim dated 24.05.2023 and amended on 18.10.2023 (the amended statement of claim) and filed by Brian Thomas Nyagunda being the claimant in the lower court (hereafter the Appellant) against Fasil Mohamed and Ismax Security Limited, the 1st and 2nd respondents in the lower court (hereafter the 1st and 2nd Respondents). The claim was for general and special damages in the sum of Kshs. 963,825/- arising out of a road traffic accident which occurred on or about 16.10.2021. It was alleged that the 1st Respondent was at all material times the driver and/or beneficial owner of the motor vehicle registration No. KDD 407P (hereafter the first motor vehicle) while the 2nd Respondent was its registered owner. It was further alleged that the Appellant was lawfully driving the motor vehicle registration number KDC 248B (hereafter the second motor vehicle) on the material day along Outer Ring Road Highway at around 2:00 am, when the first motor vehicle was so negligently and/or carelessly parked/situated that it obstructed the Highway, thereby causing the second motor vehicle to ram into it, resulting in extensive damage to the second

motor vehicle as well as severe bodily injuries to the Appellant herein. By way of the amended statement of claim, the Appellant attributed the accident to negligence on the part of the Respondents, by setting out the particulars therein.

2. Upon service of summons, the 1st and 2nd Respondents entered appearance and filed their joint response to the amended statement of claim dated 27.10.2023, denying the key averments in the claim and liability. Alternatively, the Respondents pleaded contributory negligence against the Appellant by setting out the particulars thereof in their response to the amended statement of claim.

3. When the matter came up before the Small Claims Court for hearing on 10.11.2023, the parties recorded a consent on liability in the ratio of 85:15 in favour of the Appellant and against the Respondents, which consent was consequently adopted as an order of the lower court. Thereafter, the parties agreed to canvass the issue of quantum by way of written submissions.

4. In the end, the trial court by way of the judgment delivered on 27.11.2023 awarded damages in the following manner:

    a. General damages for pain, suffering and loss of amenities Kshs. 450,00/- (less 15% contribution)

    b. Special Damages Kshs. 74,825/-

    Total Kshs. 457,325/-

The Appeal

5. Being dissatisfied with part of the award, the Appellant moved the court by way of the present appeal (vide the memorandum of appeal dated 28.12.2023 and amended on 11.06.2024) challenging the same on the following grounds:

> " 1. The decision of the learned trial Adjudicator to deny the Appellant compensation for the loss of use of his motor vehicle is per incuriam because it ignores the consent by the parties on liability and their consent to proceed vide section 30 of the *Small Claims Court Act*, 2016, which was recorded as an order of the court on 10/11/2023.
>
> 2. The learned trial Adjudicator erred in law by ignoring that through the said consent the Parties admitted into evidence, Without Challenging, the documents submitted by the Appellant to support his claim for compensation for hiring a vehicle due to the loss of his car.
>
> 3. The learned trial Adjudicator failed to enforce the law that parties are bound by their pleadings by failing to note that the Respondents had never disputed in their defence or in their pleadings the veracity of the Appellant's documents but instead, they introduced the veracity of the documents as new issues in dispute in their submissions.
>
> 4. The learned trial Adjudicator erred in law by failing to take note that submissions are not pleadings. She indicates that her decision to deny the Appellant compensation for hiring a vehicle is based on the Respondents challenging the veracity of the Appellant's evidence, which only came up in their submissions and not their pleadings.

5. The learned trial Adjudicator erred in law by failing to note that the Respondents violated Order 2 rules 1(2), rule 4(1) and rule 6 of the Civil Procedure Rules, 2010 by introducing new issues of dispute in their submissions, yet they had never raised these issues in their defence or pleadings.

6. The learned trial Adjudicator erred in law by basing her refusal to award the Appellant compensation for hiring a motor vehicle on the unprocedural violation of the aforestated Order 2 rules by the Respondents.

7. The learned trial Adjudicator erred in law in basing her decision to deny the Appellant compensation for hiring a vehicle on the unsupported apprehension, conjecture and innuendo expressed by the Respondents in their submissions, contrary to the evidence on record, and in direct violation of well settled precedents that Court orders cannot be issued based on apprehension.

8. The learned trial Adjudicator erred in law by taking into account irrelevant factors in holding that the Appellant could only be compensated for the loss of use of his motor vehicle for travel to hospital visits only and not for general loss of his means of transport.

9. The learned trial Adjudicator erred in law by failing to apply fully the principles of the law of negligence. The Respondents having admitted negligence and settled on an 85:15 ratio on liability, injury having ensued, the Honourable Adjudicator overlooked the reality of the loss of use of the Appellant's motor vehicle and its resultant compensation to the Appellant for pecuniary damages.

10. The learned trial Adjudicator erred in law by misinterpreting the Appellant's plea for compensation for the cost of hiring a motor vehicle to mean compensation for transport to hospital visits and thereby arrived at an incongruent conclusion that the Appellant could not have been travelling to hospital for the 221 days that he hired a car for his use.

11. The learned trial Adjudicator ignored well settled precedence that recognizes loss of use of motor vehicle as a legitimate injury that is deserving of compensation and that the threshold for its award is that it must be pleaded and reasonably proved.

12. The learned trial Adjudicator erred in law by failing to adequately consider the comprehensive evidence on record, inter alia vehicle hire receipt, insurance discharge voucher, insurance payment after 221 days, and image of the wreckage of Appellant's car, which he submitted in support of his claim for compensation for loss of user.

13. The learned trial Adjudicator awarded the Appellant special damages in the form of medical expenses which receipts total Ksh. 79,825/- but the amount indicated in the judgement is less by Ksh. 5,000/- in error of the total due." (sic)

6. The Appellant thus seeks the orders hereunder, on appeal:

I. Thatthe error in the compensation for special damages be amended from Ksh. 74,825/- to Ksh. 79,825/-;

II. Thatthe claim for Ksh. 884,000/- loss of user be held as pleaded and proved and accordingly awarded;

III. Thatthe decree dated 19/4/2024 be amended accordingly;

IV. Thatcosts of this Appeal be awarded to the Appellant.

V. Thatinterest be awarded on I, II and III until payment in full.

VI. Any other relief that this Honourable Court may deem fit and just to grant. (sic)

Submissions

7. Directions were given for the appeal to be dispensed with by way of written submissions. However, at the time of writing this judgment, only the submissions by the Appellant had been filed and availed for this court's reference. There is nothing on the record to indicate compliance on the part of the Respondents.

8. That said, the Appellant's counsel submitted that the claim for loss of user ought to have been awarded by the trial court, the same having been both pleaded and proved in line with the principle on special damages, thereby citing inter alia, the decision in Hahn v Singh [1985] KECA 129 (KLR) where the Court of Appeal reaffirmed the principle that special damages ought to be specifically pleaded and strictly proved. Counsel proceeded to submit that the Appellant tendered as BTO-8 a receipt for car hire to support the claim for loss of user, hence the trial court ought to have awarded the same. Counsel relied on the case of Christine Mwigina Akonya v Samuel Kairu Chege [2017] KEHC 1484 (KLR) in which the court determined as follows:

> " Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test."

9. Counsel equally faulted the trial court for allegedly considering irrelevant factors in declining to make any award under the head of loss of user; namely, that the trial court lay emphasis on the question whether it had been demonstrated that the vehicle upon which the said claim was made, had in fact been utilized for hospital visits, with the court finding in the negative. It is counsel's argument that whether or not the said motor vehicle was being used to transport the Appellant to hospital for treatment of his material injuries is irrelevant; that the position remains that the claim for loss of user was proved and therefore ought to have been awarded. In so submitting, counsel borrowed from the decision rendered in Jackson Mwabili v Peterson Mateli [2020] KEHC 2814 (KLR) thus:

> " Loss of user in the context of the respondent's case, was the damage he suffered following the inconvenience of not having his vehicle available for use after it has been involved in an accident thus rendering it unfit for use temporarily for a period. A claim for loss of user in this case, refers to compensation for what the respondent suffered as a result of not being able to use his damaged vehicle."

10. Counsel further faulted the Respondents for challenging by way of their submissions, the veracity or adequacy of the receipt tendered to support the claim for loss of user; in contravention of the principle

that submissions cannot take the place of evidence; and yet the trial court relied on this argument in further declining to make any award under that head.

11. It is equally counsel's contention that in declining to award any damages under the above head, the trial court overlooked the consent which had earlier been adopted as an order of the court, on the question of liability.

12. Lastly, it is counsel's contention that the trial court erred in awarding the sum of Kshs. 74,825/- on special damages and yet receipts for the sum of Kshs. 79,825/- had been tendered to support the sum sought under this head. That the Appellant was therefore entitled to the latter sum. On those grounds, the court was urged to allow the appeal accordingly.

Analysis

13. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.

14. The present appeal is primarily challenging the decision by the trial court declining to award any damages under the head of loss of user, and further challenging the award made under the head of special damages, which are viewed by the Appellant as being lower than what was proved. Consequently, the court will address the 13 grounds of appeal contemporaneously under the two (2) heads.

15. In considering the appeal, the court will therefore be guided by the principles enunciated by the Court of Appeal in the case of Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30. It was held in that case that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

16. The same court stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 that:

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low".

17. In respect of the damages sought under the head of loss of user, as earlier mentioned, the Appellant by way of his pleadings, sought the sum of Kshs. 884,000/- under that head. The claim was further advanced by way of written submissions, and challenged in the Respondents' submissions. It is not in issue that a claim for loss of user is regarded as a claim on special damages.

