



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 311 of 2003

MARK KHAN TRANSPORTERS LTD. APPELLANT

AND

PETER MBUGUA RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma (Mbito, J.) dated 11th March, 2002

in

H.C.C.C. NO. 7 OF 1999)

JUDGMENT OF THE COURT

This is an appeal by the appellant, *Mark Khan Transporters (K) Ltd.* from the judgment of the superior court at Bungoma (*Mbito, J.*) dated 11th March, 2002. The said judgment arose from an appeal filed in the superior court against a judgment of the Senior Principal Magistrate dated 4th January, 1999.

The case for the respondent, *Peter Mbugua*, according to the pleadings filed in the trial court was that on 30th April, 1986, the respondent's vehicle, a matatu, was involved in an accident with appellant's tractor due to the negligence on the part of the appellant's driver. After the hearing, the trial court gave judgment against the appellant company on liability and proceeded to award Kshs.75,000/= as special damages in respect of spares bought by the respondent together with loss of income of Kshs.5,000/= per day for a period of 37 days, the period the respondent's vehicle was undergoing repairs. The total amount in respect of loss of use was Kshs.185,000/=.

In the superior court, the appellant put forward six (6) grounds of appeal. The appellant was unsuccessful on all the grounds presented and the appeal was dismissed on 11th March, 2002.

It is against that judgment that the second appeal has been filed in this Court.

The *Memorandum of Appeal* contains six grounds of appeal as follows:-

“(1) That the learned trial judge erred in law and fact in considering hearsay and inadmissible evidence in holding the appellant liable to the respondent in damages contrary to the law of Evidence

and cardinal principals (sic) of Evidence.

(2) That the learned trial judge erred in law and fact in holding the appellant liable to the respondent in damages when the respondent had failed to establish his legal ownership to the accident vehicle.

(3) That the learned trial judge erred in law in upholding the lower court's award of special damages when the same had not been properly pleaded and established as the law requires.

(4) That the learned trial judge erred in law in upholding an erroneous award of special damages for loss of user when the same had both (sic) been properly established and proved as the law requires.

(5) That the learned trial judge erred in law in upholding the lower court's findings on vicarious liability when there was a non-joinder of parties and hence causing a miscarriage of justice.

(6) That the learned trial judge fell in error in failing to consider the appellant's submissions in his judgment."

When the appeal came up for hearing, Mr. Masinde, the learned counsel for the appellant, indicated to the Court that he had abandoned **grounds 2 and 5**. In his submissions, the learned counsel combined grounds 1 and 3. The thrust of Mr. Masinde's submissions on these two grounds, were that the superior court admitted inadmissible evidence namely the police abstracts for his vehicle and the appellant's vehicle tractor KAA 124H, the cost of repair receipts, and the record of the vehicle's income per day. The learned counsel contended that the amount of loss of use of the vehicle for 37 days was erroneous and unreasonable, since the repairs could not take more than 7 days.

On **ground 4**, the learned counsel submitted that the special damages were wrongly awarded since they were not pleaded in the plaint.

Finally as regards ground 6, the learned counsel contended that his submissions in court, were not considered by the superior court.

On his part, Mr. Kituyi, the learned counsel for the respondent submitted that the appellant did not object to the production of the evidence in the trial court, the admissibility of which he was now challenging in the second appeal as is clear from page 15 of the record of appeal and that the exhibits were produced in the presence of the learned counsel for the appellant who did not object to their production. He added that the evidence adduced on both liability and damages was accepted by the two lower courts because it was credible and the appellant never challenged the evidence as adduced nor offered any evidence to contradict the evidence adduced by the respondent.

He concluded by submitting that the appellant had only raised issues of facts based on evidence and this being a second appeal, consideration of matters of fact were outside the mandate of the Court. The learned counsel invited the Court to note that the appellant never gave evidence at all in support of its defence in the trial court.

We have considered the submissions as set out above and we are in full agreement with the submissions made on behalf of the respondent by his counsel. As regards grounds 1 and 3, the pleadings in the record clearly show that special damages were claimed and particulars given. As a result the appellant has been unable to demonstrate any legal issue for consideration before us.

Similarly, as regards grounds 4 and 6 the issue of the records produced including the records relating to the income of the "matatu" are all matters of fact which should not attract our intervention, this being a second appeal.

As regards the point concerning the loss of use of the matatu, the Court is aware that by a stream of authorities it has held that this must be claimed as special damages and the loss suffered should be proved

strictly.

In the circumstances of this case, it is clear from the pleadings that the loss of use was specifically claimed as special damages. On the issue of proof, the two lower courts were satisfied with the evidence in support of the claim which included a book setting out the daily income of the matatu receipts including the number of days the vehicle was not in use. On this, the two lower courts having made concurrent findings of fact and we cannot upset those findings. In that regard, we re-echo the holding of this Court in the case of **CHEMAGONG V. REPUBLIC [1984] KLR** where the Court held:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

In our view, the facts of the case before us are clearly distinguishable from the facts in the case of **WAWERU V. NDIGA [1983] 1 KLR 236** where the Court stated that:-

“Damages for loss of the use of a vehicle can be claimed as special damages and not general damages and the loss suffered should be proved strictly.

The respondent in his plaint had claimed the damages as general damages and had set out no particulars of the loss.”

In the case before us, the special damages were specifically pleaded and evidence was adduced in support thereof.

On the issue of the number of days during which the repairs were effected by the respondent, that is (37 days), the appellant has contended that a reasonable period in his view should have been 7 days but the two courts below did consider 37 days for the repairs as reasonable.

On our part, there is no basis upon which we can interfere because it has not been shown that the period is manifestly excessive and therefore unreasonable, the appellant having offered no evidence at all at the trial.

What is or is not reasonable must be a question of fact to be determined by a court in each case. There cannot be a rule of thumb in determining reasonableness. To illustrate the point in the case of **TIMSALES LTD. V. UP & DOWN SAW MILLS (KENYA) LIMITED, [1985] KLR 557** which case involved the lending of a portable cross cut saw which the borrower failed to return to the owner for a period close to two years, the Court held that the owner of the saw had a duty to mitigate his loss by buying a new one within a reasonable period which in the circumstances would be **90 days** and not two years and that it was wrong to have awarded damages upto the time of the return of the machine.

The principle on mitigation in the case was stated as under:-

“The respondent ought to have mitigated the damage by purchasing another machine within a reasonable time during which he would expect the appellant to return the machine. Such reasonable time would be ninety days.”

In the matter before us, the vehicle in question in this case was a matatu and the duty the respondent had in the circumstances was to effect the repairs within a reasonable time. We are of the view that he discharged his duty. In the circumstances, the loss of use awarded for 37 days which was accepted by the two courts below was reasonable.

We, are, therefore convinced that the superior court did correctly address itself on the applicable law.

For the above reasons, we dismiss the appeal with costs to the respondent. It is so ordered.

Dated and delivered at Kisumu this 17th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR