**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT MOMBASA**

**Civil Appeal 119 of 1995**

**RYCE MOTORS LIMITED**

**COAST AGENCY ……APPELLANTS**

**AND**

**ELIAS MUROKI ……...RESPONDENT**

**(Appeal from judgment and Decree of the High Court of Kenya at Mombasa (Justice Mbogholi) dated 9th March, 1995**

**IN**

**H. C.C.C. NO. 26 OF 1993)**

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**JUDGMENT OF THE COURT**

This appeal raises primarily the issue of award of special damages claimed by and awarded by the learned judge in the superior court. Those special damages were claimed under the legend “loss of profit per day Ksh. 4500/= with effect from 27.10.1992 until payment in full”.

The learned judge accepted the evidence of Elias Muroki, the respondent, (hereinafter referred to as “the plaintiff”) to the effect that his one “matatu’ was bringing in to him daily profits of Kshs.4500/=.

The relevant facts are that on or about the 1st day of October , 1992 the plaintiff delivered his ‘matatu’ registration number KAA 170R (a 26 seater omnibus -hereinafter referred to as ‘the matatu’ to Ryce Motors Limited, the first appellant, for carrying out a service.

On or about the 27th day of October, 1992 the matatu whilst under the control of Ryce Motors Limited and whilst being test-driven by an employee of Ryce Motors Limited was involved in an accident with a motor vehicle registration number KWT 872 and was declared a write-off.

Ryce Motors Limited, after it was sued, took out third party proceedings against the owner of the said motor vehicle registration number KWT 872: that is against “Coast Agency”, presumably a firm.

The liability as between Ryce Motors Limited and Coast Agency was agreed at 15% and 85% that is Ryce Motors Limited was to pay 15% of the damages and Coast Agency 85% thereof.

The value of the matatu was not in dispute and consent judgment was entered in favour of the plaintiff in the sum of Shs.552, 537/= with interest and the issue of loss of profits was left for determination by the learned trial judge.

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.

That would in normal circumstances have called for an end to this judgment but Mr. Inamdar for the appellants insisted on arguing out what he considered to be a serious flaw in the judgment of this Court in the case of Peter Njuguna Joseph & Another vs. Ann Moraa Civil Appeal No. 23 of 1991 (unreported). In that case, the Court said:

“We are here concerned with the actual loss of user of the vehicle which has been immobilized by the accident. The owner must take all reasonable steps to ensure that the vehicle is back on the road within a reasonable period. The owner must mitigate his damages by having the vehicle repaired if it was not a write-off. If the vehicle is to be a write-off, then the owner is entitled to pre-accident value of the damaged vehicle. He would then be paid a reasonable figure for loss of user until the time he received the pre-accident value of the write-off vehicle.”

The learned trial judge literally followed the last part of the foregoing passage and awarded damages for loss of profits at the rate of Kshs. 4500/= for the period between 27th October, 1992 and 16th December, 1994,that is to say, for a period of two years and 35 days.

Mr. Inamdar submitted that the statement in the above cited case that the owner of a write-off vehicle “would then be paid a reasonable figure for loss of user until the time he received the pre-accident value of the write-off vehicle” was too wide and incorrect in law. In support of this submission, he relied on several English authorities. Some of these cases are referred to in vol. 12 of Halsbury’s laws of England (4th Ed. ) at paragraph 1164 where it is stated:

“where a profit-earning chattel, that is a chattel used by the plaintiff in the course of his business is damaged or destroyed the plaintiff is entitled to loss of profits during the period which is reasonable required to replace the lost article in the market. The cost of a substitute, reasonable hired may provide the measure of damages.”

This statement of law is based on the decision in Liesbosch, Dredger v. S. S. Edison, [1933] A. C. 449, H.L. It was reiterated in the Cases of The Aprad, [1934] All E. R. Rep. 326; Pramppery & Another v. James A. Cuthlertson Ltd. [1951] SLT 191; and Jones v. Port of London Authority, [1954] I Lyoyd's Re. 489.

We do not know whether in Ann Moraa's case the attention of this Court was drawn to the cases reffered to above. Had that been done it is very unlikely that the court would have held that a plaintiff is entitled to a reasonable figure for loss of user of a profit-earning chattel until he receives the pre-accident value of the destroyed article. We do not think the court intended to depart from these authorities which were cited to us and which we have referred to. In our view, the statement in ANN MORAA's case that a plaintiff is entitled to wait until he is paid the pre-accident value of his destroyed property does not reflect the correct legal position. The position law is that a man in the position of the respondent must take reasonable steps to mitigate his damages and for this purpose there is no distinction between a damaged and destroyed article.

In the upshot, we allow this appeal and set aside the decree of the superior court in respect of special damages for loss of profits and award costs of the appeal to the appellant. The respondent's costs in the superior court shall be based on the judgment consented to.

Dated and delivered at Mombasa this 26th day of January , 1996.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL