



**Macharia & another v Ngundo (Civil Appeal E015 of 2024)
[2025] KEHC 7188 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E015 OF 2024**

**JN KAMAU, J
MAY 29, 2025**

BETWEEN

STEPHEN GAKERE MACHARIA 1ST APPELLANT

DESERT RUNNER SERVICES COMPANY 2ND APPELLANT

AND

MONICA WAMBUI NGUNDO RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. Ndombi (PM) delivered at Vihiga in Principal Magistrate's Court Case No 254 of 2022 on 14th March 2024)

JUDGMENT

Introduction

1. In her decision of 14th March 2022, the Learned Trial Magistrate, Hon R. Ndombi, Principal Magistrate, dismissed the 1st and 2nd Appellants' suit with costs to the Respondent.
2. Being aggrieved by the said decision, on 5th April 2024, the Appellants filed Memorandum of Appeal of even date. They relied on four (4) grounds of appeal.
3. His Written Submissions were dated 25th November 2024 and filed on 26th November 2024 while those of the Respondent were dated 21st May 2025 and filed on 22nd May 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.



5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Appellants' Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Appellants proved their case on balance of probabilities as is required of civil cases;
 - b. Whether or not the Appellants produced sufficient proof of loss of income/user for the period when the motor vehicle was out of commission;
7. All the grounds of appeal were dealt with together as they were all related.
8. The Appellants placed reliance on the case of *Selle & Another vs Associated Motor Board Co Ltd & Others* (Supra) and the case of *Peter vs Sundays Post Limited* [1958] EA 424 where it was held that an appellate court had the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. They urged the court to revisit the evidence as presented in the trial court, analyse the same, evaluate them and arrive at its own independent conclusion.
9. They baffled by the Trial Court's dismissal of their case despite its conclusion that the Respondent's driver was liable for the occurrence of the accident. It was their contention that the Trial Court wrongly exercised its discretion to dismiss their claim without just cause.
10. They invoked Section 107 (1) and (2) of the *Evidence Act* and submitted that through their testimony and evidence on record they had demonstrated on a balance of probability that the Respondent was liable for the accident and that they suffered loss of user when their Motor Vehicle Registration Number KCL 794 Y (hereinafter referred to as "the subject Motor Vehicle") was grounded for repairs after being hit by the Respondent's Motor Vehicle Registration Number KCW 159W. They urged the court to set aside the Trial Court's Judgment and allow their appeal.
11. On her part, the Respondent also placed reliance on the cases of *Selle & Another vs Associated Motor Board Co Ltd & Others* (Supra) and the case of *Peter vs Sundays Post Limited* (Supra) where the courts therein laid down the duty of an appellate court. She submitted that the Trial Court did not err in dismissing the Appellants' claim despite having concluded that its driver was liable for the accident as it was alive to the fact that the issue of liability and loss of user were totally different aspects of the case both requiring proof to the requisite standard of proof. She was emphatic that there was no legal or factual correlation between liability for the accident and liability to pay for damages suffered in the nature of loss of user when such loss was not strictly proved.
12. The Trial Court found the Respondent to have been wholly liable for the accident herein. While this court noted the parties' respective Written Submissions on the issue of liability, it noted that the Respondent had not cross-appealed against the said apportionment of liability. This court did not therefore see it necessary to analyse the evidence that was adduced relating to apportionment of liability herein.
13. This court was called to determine whether or not the Trial Court erred when it dismissed the Appellants' claim after finding the Respondent herein fully liable for the accident herein.



