Case Number:	Civil Appeal 38 of 2020
Date Delivered:	09 Dec 2021
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	David Kipyegomen Kemei
Citation:	Bungoma Line Sacco Society Limited v Super Bargains Hardware (K) Limited [2021] eKLR
Advocates:	Nanzushi for Anwar for Appellant Mrs Wakoli for Onyikwa for Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO. 38 OF 2020

BUNGOMA LINE SACCO SOCIETY LIMITED.....APPELLANT

VERSUS

SUPER BARGAINS HARDWARE (K) LIMITED.....RESPONDENT

(Being an Appeal against the Judgement of the Honourable S. O. Mogute (PM)

delivered on the 30th day of January, 2020 in Bungoma Chief Magistrate's

Court Civil Suit No. 264 of 2019)

BETWEEN

BUNGOMA LINE SACCO SOCIETY LIMITED.....PLAINTIFF

AND

SUPER BARGAINS HARDWARE (K) LIMITED.....DEFENDANT

JUDGEMENT

1. The Appellant herein filed a suit in the trial court on 2nd August, 2019 seeking the following reliefs:

i. Kshs. 2,657,750/- being special damages.

ii. Interest at court rates.

iii. Costs of the suit.

The claim had arisen as a result of a road traffic accident which occurred on **23rd February, 2019** along Bungoma-Chwele road at Marakaru area when the Respondent's motor vehicle registration No. KBU 447P Isuzu Truck veered off its path and violently rammed onto the Appellant's motor vehicle registration No. KCR 556Y Toyota Hiace matatu and as a result caused extensive damage to it and which was declared a write off. The particulars of the Respondent's authorized driver's negligence were pleaded and the particulars of damage incurred also provided.

2. The Respondent denied the Appellant's claim and the matter proceeded to hearing.

3. During the hearing the appellant called **PW1, Corporal Jane Orry**, from Bungoma Traffic Base who testified that the Respondent's motor vehicle registration No. KBU 447P changed lanes and went to that of the oncoming motor vehicles and as a result collided with the Appellant's matatu head on. She further noted that the driver of KBU 447P is still at large. On cross-

examination, she testified that there were no pre-accident defects that were noted. According to **PW2, George Mathu**, a motor vehicle loss assessor from Meka Automobile Works and Assessors stated that he assessed the damage caused to motor vehicle registration No. KCR 556Y and prepared a report to that effect. He produced the report dated **26th February, 2019** as PEx3 in support to the Appellant's case. On cross examination, he testified that the pre-accident value of motor vehicle registration No. KCR 556Y was Kshs. 2,980,000/=and that Kshs. 2,132,000/=was required for the repairs. On re-examination, he noted that there could be a variation of 10% in the figures. **PW3, Omuse Fadhili Barasa**, the driver of motor vehicle registration No. KCR 556Y Toyota Hiace testified that the driver of motor vehicle registration No. KBU 447P came to his lane and ended up colliding with his motor vehicle head on. On cross examination, he testified that the motor vehicle that hit him was heading towards Bungoma from Chwele and that it hit him from bonnet backwards. He noted that his motor vehicle had proper brakes and that the accident occurred at around 3.00 Pm and that it had earlier rained. On re-examination, he reiterated that the accident occurred on his lane (left side) facing Chwele from Bungoma. He added that the lorry hit the Matatu on the right side of the front side. **PW4, Augustine Mureithi Wangui**, the secretary to the Appellant, testified that, the motor vehicle registration number KCR 556Y belongs to the Appellant and he produced a copy of the log book as PEx4. He also produced a receipt for towing charges as PEx5 and search certificate as PEx6 (a). On cross examination, he testified that he was not at the scene of the accident and that the vehicle was sold at Kshs. 350,000/= and he has no receipt to that effect.

