



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 29 OF 2017

GERDA MARIA SIMON..... APPELLANT

VERSUS

GLOBAL TRUCKS LTD.....RESPONDENT

(Being an appeal from the judgment of Hon D Nyambu SRM delivered on 19th July, 2017 in CMCC No 1000 of 2016)

JUDGMENT

1. This appeal arises from a judgment of the lower court in which that court dismissed with costs a suit claiming special damages of Kshs 383,000/= . These were alleged to be the costs of repairing her vehicle alleged to have been rammed from the rear left side. Additionally, the appellants claimed the daily cost of Kshs 6,000/- incurred in hiring an alternative vehicle from 17th September, 2016.

2. The defendant was undefended, and after interlocutory judgment, the case came up for formal proof. The trial court heard the evidence of one witness, PW1, Peter Nkurunnah – who was the driver of the accident vehicle at the material time – on behalf of the plaintiff.

3. The trial court determined that the plaintiff had produced evidence of assessment of the damage and value of the damage to the vehicle, but did not submit any receipts to prove the special damages claimed as repair costs; and that repairs had not been proved. The court stated that there had been no proof that the principle that special damages pleaded must be specifically proved. In the absence of receipts, the repairs claimed were not payable. In addition, in the absence of receipts proving the hiring of the vehicle, the claim for hiring was not payable.

4. In the appeal, the appellant faults the trial court for holding that that the appellant should have proved that the cost of repairs had been paid; that the trial court ignored the expert evidence of assessment of the damage and repair cost; that the trial court did not take into account the plaintiff's submissions and uncontested facts; and that the trial court awarded costs when the defence did not enter appearance or participate in the proceedings. The appellant seeks that the appeal be allowed with costs and judgment be set aside, and that the court do assess the damages payable to the appellant.

5. The appellant relied on the judgment of the Court of Appeal in **Nkuene Dairy Farmers Co-operative Society & Another v Ngacha Ndeiya [2010]eKLR**. That case was similar to this case in that it was a claim for material damage following an accident; that the plaintiff proved the damage; that the plaintiff did not do any actual repairs; that the appellants did not call any evidence in support of their case.

6. The Court of Appeal in **Nkuene Dairy** held:

“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show that the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent’s vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.

7. The Court adopted the decision of the Court, differently constituted in **David Bagine v Martin Bundi Civ App No 283 of 1996**, where it was stated that “a motor vehicle assessor’s report would provide acceptable evidence to prove the value of material damage to a motor vehicle” where it held:

“the best evidence in this respect could have been supplied by an automobile assessor “

8. In its conclusion, the Court of Appeal agreed that:

“the Assessor’s report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent’s claim”

9. I note that in their written submissions in the lower court, the appellant had cited both the **Nkuene Diary** and the **David Bagine** cases, but the trial magistrate appears to have misunderstood the import of those cases in that he found that despite material damage being proved, receipts were still necessary to show that repairs were actually done and paid for.

10. Applying the above authorities, this court finds that the trial court was wrong to decline the assessment report as sufficient evidence of material damage in respect of the appellant’s accident vehicle.

11. As for the claim for reimbursement of hiring costs, I agree with the trial court that there was insufficient evidence to enable an award to be made, in the absence of a receipt(s). For example, what was produced was an agreement between PW1 and the plaintiff and Aruba Mara Bush Camp. The agreement states that PW1:

“1). Joseph will let Aruba Mara Bush camp to rent his car for the days Aruba camp is busy

They hired Joseph car because of the accident which happened on the 17th September, till further notice”

Nothing was availed by the appellant to show the number of days for which the hiring was done when the camp was busy. This is an open-ended contract clause that requires further evidential material to elaborate upon the period of hiring. The evidence of PW1 does not indicate the dates of the hiring or provide receipts. Thus, no amount is proved for the alleged hiring.

12. With regard to special damages claimed, these included the assessment costs of Kshs 6,000/=, for which a receipt was exhibited. That amount is proved and payable.

13. Accordingly, the appeal succeeds to the extent shown herein and the trial court’s judgment is set aside. In the result the appellant is entitled to the damages as follows:

a. Damages for costs of repair including VAT thereon Kshs 376,768/=

b. Special damages for vehicle assessment charges Kshs 6,000/=

Total Kshs 382,768/=

14. The appellant shall be entitled to interest on special damages from the date of filing the suit in the trial court.

15. Interest on the judgment sum shall accrue at court rates from the date of judgment.

16. The appellant shall have costs in the trial court and on appeal.

17. Orders accordingly.

Administrative directions

1. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

2. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

3. Orders accordingly.

Dated and Delivered via video-conference at Nairobi this 4th Day of June, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Juma for the Appellant

2. Defendant unrepresented/not participating

3. Court Clerk - Quinter Ogutu