REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: CHESONI, C.J., LAKHA & OWUOR, JJ.A.)
CIVIL APPEAL NO. 212 OF 1998
BETWEEN

ABUDI ALI MAHADHI .....APPELLANT
AND
RAMADHANI SAIDI 1STRESPONDENT
FREIGHT FORWARDERS LIMITED 2NDRESPONDENT

(Appeal from the Judgment of the High Court of Kenya at

Mombasa (Justice Wambiliangah) dated 18th November, 1995 in

H.C.C.C. NO. 424 OF 1992)
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JUDGMENT OF THE LAKHA, J.A.

The unsuccessful plaintiff appeals to this Court from the judgment of the superior court (Wambiliangah, J.) given on 18 November, 1995 whereby he dismissed the plaintiff's suit with costs.

By an amended plaint dated 6 October, 1994 the plaintiff claimed that in May 1988 he had let on hire to the defendant at the latter's request the vehicles number KPP 484 together with trailer ZA 088 and KKW 645 together with trailer Z 9406 at agreed charges to enable the defendant to transport food from Mombasa to Sudan for the second defendant. It was a term of the said hire agreement that the said vehicle would be returned to the plaintiff at the end of the said trip and that the defendants would pay K.Shs.8,000/= for everyday that the delay occurred. The defendants, in breach of the said hire agreement, did not return the said vehicle and trailer to the plaintiff who suffered loss and damages by the delay occasioned on the part of the defendants in returning the vehicle to the plaintiff.

The defendants' defences in the main were a denial of the agreement alleged and a denial of any breach on their part. The alleged loss and damages were also claimed.

Between June, 1993 and October, 1995 the trial of the action came up for about 15 days when some 10 witnesses were called whereof 7 were on behalf of the plaintiff and 3 on behalf of the defence. The learned judge, in a reserved judgment, pronounced on 1 November, 1995 found for the defendants and dismissed the plaintiff's suit with costs.

In relation to KPP 484 he held, inter alia, that:

> "In any case his (meaning the plaintiff's) own evidence as I have already said was inconsistent and riddled with the irreconcilable variations which I have pointed out. Such evidence must be

> rejected. So I hold that the vehicle at the time of the accident had already been sold to Fankupe Mzee and his partner. It was no longer the property of the plaintiff and he cannot at all be entitled to recover damages for its lost value."

He then proceeded to deal with the claim for loss of use in respect of the vehicle KKW 645. He delivered himself thus:-

> "I hold that since the defendants were not responsible for the events which rendered the immediate return journey of the vehicle impossible, and furthermore, since the defendants cannot have had control of any sort over the warring parties in Southern Sudan, it can never be said that the plaintiff's loss of use of his vehicle can be directly and legally traced to any repressible act or omission whatever on the part of the defendants. I do not find any circumstances to lead me to ascribe any blameworthiness to the defendants. ..... If other intervening events rendered that return journey impossible, then he can only blame the authors of those events.
>
> Otherwise there is no nexus of any sort between the defendants and the events which prevented the return journey of the vehicle. ..... All in all, there is no evidence from which I can impute wrongdoing or blame on the defendant so as to hold them liable to the plaintiff as claimed on this aspect."

The learned judge concluded his judgment as follows:-

> "In the upshot, I have no scintilla of doubt that the entire case of the plaintiff was altogether misconceived and, also that all the plaintiff's witnesses including the plaintiff himself were outrageously pathetic witnesses who only manifested their lack of self respect. They perjured themselves a great deal."

As already mentioned, the learned judge found against the appellant and his findings are on issues of fact. The learned judge saw and heard the witnesses and having found the facts as above set out, the burden was on the appellant to show that there was no evidence upon which the Judge could come to such conclusion or that the Judge misapprehended the evidence or that his appreciation of it was plainly wrong. As was said in the case of **PETERS V SUNDAY POST LTD [1958] EA 424** while this Court has the jurisdiction to re-assess and re-evaluate the evidence on a first appeal, it is a very strong thing indeed for the court to interfere with a trial judge's findings on facts unless the circumstances enumerated in PETER' s case, supra, are satisfied. Having listened carefully to Mr. Kiarago, for the appellant, I have heard nothing which would make this Court interfere with the learned Judge's conclusions which are fully borne out by the evidence which was placed before him. That being our view of the matter, this appeal must fail.

There is one other matter. In my judgment, I consider this case to be governed by the pleadings in this suit and, as Mr. Gikandi for the respondent submitted, rightly in my view, the plaintiff's claim was for

special damages which had not been pleaded at all. It has been held time and again by this Court that special damages must be pleaded and, of course, strictly proved. The claim for the loss of user and that of the value of the vehicle in the event it had been destroyed are matters of special damages which ought to have been strictly pleaded but was not done. Nor were they proved. I refer to the case of **OUMA V. NAIROBI CITY COUNCIL 1976 KAR 297 at 304** where Chesoni, J., (as he then was) held:-

> "Although special damage had been specifically pleaded by listing in the plaint the items alleged to have been stolen or damaged, the plaintiff's failure to prove such damage at trial with certainty and particularity precluded the court from making any award of special damages."

Also, see **KENYA BUS SERVICES V. MAYENDE 1991 2 KAR 232 at 235** where it was held referring to the remarks by this court in **Mariam Maghema Ali v Jackson M Nyambu t/a Sisera Store CA 5 of 1990 and in Idi Ayub Omari Shabani v City Council of Nairobi (1985) 1 KAR 681 at 684:**

> ".... Special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard, C.J. in Bonham Carter v Hyde Park Hotel Ltd (1948) 64 T.L.R. 177 thus: "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it."

Accordingly, and for the reasons above stated, this appeal must fail and I would dismiss it with costs.

Dated and delivered at Mombasa this 30th day of July, 1999.

A.A. LAKHA

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JUDGE OF APPEAL