REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.21 OF 2016

NDUGU TRANSPORT COMPANY LIMITED.....1ST APPELLANT

NICHOLAS ODHIAMBO OWOUR.....2ND APPELLANT

VERSUS

DANIEL MWANGI WAITHAKA LETEIPA.....RESPONDENT

(Being an appeal from the Judgment of the Hon. B. Limo (SRM) in Kericho CMCC No. 185 of 2015 dated 14th September 2016)

JUDGMENT

1. The sole issue that arises in this appeal is whether the trial court erred in making a global award of Kshs.200,000 to the plaintiff/respondent in respect of the loss of user of his vehicle.

2. The respondent was the plaintiff in the suit before the trial court. His claim against the appellants/defendants arose from a road traffic accident which occurred on 18th February 2015. In his plaint dated 20th May 2015, the plaintiff alleged that on or about 18th February 2015 while he was driving the motor vehicle registration No. KBF 583S along Kericho Kisumu road at Kapkawa area or thereabouts, the 2nd defendants for whose torts the 1st defendant is vicariously liable, drove motor vehicle registration No. KBF 979 N/ZB 7098 so carelessly and/or negligently that the same was caused to collide with motor vehicle registration No. KBF 583 S.

3. The plaintiff alleged that he had sustained severe injuries loss and/or damage as a result of the accident. He prayed for the following orders from the court:

a. General Damages for pain, suffering and loss of amenities;

b. Special damages aforesaid;

c. Costs of and incidental to this suit;

d. Interest at court rates; and

e. Any other or further relief that this Honourable Court may deem fit and just to grant.

4. The defendants/appellants filed their joint statement of defence dated 21st August 2015 in which they denied essentially all the averments in the plaint. They alleged, however, that if indeed an accident did occur as alleged, the same was solely caused and/or substantially contributed to by the plaintiff's own acts of negligence. They also denied that the accident resulted in injuries to the plaintiff, and they also denied the loss and damage alleged in the plaint. They prayed that the suit be dismissed with costs.

5. However, by a consent between the parties dated 29th June 2016, liability was agreed upon in the ratio of 80%:20% in favour of the plaintiff as against the defendants. The parties also consented to general damages in the sum of Kshs.100,000/-. The said consent was adopted as an order of the court on 29th June 2016.

6. In his decision dated 14th September 2016, Hon. Limo (RM) entered judgment for the plaintiff against the defendants for a sum of Kshs. 1,200,000/- for material damage, Kshs.200,000/- for loss of user, special damages of Kshs. 30,500/- subject to liability at 80:20 in favour of the plaintiff.

7. The court also awarded the plaintiff a sum of Kshs.150,000/- for the personal injury claim, as well as the costs of the suit.

8. Aggrieved by the decision of the trial court, the appellants filed their Memorandum of Appeal dated 28th September 2016 in which they set out the following grounds for appeal:

> ***1. THAT the trial Magistrate erred in law and fact by awarding a global sum of kshs. 200,000 being an award for loss of user failed to appreciate the principles applicable in the award of damages under the head loss of user.***
>
> ***2. THAT the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in awarding damages in a material damage claim.***
>
> ***3. THAT the learned trial magistrate erred in law and fact in failing to appreciate the fact that the onus of proof was on the Plaintiff and therefore shifted the burden by holding that the Plaintiff had proved his case on the requisite standards on the basis of scanty evidence.***
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> ***4. THAT the learned trial magistrate erred in law and fact by failing to consider the authorities and submissions of the defence and critically analyse the same and accord it due weight.***

9. The appellants pray that the decision of the trial court be reviewed or set aside; that the court do revisit the issue of assessment of damages and assess the same afresh; and that the respondent bears the costs of this appeal.

10. The parties canvassed the appeal by way of written submissions. The appellants filed submissions dated 17th October 2017 while the respondent filed submissions dated 1st August 2017.

The appellants' submissions

11. The appellants contend that the trial court failed to appreciate the principles applicable in the award of damages for loss of user. They submit that the respondent's claim for loss of user was unsubstantiated. They make reference to PW1's testimony where he testifiued that he never kept any record of daily collections so that his claim for loss of user per day at the rate of Kshs. 6,500 was unsubstantiated. They argue that damages for loss of user are quantifiable and ascertainable; that they should be pleaded as special damages; and failure to plead them as such is fatal to the claimant's claim.

12. The appellants relied on the decision in **Maritim & Another vs Anjere [1990-1994] EA 312** at 316 as cited in **Pollmans Tours & Safaris Ltd vs Gupta Sea Tour Limited [2015] eKLR** as well as **Summer Limited Meru vs Moses Kithinji Nkanata (2006) eKLR** and **Civil Appeal No. 283 of 1996 David Bagine vs Martin Bundi** as cited in **Jackson Kiprotich Kingeno & Another vs Daniel Kiplimo Kimetto [2008] eKLR** to support their contention that the trial court erred in making an award in damages for loss of user in this case.

13. It is also their submission that the court made an award for loss of user based on speculation and his own hypothesis of trade customs in the motor vehicle transport business. The appellants draw attention to what they refer to as a "casual statement" made by the court in which he referred to an authority cited by the plaintiff in which the court adopted a figure of Kshs.1,500/- per day as a multiplier.

14. The appellants submit that the Learned Magistrate proceeded on the basis of speculation and conjecture and therefore arrived at the wrong conclusion. They further relied on the case of **Equity Bank Limited vs Gerald Wangombe Thuni [2015] eKLR** in which the court set aside an award for loss of user and allowed the appellants' appeal on this score. It was their submission that once a vehicle has been written off, the only compensation due to its owner is the pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to proof, and there would ordinarily be no assessment of damages. Reliance was placed in this regard on the decision in **Miwa Hauliers & Another vs Godfrey Auma [2007] eKLR**.

15. The position of the appellants was that since the plaintiff was unable to prove his daily income from the matatu business as no documentary evidence was supplied to support the claim of Kshs.6,500/- daily earnings, no award of loss of user should have been made. The appellants urged the court to find that the plaintiff's claim for loss of user was unsubstantiated and must be rejected, and set aside the award of Kshs.200,000/- for loss of user with costs to the appellants.

The respondent's submissions

16. In submissions dated 1st August 2017, the respondent supports the decision of the court and prays that this appeal be dismissed with costs. The respondent submits that the issue for determination is whether the trial magistrate erred in law and fact in awarding a global sum of Kshs.200,000/- for loss of user. His answer to this issue is in the affirmative.

17. The basis of this submission is that the respondent had proved that he was the legal and beneficial owner of the motor vehicle registration No.KBV 583F and had produced a sale agreement in evidence. The defendants/appellants had not produced any evidence to rebut this position. It was contended on his behalf, further, that he produced evidence that the said motor vehicle was used as a public service vehicle, a fact which had not been controverted. The respondent had also testified that he would earn approximately Kshs.6,500/- per day from the subject motor vehicle, and in the circumstances, the trial court exercised its discretion judicially in awarding a global figure of Kshs.200,000/- as damages under the head of loss of user.

18. The appellant relied on the decision in **Joseph Mwangi Gitundu vs Gateway Insurance Co. Ltd [2015] eKLR** and **Summer Limited Meru vs Moses Kithinji Nkanata [2006] eKLR** in which the court noted that no documentary evidence was supplied to support the

averment of Kshs.3,000/- daily profit but still went ahead and assessed daily earnings at Kshs.1,000/- for the period of one year.

19. It was submitted further that the respondent's motor vehicle had a pre-accident value of Kshs.1,295,000/-, a fact which was uncontroverted. That PW2 had also testified that the motor vehicle was a complete write-off and would be uneconomical to repair. It was his submission therefore that the court should not disturb the award of Kshs.200,000/- as the court exercised its discretion judicously in awarding the said sum. The respondent urged the court not to disturb the award but to dismiss the appeal with costs.

Determination

20. As I observed at the beginning of this judgment, the only issue for determination is whether the learned trial magistrate erred in law and fact in awarding Kshs.200,000/- to the respondent for loss of user.

21. I have considered the record of the trial court, the judgment of the court, the pleadings and the submissions of the parties.

22. The principles on which an appellate court will disturb an award in damages are, I believe, fairly well settled. In **Premier Diary Limited vs Amarjit Singh Sagoo & Another [2013] eKLR** the Court of Appeal stated as follows:

> ***"It is the duty of this court, on a first appeal like this one, to reconsider the whole matter and re-evaluate the same to reach our own conclusions always remembering however, that we did not hear the parties or observe their demeanour, an advantage only the trial Judge had. Sir Kenneth O'Connor sitting at the predecessor of this Court spoke on this issue very well when he said in Peters vs Sunday Post Limited [1985] EA 424:***
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> ***"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has 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 itself have come to a different conclusion..."***

23. In **M O R vs Franciscan Sisters of the Immaculate [2017] eKLR** the court considered the circumstances under which an appellate court could interfere with a trial court's award of damages and stated as follows:-

> ***"The law is that an appellate court will not interfere with a trial court's award in damages unless the award is so inordinately high or low as to represent an entirely erroneous estimate, or it is shown that the court proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at a figure that was inordinately high or low."***

24. The question is what evidence there was before the trial court with respect to the claim for loss of use. The plaintiff/respondent called 2 witnesses, with the respondent, Daniel Waithaka Leteipa as PW1. His evidence so far as is relevant to the issue in dispute, which emerged in cross-examination, was that the motor vehicle was a public service vehicle (PSV) and that he had a PSV license in his records. He had worked for 2 years and used to get a sum of Kshs.6,500/- per day. He stated that he did not have receipts for this amount but prayed for payment of loss of user and value of his motor vehicle.