18. Upon consideration thereof, the trial court in declining to award the same, reasoned that it was questionable whether the Appellant could have utilized the car hired to visit the hospital at a cost

of Kshs. 884,000/- adding that the veracity of the receipt tendered as evidence had equally been questioned by the Respondents, through their written submissions. The trial court further reasoned that the Appellant likely included expenditures incurred on other dates, separate from those entailing hospital visits.

19. Upon re-examination of the record, the court observed that upon recording the consent on liability, the parties agreed to address the issue of quantum by way of written submissions. In the circumstances and to answer the issue raised by the Appellant regarding the veracity of the Respondents' arguments challenging his evidence through their submissions, it is apparent from the record that none of the parties testified but merely relied on their documents filed. In the premises, it is fair to state that the only reasonable avenue through which the Respondents could challenge the Appellant's evidence was at the submissions stage.

20. Be that as it may, whether or not the Appellant's evidence was controverted, the duty lay with him to tender credible material to support the damages sought.

21. Upon re-examination of the record, the court observed that the Appellant tendered as BTO-8 a document purportedly termed as a receipt dated 26.05.2022 and issued by Metroberry Tours and Travel, purporting that the Appellant had paid a sum of Kshs. 884,000/- for use of the hire motor vehicle registration number KDD 640F for a period of 221 days from 16.10.2021 to 25.05.2022 and at a daily rate of Kshs.4,000/-. However, the Appellant did not tender any supporting material to ascertain the prior existence of an agreement for hire entered into between himself and the abovementioned party, and the terms thereof. From the above exhibit, there is no way of ascertaining the manner and specific dates on which the alleged payments were actually made, if at all. Furthermore, while the insurance discharge voucher and insurance payment coupled with photos of the image of the wreckage of the second motor vehicle which were tendered as BTO 9 and BTO 5 respectively, may support the averment that the said motor vehicle was written off and that the Appellant consequently received compensation for the second motor vehicle from his insurer, the same does not strictly prove the expenses said to have been incurred and therefore claimed by the Appellant for loss of user. In the court's view, the material tendered by the Appellant did not meet the threshold of strict proof in line with the legal principles on special damages for loss of user set out in the case of Christine Mwigina Akonya v Samuel Kairu Chege [2017] KEHC 1484 (KLR) and Jackson Mwabili v Peterson Mateli [2020] KEHC 2814 (KLR) both cited in the Appellant's submissions and referenced hereinabove, as well as in the case of David Bagine v Martin Bundi [1997] eKLR in which the Court of Appeal reasoned thus:

> "We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs."

22. In view of the foregoing circumstances, the court is of the view that the trial court arrived at a reasonable finding in declining to make any award under that head.

23. This leaves the award in respect of special damages. It is trite law that special damages must be specifically pleaded and strictly proved. This was the position acknowledged by the Court of Appeal in David Bagine v Martin Bundi (supra) when it stated that:

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
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> "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;
>
> "Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it."

24. In his pleadings, the Appellant sought special damages to the tune of Kshs. 79,825/-. In the end, the trial court awarded a sum of Kshs. 74,825/- under that head. The Appellant is now challenging the said award on the grounds that it is lower than what was both pleaded and proved, as referenced hereinabove.

25. From its re-examination of the record, the court noted that the Appellant availed duplicate receipts on pages 167 and 168 of the record of appeal, both dated 17.12.2021 for the sum of Kshs. 1,000/-. In view of the duplication, only one (1) of the receipts was applicable.

26. That said, from its tabulation, the court observed that the Appellant tendered as BTO-7 various receipts totaling sum of Kshs. 78,825/- to represent medical related expenses incurred at Nairobi West Hospital and AIC Kijabe Hospital respectively. On that basis, the court finds that the trial court erred in awarding a lower sum than what was proved by way of receipt evidence. Consequently, the award under this head ought to be substituted with an award totaling the sum of Kshs. 78,825/-.

Determination

27. Based on the above reasoning, this appeal partially succeeds. Consequently, the court hereby sets aside the trial court award made on special damages, in the manner set out hereinabove.

    i. Consequently, the judgment on appeal shall now read as follows:

        a. General damages for pain, suffering and loss of amenities Kshs. 450,00/-

        b) Loss of user NIL

        c) Special Damages Kshs. 78,825/-

        Total Kshs. 528,825/-

        Less 15% contribution

        Net Award: Kshs. 449,501.25 (Four Hundred and Forty-Nine Thousand, Five Hundred and One, and Twenty-Five Cents)

ii. The Appellant shall have costs of the suit and interest on the general damages at court rates from the date of judgment until payment in full, and interest on the special damages at court rates from the date of filing suit until payment in full.

iii. The Appellant shall also have the costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2025

HON. T. W. OUYA

JUDGE

For Appellant...Ms. Makoriwa

For Respondent...Okoth

Court Assistant...Martin