14. The Appellants submitted that their subject Motor Vehicle was grounded for repairs due to the extensive damage caused by the accident from the said date of the accident to 25th October 2021 when they received a release letter from their insurers.
15. They further asserted that at the time of the accident, they were making deliveries with Pwani Oil Limited and that their business was yielding an average of Kshs 12,088/= per day being an overall calculation from the business for twenty-one (21) months making approximately fifteen (15) trips per month. It was their submission that as a result of the subject Motor Vehicle having been grounded for forty-three (43) days, they lost approximately fifteen (15) business trips as they could not conduct any business under the contract.
16. They placed reliance on several cases among them the case of *Kamenchu vs County Government of Embu* [2023] KEHC 25593 (KLR) where it was held that the owner of a damaged vehicle was entitled to compensation and courts had been liberal when quantifying damages for loss of user. They also referred to the case of *Nyaga vs Attorney Genral* (On behalf of the Ministry of Environment, Water and Natural Resources [2023] KEHC 26484 (KLR) where the court quoted the case of *Jackson Mwabili vs Peterson Mateli* [2020]eKLR where it was held that the trial court could exercise its discretion in awarding general damages for loss of user but limited to the profit lost.
17. They contended that they not only led evidence on the causation of the accident but also presented their case on loss of income and produced a contract for provision of commercial transport, spread sheets on income from their subject Motor Vehicle through Pwani Oil deliveries and further supplier remittances by Pwani Oil Products Limited. They pointed out that they were clear in their evidence that the income lost could only be estimated and that the accounts they provided to court were prepared by their accountant as per their lost earnings.
18. In that regard, they relied on the case of *Jebroek Sugarcane Growers Co Limited vs Jackson Chege Busi*, Civil Appeal No 10 of 1991 (unreported) where it was held that the fact that damages were difficult to estimate and could not be assessed with certainty or precision did not relieve the wrong doer of the necessity of paying damages for his breach of duty and was no ground for awarding only normal damages.
19. They argued that although the damages they had suffered may not be assessed with certainty or precision, it could not relieve the Respondent of the necessity of paying damages for her breach of duty. They urged the court to accord them the benefit of every reasonable presumption as to the loss suffered.
20. To buttress their point, they cited the case of *Samuel Kariuki Nyangoti vs Johaan Distelberger* [2017]eKLR among several cases where it was held that the loss of use of a profit-making chattel such as a lorry or matatu through an accident was similarly a claim in general damages and that the standard of proof in such claims was on a balance of probabilities.
21. They further submitted that the loss of user of profit was in the nature of general damages and was proved on a balance of probabilities hence not special damages to be subjected to strict proof. They asserted that where a commercial vehicle was damaged owing to the negligence of another, its owner could claim for loss of user as they were entitled to compensation for the period the motor vehicle was not in use even though no single document was produced.
22. They added that the evidence they adduced was sufficient proof that they earned money from the subject Motor Vehicle and that it was not their fault that they did not have a more sophisticated business model to track their earning from the said subject Motor Vehicle. They pointed out that they could not pre-meditated the accident so as to have kept better records.



23. They argued that the Trial Court was punishing them for failing to have sophisticated business method which amounted to compounding their loss yet they had already suffered immense losses from the accident. They asserted that had the accident not occurred they would have continued with their business and earned their monies.
24. They were emphatic that they had discharged their burden on a balance of probabilities by proving their loss of user through the documentary evidence, witness statements and oral evidence that they adduced in court but that the Trial Court erred in not appreciating that a claim for loss of user referred to compensation of what the respondent suffered as a result of not being able to use his damaged vehicle and that the said principle called on a negligent party, to pay a sum of money which will put the party who had suffered loss in the same position as he would have been if he had not sustained the wrong for which he was now seeking compensation or reparation.
25. They urged this court to assess and award general damages for loss of user as prayed at Kshs 12,080/= per day or the sum close to Kshs 12,000/= per day together with interest which would have been earned from 13th September 2021 to 25th October 2021 from the date of filing suit till payment in full. They also prayed they be awarded costs at the Trial Court and of this appeal.
26. On its part, the Respondent submitted that the issue of loss of user was in the nature of a specific damage claim which required specific pleading and specific proof to succeed. In this regard, she relied on the case of *Ndugu Transport Company Limited & Another vs Daniel Mwangi Waithaka Leteipa*[2018]eKLR where it was held that loss of user was a special damage claim and not only must it be specifically proved, it must also have been specifically pleaded in the plaint.
27. She argued that the Trial Court was thus not obliged or obligated either in law or fact to conclude that since her driver was found liable for causing the accident, she was ipso facto liable for the alleged loss whereas the Appellants failed to prove such loss to the requisite standards of proof. She added that the failure on the part of the Appellants to properly prove loss of user was well captured in the proceedings when the 1st Appellant was cross-examined and he told the court that he had no document to show or demonstrate the income from the subject Motor Vehicle or even related financial records.
28. To buttress her point, she cited the case of *Gachanja Muhori & Sons Limited & Another vs Catholic Diocese of Machakos*[2014]eKLR where it was held that the claim for loss of user had failed where the respondent did not produce receipts in proof of the daily earnings of Kshs 3000/=.
29. The 1st Appellant testified that the subject Motor Vehicle was being used to transport goods to supermarkets and wholesalers. He produced his contract with the 2nd Appellant dated 1st November 2019 on the same. He stated that he started the contract sale in 2019 and had seven (7) fleets of Motor Vehicle that operated at different fees with the 2nd Appellant. He said that he used to making 12,080/= per day for thirteen (13) trips, which in the Memorandum of Appeal, were indicated as fifteen (15) trips per month. He prayed for compensation in the sum of Kshs 520,000/=.
30. When he was cross-examined, he testified that the subject Motor Vehicle was grounded for forty-three (43) days while it was undergoing repairs. He explained the steps that used to be taken from the time an order was made and the delivery and payment were done. He said that he did not have tax remittance for the period in question, he also did not have documents to show financial records and/or income from the said second subject motor vehicle.



31. Notably, there was no consensus whether loss of user was a special damage or general damage or if the same could be given in the absence of document. One (1) school of thought considered loss of user fell under general damages as stated in the case of Jackson Mwabili vs Peterson Mateli (Supra) thus:-
- “ loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user.”
32. This court belonged to the school of thought that the claim for loss of user was a special damage as general damages are merely plucked from the air to compensate a party for loss suffered. The loss of user had to have a basis of the loss suffered and the duration that that loss was suffered. It was not an imaginary figure but had to be supported by evidence. This was a view that was also held by the court in the case of Gachanja Muhori & Sons Limited vs Catholic Diocese of Machakos [2014]eKLR that the Respondent relied upon to support their case that the Appellants had not proven their claim for loss of user.
33. In addition, this court took the view that the Respondent had taken that the fact that a party had been found liable did not automatically mean that the claim for loss of user was successful. It had to be proven.
34. There was also another school of thought that held that loss of user could be awarded even where there was no documentation. In the case of Peter Njuguna Joseph & Another vs Anna Moraa (Civil Appeal No. 23 of 1991 (unreported), the Court of Appeal assessed the loss of user of an immobilised matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.
35. Be that as it may, in the present case, whether the claim for loss of user was considered a general damage or special damage, the Appellants He produced the letters dated 23rd September 2021 and 25th October 2021 from CIC Group evidencing that fact that the subject Motor Vehicle was grounded from 13th September 2021 to 25th October 2021 and other documents showing their cash flow. This court was satisfied that they had proved their case on a balance of probability which is the required standard of proof in civil cases.
36. It was trite law that the standard of proof in civil cases was a matter of fact and the scale was to be tilted using the competing arguments and evidence in order for the court to establish this standard. That is to say, the balance of probabilities was usually attained when the court considered one side of the story to have been weightier.
37. In the case of Miller vs Minister of Pensions (1947) 2 ALL ER 372, the court had this to say about the burden of proof in civil cases:-
- “ That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case.”
38. In the present case, the Appellants presented their case and produced evidence which showed that the subject Motor Vehicle was used for commercial purposes, in this case, delivering goods as was evidenced in the Supplier Remittances and Delivery documents that they tendered in evidence.
39. They asserted that the subject Motor Vehicle brought a daily income of Kshs 12,080/= . In their submissions, they suggested that the court could award the said sum or a sum close to Kshs. 12,000/= . As the expenses and profits from this income were unascertainable, this court exercised its discretion



and awarded a daily loss of user of Kshs 10,000/=. Indeed, it was difficult to discern from the documents they had submitted if the figure of Kshs 12,080/= was consistent on all trips. However, as the Respondent did not call any witnesses to controvert the Appellants' evidence, this court was persuaded that it should allow the Appellants' claim for loss of user as follows:-

Kshs 10,000 x 43 days

40. The forty-three (43) days were from the date of the accident 13th September 2021 when the accident occurred to 25th October 2021 when the subject Motor Vehicle was ready for release from garage as was evidenced in the Release letter from CIC Group dated 25th October 2021.
41. In the Premises, Grounds of Appeal No (1), (2), (3) and (4) of the Memorandum of Appeal were merited and the same be and are hereby allowed.

Disposition

42. For the foregoing reasons the upshot of this court's decision was that the Appellants' appeal that was lodged on 5th April 2024 was partly merited. The effect of this is that the Judgment of Hon R. Ndombi delivered on 14th March 2024 dismissing the Appellants' suit in Vihiga SPMCC No 254 of 2022 be and is hereby set aside and/or vacated and substituted with an order that Judgment be and is hereby entered in favour of the Appellants wholly against the Respondent for the sum of Kshs 430,550/= made up as shown hereunder:-

Loss of user

43 x 10,000/= Kshs 430,000/=

Special Damages Kshs 550/=

Kshs 430,550/=

Plus costs and interest thereon. For the avoidance of doubt, interest on special damages and loss of user will accrue at court rates from the date of filing suit from the date of judgment of the lower court until payment in full.

43. As the Appellant was partly successful in its Appeal, it is hereby directed each party will bear its own costs of the Appeal herein.
44. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF MAY 2025

J. KAMAU

JUDGE