25. The evidence of PW2, Seth Khai Kayangi, a motor vehicle assessor from Buyanga Claim Assesors, was that the pre-accident value of the vehicle was Ksh.1,295,000/- and the salvage value was around Kshs. 75,000/-. In the circumstances the vehicle was considered a write off and therefore it would not be economical to repair it. He produced an assesement report for the motor vehicle dated 3rd May 2015.

26. I note from the decision of the court that the trial magistrate was clear that the respondent had not supported his claim for loss of user, and the court noted that such claim without proof must be rejected summarily. He was, however, it would appear, convinced to make an award in damages. He stated as follows:

> ***"The plaintiff has acted on authority in which a court faced with a similar scenario adopted an equitable figure of Kshs. 1500 per day as a multiplier..."***

27. Was this a proper basis for making the award, or was the award made, as submitted by the appellant, based on speculation and conjecture? I have considered various decisions in which courts have dealt with claims for loss of use.

28. In **Summer Limited Meru vs Moses Kithinji Nkanata [2006] eKLR High Court Civil Appeal No. 89 of 2004**, Lenaola J (as he then was) held that the amount of earnings from a business is not a matter that can be left to judicial discretion or reason since it is a special damage that must be specifically proved. Without such proof, it cannot be awarded. The judge stated as follows:

> ***" On the first point, my view is that the amount of earnings from the matatu business is not a matter that can be left to judicial discretion or reason. It is a special damage that must be specifically proved. Without such proof it cannot be awarded. I note that the learned trial Magistrate said this on the point;***
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> > ***"Under this head, I do note that no documentary evidence was supplied to support the averment of Kshs.3000/- daily profit. In the absence of records, I make an award of Kshs.1,000/=. The Plaintiff has failed to mitigate his losses, therefore, I allow the same for a period of 1 year".***
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> > ***Like the trial Judge in Ryce Motors Ltd and Anor – vs – Muroki (1995-1998) 2 EA 363, the learned trial Magistrate was***

given a booklet to support the claim for Kshs.3,000/- per day which she rejected. The Court of Appeal said this when the matter came before it on Appeal;

> ***"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……"***
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> > ***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 Kshs.4,500/- per day. He did not support such claim by any acceptable evidence …… and we set aside the award in its entirety".***
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> ***The Plaintiff in the Ryce case was in the same position as the Respondent in this case and once he was unable to prove his daily income from the matatu business then the claim for loss of user must be rejected. I must do the same in this regard and will set aside the entire award of Kshs.365,000/- as the same was not based on any plea that was strictly proved before the lower court. In fact the lower court agreed that there was no proof of the claim for loss of user and having done so, it should not have made any award under that heading."***

29. In **Civil Appeal No. 283/1996**, ***David Bagine vs Martin Bundi*** *as cited in* ***Jackson Kiprotich Kipngeno & Another vs Daniel Kiplimo Kimetto [2008] eKLR*** it was held that*:*

> ***"We must and ought to make it clear that damages 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…"***

30. In its decision in **Civil Appeal No. 25 of 2013 Macharia Waiguru versus Murang'a Municipal Council & Another (2014) eKLR** the Court of Appeal sitting in Nyeri stated as follows:

> ***"On the issue relating to the claim of Kshs. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended plaint indicates that this is a claim for Kshs. 300,000/= and loss of user which is a claim for special damages."***

31. The Court then cited its earlier decision in **Siree vs Lake Turkana El Molo Lodges (2002) 2EA 521** where it had held:

> ***"This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages."***

32. The court took the view that damages for loss of user are quantifiable. They can be pleaded as special damages, and failure to plead them as such is fatal to a claimant's claim under this head. The court further relied on its decision in **Maritim & Another –v- Anjere (1990-1994) EA 312 at 316** in which it was emphasised:

> ***"In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."***

33. What emerges from these decisions is that the correct position in law in this jurisdiction is that a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, "do the best it can" and make an award on a claim that was neither pleaded nor proved-see **David Bagaine vs Martin Bundi [1997] eKLR**.

34. I therefore agree with the submissions of the appellants that the trial court erred in making the award of Kshs.200,000 as loss of user when there was no evidence before him to support the testimony of the respondent that he used to earn Kshs.6,500 per day. I accordingly allow this appeal and set aside the award of the trial court of Kshs. 200,000. The appellants shall have the costs of this appeal.

Dated Delivered and Signed at Kericho this 3rd day of July 2018

MUMBI NGUGI

JUDGE