Ouru Superstores Limited v Unilever Tea Kenya Ltd & another (Civil Appeal E049 of 2023) [2025] KEHC 6706 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6706 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E049 OF 2023

DKN MAGARE, J

MARCH 27, 2025

BETWEEN

OURU SUPERSTORES LIMITED ..... APPELLANT

AND

UNILEVER TEA KENYA LTD ..... 1ST RESPONDENT

RICHARD NYABUTO NYATINDO ..... 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. N.S Lutta– CM dated 28.3.2023 and delivered by S. Abuya, CM arising from Kisii CMCC No. 112 of 2014. The Appellant was an Appellant in the lower court. The court entered judgment as follows:

    a. Liability 100%

    b. Loss of earnings 500,000/=

    c. Special damages 1,000/=

    Total 501,000/=.

    d. Costs and interest

2. The Appellant was aggrieved and filed this appeal vide a memorandum of appeal dated 22.5.2023. The Appeal is therefore on quantum only. The Memorandum of Appeal dated 22.5.2023 raised the following sole ground:

    a. The learned magistrate erred in law and fact in relying on the Plaint dated 25.4.2014 instead of the Amended Plaint dated 23.6.2015 hence wrong conclusion on special damages and loss of earnings.

3. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

pleadings

4. The Appellant field suit vide an amended plaint dated 23.6.2015, amending a plaint dated 25.4.2014 the Appellant pleaded Special Damages as follows:

    a. Towing expenses Ksh. 160,000/=.

    b. Police abstract Ksh. 200/=.

    c. Loss of income Ksh. 8,400,000/= on account of Ksh. 70,000/- per trip for 12 trips per month.

    d. Official search Ksh. 1,000/=

5. It was pleaded that on 5.6.2013, the 1st Respondent while driving motor vehicle registration no. KBS 370Y along Kericho Kisii road at Chemosit area negligently drove the said motorvehicle as a result of which it collided with the Appellant's motor vehicle registration no. KBB 967G and trailer No. ZC 8269 causing extensive damage to the Appellant's said motor vehicle. The turn boy, one Albert Kibagendi was said to have died as a result of the accident and the driver suffered serious bodily injuries. The fatal and serious bodily injuries are not before this court.

6. The Appellant as Defendant in the lower court entered appearance and filed defense denying the averments in the Plaint.

Evidence

7. PW1 was Samuel Maganga Hamisi. He relied on his witness statement and on cross examination, he testified that he was employed by the Appellant. He was driving motor vehicle registration no. KBB 967G as employee of the Appellant. He did not compute the profits and losses.

8. PW2 was Caroline Nyomenda. She relied on her witness statement and produced documents. It was her case that she was the transport manager of the Appellant. she dealt with maintaining motor vehicles. She had no schedule of the repairs.

9. PW4 was Charles Nyanaro, accountant of the Appellant. He relied on his report on the loss of earrings produced in evidence. According to him, the motor vehicle was making Ksh. 408,600 per month. On cross examination, it was his case that he had no profit and loss account. That depreciation was not captured in his report. Further, that the Motor vehicle made Ksh. 70,000 per month.

10. Both parties then closed their respective cases. The Court delivered its Judgment on 28.3.2023. The Judgment was as follows:

    a. Liability 100% in favor of the Appellant

    b. Loss of earnings Ksh. 500,000/=

    c. Special Damages Ksh. 1,000/=

Submissions

11. The Appellant submitted that as a company it lost Ksh. 8,400,000 per year which the court ought to have granted. It was in this regard submitted that the Amended Plaint pleaded and the accountant who testified proved the loss of earning.

12. On the part of the Respondent, it was submitted that the loss of earnings was not proved.

Analysis

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

18. This Appeal being on quantum only, the principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of Damages in discretionary. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro

Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage.

19. This court I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he that:

> [The] Appellants must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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.
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> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

20. The burden was on the Appellant to prove loss. On this subject, Section 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

21. On special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss

which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

22. Special damages are thus very specific and constitute a liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses.

23. Loss of earnings from the motor vehicle was thus a special damage as such must be specifically pleaded and strictly proved. In so finding, I am guided by the judgment in the High Court case in Nairobi Civil Suit No. 1620 of 1995 (Gilbert Mwirigi -vs- Elijah Muthuri) where the Court held:

> " Although the Appellant intimated that he had lost the income which the vehicle used to earn him in his matatu business, this he treated as general damage. In my humble opinion, loss of user being a claim that can be quantified is a specific claim, which should fall under claims for special damages, and not general damages. I shall therefore disregard that aspect of his claim because, it being a claim in special damage, it was not specially pleaded in the plaint. The general rule is that special damage must not only be specially pleaded, but they must be specifically proven. Not having been so pleaded I regret, lack the jurisdiction to make any award for loss of user."

32. Special Damages must be both pleaded and proved, before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
>
> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

24. On reevaluation, the computation by Benson & Associates Accountants dated 2.5.2017 was the evidence that the Appellant chiefly relied on to prove loss of earnings occasioned by the damage to motor vehicle registration number KBB 967G as a result of the accident. The said computation was

not an actual proof of the amount that the motor vehicle used to earn for the Appellant. It would be expected that the Appellant lays down clear income that the motor vehicle brought to the business considering all expenses and losses.

25. The lower court awarded Ksh. 500,000/- for loss of earnings from the motor vehicle. In my assessment, that award is commensurate as it was not in dispute that the Appellant incurred loss since the motor vehicle was out of use after the accident and before then, it was in use generating income. The Court of Appeal in Wambua -vs- Patel & another (1986) KLR 336, where the Appellant had not kept proper records of what he earned, stated inter-alia:

> " Nevertheless, I am satisfied that he was in cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the Appellant should be denied his earnings because he did not develop more sophisticated business method...." But a victim does not lose his remedy in damages because the quantification is difficult.

26. Therefore, the Appellant failed to prove specific income that came to the business as a result of the use of the motor vehicle. the pleaded amount of Ksh. 70,000 per trip was not justified. There was also no proof of Ksh's towing charges. 160,000/- as no receipt was produced in evidence. In Cecilia W. Mwangi & Ano. vs Ruth W.Mwangi Civil Appeal No.251 of 1996 (1997) eKLR, the Court of Appeal held that:

> " Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability.

27. As loss of income was not proved, I find no basis to interfere with the finding of the court that Ksh. 70,000 per trip, as alleged, was not proved. The Court of Appeal in S J v Fransisco Di Nello & another (2015) eKLR addressed the issue as doth:

> " Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income, which may be defined as real actual loss, is loss of future earnings. Loss of earning capacity may be defined as a diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss, which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved."

28. The Appellant had totally failed to prove any loss. The lower court was gratuitous enough to award Ksh500,000/=, which was not proved. It is not the court's duty to deal with special losses to award damages, 'but I am doing the best I can'. That is reserved for general damages, which are at large. in the case of David Bagine Vs Martin Bundi [supra] the Court of Appeal posited as doth:

> The learned judge proceeded to assess "loss of user" damages as general damages although the same were claimed as special damages "to be proved at the hearing of the suit". In doing so the learned judge erred.
>
> 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 not 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.

29. Indeed, where there is a total loss, there is no award of loss of earnings. The Appellant did a disservice by failing to value the motor vehicles before and after. This may not be surprising as the same appears to have been fully insured. It is my hope that this was not a bid for claiming for the same accident twice.

30. All parameters considered, the Appeal does not have merit. In the circumstances, the appeal is not merited.

31. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

32. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

33. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

34. The appellant has lost the Appeal. The Respondent is entitled to costs, so the Appeal is dismissed with costs of Ksh 85 000/=.

Determination

35. In the upshot, I make the following orders:

    i. The Appeal is dismissed with costs of Ksh 85 000/=.

    ii. 30 days stay.

    iii. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 27TH DAY OF MARCH,2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Orucho for the Respondents

Court Assistant - Michael