



**Tana Water Works Development v Kanoro (Civil Appeal
63 of 2022) [2024] KEHC 4879 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 63 OF 2022
MA ODERO, J
APRIL 26, 2024**

BETWEEN

TANA WATER WORKS DEVELOPMENT APPELLANT

AND

SAMUEL WANJOHI KANORO RESPONDENT

JUDGMENT

1. Before this Court for determination is the Appeal dated 16th November, 2022 by which the Appellant Tana Water Works Development Agency seeks the following:-
 - “(a) That part of the judgment and decree of the lower court dated 28th October, 2022 awarding Kshs. 240,000 as damages for loss of user be set aside and be substituted with an order dismissing the same.
 - (b) That the Respondent do pay costs here and below.
2. The Respondent Samuel Wanjohi Kanoro opposed the Appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 31st March, 2023 whilst the Respondent relied upon his written submissions dated 3rd May, 2023.

Background

3. The genesis of this appeal non-injury is a road traffic accident which occurred on 5th March, 2021 along the Thika-Kenol Road at the Delmonte Area. The accident involved two vehicle a Toyota station Wagon (Fortuner) Registration No. KBT 0232 belonging to the Appellant and a Toyota Succeed Registration KBN 581X belonging to the Respondent.
4. Following the accident the Respondent filed a suit seeking damages vide a plaint dated 10th August, 2021.



5. The Respondents case was that on the material day he was being driven along the Thika-Kenol Road in his vehicle a Toyota succeed Registration KBN 581X. That the Appellants motor vehicle Toyota Fortuner Registration KBT 0232 was being driven recklessly negligently along the same road and hit the Toyota Succeed from behind.
6. That as a result of the accident the plaintiff suffered general and special damages arising from material damage to his vehicle for which he prayed that the Appellant be held liable.
7. The Appellant filed a Defence to the suit in which they denied that their vehicle was being driven recklessly and denied the Respondents claim for damages.
8. The matter was heard in the Magistrate Court and on 28th October, 2022 Hon. vs Kosgei Senior Resident Magistrate delivered a judgment in favour of the Respondent against the appellant in the following terms.
 - “(a) Liability at 100%
 - (b) Kshs. 61,556 for material damage to motor vehicle Registration No. KBN 581X and related costs.
 - (c) Kshs. 240,000 for loss of user
 - (d) Costs and interest on the above sums at court rates from the date of judgment”
9. Being aggrieved by the decision the Appellant filed a memorandum of Appeal dated 16th November 2022, which memorandum was premised upon the following grounds;-
 - “(i) The Learned Senior Resident Magistrate erred in law and fact in making an award for loss of user when the same is a special claim which had not been specifically pleaded and proved. A miscarriage of justice was thereby occasioned.
 - (ii) The Learned Trial Magistrate erred in law and in fact in holding that “the Court opines that the Plaintiff is entitled to 48 days *5,000/= Kshs. 240,000/=” as the amount of loss of user per day for 48 days when this had not been specifically pleaded and proved. A miscarriage of justice was thereby occasioned.
 - (iii) The Learned Trial Magistrate erred in law and fact in awarding Kshs. 5,000/= per day for 48 days when this was not specifically pleaded and proved. A miscarriage of justice was thereby occasioned.
 - (iv) The Learned Trial Magistrate erred in law and fact in awarding Kshs 240,000/= as general damages for non of user when this was not specifically proved and when pleaded as general damages. A miscarriage of justice was thereby occasioned.
 - (v) The Learned Trial Magistrate’s findings under the head of damages for loss of user has no basis in law. A miscarriage of justice was thereby occasioned.
 - (vi) The Learned Trial Magistrate erred in law and fact in disregarding the Superior’s Court’s authorities on the issue of damages of Loss of user referred



to her in the Defendant's Submissions when they are in law binding on her. A miscarriage of justice was thereby occasioned."

10. As stated earlier the appeal was opposed.

Analysis and Determination

11. I have carefully considered this appeal the record of Appeal as well as the written submissions filed by both parties.

12. This being a first appeal, it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited & Others*[1968] E.A 123, the court of appeal held that:-

"An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally....."

13. The fact of the accident is not in any dispute. Neither is it in dispute that as a result of the said accident the Respondents motor vehicle was damaged and had to undergo repairs.

The Appellant does not appear to take issue with the courts finding on liability.

14. However the Appellant challenges the award made to the Respondent for loss of user. The Appellant contends that the Respondent did not tender any evidence to prove that he made a daily income of Kshs. 5,000 using his vehicle to transport vegetables. That in the circumstances the learned trial magistrate erred in allowing the Respondents claim for loss of user.

15. On his part the Respondent asserts that he pleaded loss of user in paragraph 6 of the Complaint dated 10th August 2021. That the trial court rightly considered the fact that his vehicle was undergoing repairs and awarded 48 days as reasonable time within which said repairs ought to have been completed.

16. That therefore the award of Kshs. 240,000 for loss of user was justified.

17. At Paragraph 6 of his complaint the Respondent stated as follows.

"At the time of the accident the plaintiff was a farmer and a businessman transporting farm produce from his Karatina Farm to various Markets for which he holds the Defendant liable for the loss of user for 2 months"

18. However to merely plead 'loss of user' is not proof of the claim. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provides as follows:-

"107 Whoever desires any court to give judgment as to any legal right or liability
(1) dependent on the existence of facts which he asserts must prove those facts exist.



When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

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.

109. The burden of proof as to any particular person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

19. In the case of *Samuel Kariuki Nyangoti -vs- Johan Distelberger*[2017] eKLR the Court of appeal in setting out the current applicable position with respect to claims for loss of user stated as follows:-

“The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitution in integrum is applied in such cases.” [Own emphasis]

20. The claim for loss of user though being a claim for general damages is also a special claim which requires proof on a balance of probability.

21. The Respondent did not avail any evidence before the trial court to show that he was a farmer/businessman who transported goods regularly to Karatina. No business licence and/or permits were produced.

22. Neither did the Respondent avail any evidence to show that he was earning an amount of Kshs. 5,000 daily from this business of farm supplies. No bank statements, receipts, invoices or Mpesa statements were produced by the Respondent in support of this claim that he was realizing a daily income of Kshs. 5,000.

23. In the absence of tangible and credible evidence to support this claim of loss of user I find that the learned trial magistrate erred in awarding the Respondent for this claim.

24. In *Ryce Motors Ltd & Another -vs- Elias Muroki*[1996] eKLR, the court of Appeal held as follows:-

“The Learned judge had before him by way of plaintiff’s evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act. These pieces of paper do not show at all if the alleged accounts were in respect of ‘the matatu’, or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis



on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety. [Own emphasis]

25. In the premises I find that the award of Kshs. 240,000 for loss of user had no basis and I therefore set aside that award.
26. Finally this appeal succeeds. I set aside the orders made by the trial court in the judgment delivered on 28th October, 2022 and in its place I make the following order.
- (i) Judgment be and is hereby entered in favour of the plaintiff (Respondent) against the Appellant (Defendant) in the following terms
 - (a) Liability at 100%
 - (b) vehicle registration number KBN 581X
 - (c) ^{Kshs.} Costs and interest on the above shall accrue at court rates from 28th October, 2021.
 - (d) ^{61,556} Costs on this Appeal will be met by the Respondent.

^{material}
^{damage}
DATED IN NYERI THIS 26TH DAY OF APRIL, 2024.

.....^{to}.....

^{motor}
MAUREEN A. ODERO

JUDGE