4. The Appellant closed its case but the Respondent did not tender any evidence in support of their defence on record.

5. The Appellant being aggrieved by the judgement of **Hon. S.O Mogute (PM)** delivered on **30th January 2020** in **Bungoma CMC Civil Case No. 264 of 2019** preferred the instant appeal which seeks this court to address the issue as to whether the learned magistrate erred in law and in fact in awarding repair costs for a vehicle that was declared a constructive loss after the accident.

6. The trial court found the Respondent wholly liable for the accident and held that the costs of repairs is less than the value of the motor vehicle and he was of the view that it will be economical to repair the motor vehicle instead of going for the value of the motor vehicle. He further held that, the Appellant failed to tender evidence to the court to show how the value of the salvages was arrived at and no receipt was produced to that effect and that the assessor did not elaborate in his report how he arrived at the value of the motor vehicle before it got involved with the accident. He proceeded to only award the Appellant costs of repairs amounting to Kshs. 2,132,000/=.

7. According to the appellant, the Respondent was at all material times the registered owner of motor vehicle Reg. No. KBU 447P while the Appellant was the registered owner of motor vehicle Reg. No. KCR 556Y and that on **23rd February, 2019** the Appellant's motor vehicle was violently struck by the Respondent's motor vehicle whereof it was extensively damaged to an extent that it was declared a constructive total loss according to the Assessment Report dated 26th February, 2019. The Appellant sought to be compensated for the value of the vehicle, owing to the fact that the vehicle was uneconomical to repair as per the assessment report produced as Pexhibit-3(a) but the learned magistrate declined to award the value of the vehicle and only awarded repair costs.

8. Being aggrieved by the decision of the trial court, the Appellant preferred this instant Appeal against the said judgement on quantum of damages assessed which is premised on five grounds namely: -

i. That the learned Magistrate erred in fact and in law by holding that the Appellant failed to prove the pre-accident value of the vehicle the subject of the suit-KCR 556Y yet the assessment report produced as P-exhibit 3(a) was instructive of the pre accident value.

ii. That the learned magistrate erred in fact and in law by holding that the Appellant failed to prove salvage value of the vehicle registration number KCR 556Y yet the assessment report produced as P-exhibit 3(a) was instructive of the salvage value.

iii. That the learned magistrate erred in fact and in law by awarding the repair costs of the vehicle yet the assessment report produced as P-exhibit 3(a) and the evidence of the assessor-PW2 declared the vehicle a write off.

iv. That the learned magistrate erred in fact and in law by failing to consider the evidence of PW2 and the assessment report produced as P-exhibit 3(a) declaring the vehicle KCR 556Y as constructive total loss unfit and for repair.

v. **That the learned magistrate erred in fact and in law by falling to treat the vehicle the subject of the suit-KCR 556Y as a write off despite the overwhelming evidence which was never challenged**.

9. The Appellant sought this court to allow the appeal; set aside the trial's court finding on quantum and substitute it with the finding that the vehicle **KCR 556Y** was a write off and thus, the quantum be reviewed upwards and that costs be awarded to the Appellant.

10. This appeal was canvassed by way of written submissions. The appellant's submissions are dated 2/11/2021. The Appellant submitted that it did discharge the burden of proof that the pre-accident value of the vehicle was Kshs. 2, 980,000/= as required under **section 107** of the **Evidence Act**. Learned counsel referred to PW2's evidence and the loss assessment report pexhbit-3(a) that was not challenged in any material aspect during cross -examination and that the learned magistrate erred in noting that PW2 did not explain how he arrived at the pre-accident value. He relied on the case of **David Bagine vs Martin Bundi (1997) eKLR** and **Eliud Manaifu Sabuni v. Kenya Commercial Bank (2002) eKLR.** Counsel further argued that it was contradictory for the magistrate to state that PW2 did not explain as to how he arrived at the pre-accident value of the vehicle when he relied on the same report to award repair costs in the same judgement. He relied on the case of **Nkuene Dairy Farmers Co-op Society Ltd & another v. Ngacha Ndeiya (2010) eKLR, and Ratcliffe v. Evans (1892) 2QB 524.** Counsel submitted that the learned magistrate erred by not appreciating that the PW2's report as Pexhibit-3 (a) was instructive of the salvage value of the vehicle and that it is assessed and not proved by way of receipts and that expecting a receipt would overburn the Appellant. The same salvage value was not even challenged by the Respondent and that the magistrate erred by holding that that Appellant failed to prove the salvage value. Counsel submitted that, the learned magistrate failed to address himself to that specific aspect of the report which remained uncontroverted and which is very clear that the vehicle was uneconomical to repair due to the magnitude of the collision and further that the damages were likely to come into view on stripping mainly on the transmission escalating the above figures which were already high. He relied on the case of **Abdi Yusuf Abdilleh v. P.N Mashru (2020) eKLR.** Counsel finally submitted that the general objective of compensation in tortious claims is *restitutio in integrum* where the victim of the tort should be restored as far as money can do so to as nearly the same position as he would have been had the tort not been committed. Counsel procced to note that the vehicle of the subject suit, according to the evidence of PW2 and the Pexhibit-3(a), was declared a constructive total loss, it being beyond economical repairs and that the salvage was sold at Kshs. 350,000/= as there was no best guidance as regards the repairable state of a vehicle after accident that the assessor's report captured.

11. Counsel urged this court to find merit the instant appeal and allow the same by setting aside the trial court's finding on quantum awarding repair costs and substitute it with a finding that vehicle KCT 556Y was a write off and thus the Appellant is entitled to the pre accident value of KSHS. 2,980,000/= less salvage value Kshs. 350,000/=and review the quantum upwards by Kshs. 498,000/= which is the difference between the value of the vehicle less the repair costs awarded.

12. In opposing the appeal, it was submitted by the Respondent that this is an appellate court and ought not to interfere with the trial's court findings on facts unless the same are founded on wrong principles of fact or law as held in **Selle vs. Associated Motor Boat Co. [1968] EA 123**. Counsel further submitted that the Appellant did not prove the analysis of how the motor vehicle loss assessor arrived at the pre-accident value of the accident motor vehicle as the same must be strictly proved as to whether it is economical to award the claim. He relied on the case of **Billiah Matiangi vs. Kisii Bottlers Limited & Another (2012) eKLR.** Counsel concluded his submissions by urging this court to dismiss the appeal with costs to the Respondent.

13. I have considered the rival submissions and the authorities cited. I have also re-evaluated the evidence which was tendered before the trial court for consideration.

14. It is clear that the appeal is challenging the trial court's finding on quantum, specifically the award made under repair costs. I therefore deem it practical to address the five (5) grounds of appeal contemporaneously under one head.

15. I have considered the foregoing. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not

bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

16. My duty as a first appellate court is to re-evaluate the evidence adduced before the trial court and come up with my own findings. While doing this, I ought to be minded that **"an appeal court would not normally interfere with the finding of facts by the trial court unless it is based on no evidence or it is based on misapprehension of the evidence or the judge has acted on wrong principle in reaching the finding he did."** (See **Sumaria and Another vs Allied Industries Limited 2017 eKLR and Ephantus Mwangi and Geoffrey Nguyo Ngatia v Duncan Mwangi Wambogo (1982-88) 1KAR 278**).

17. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

18. I now turn to the issue of quantum. It is trite law that an appellate court can only interfere with an award of damages where the award was either based on wrong principles or is so inordinately high or low as to be a wholly an erroneous estimate (See **Kemfro Limited t/a Meru Express Services v Lubia and Another [1987] KLR30**).

19. The principle espoused in the law of tort is to restitute a victim of a tortious act to as much as possible to where he would have been if he had not suffered the tort (restitution *in integrum)*. The rationale for the rule that special damages must be strictly proved is to police the practice so that Plaintiffs do not present exaggerated claims not tied to actual losses. The rule is, therefore, that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation can be considered or otherwise demonstrate with the permitted degree of certainty what loss or amount, he will suffer in the future.

20. In the present case, the Appellant demonstrated with reasonable certainty what loss it had suffered. It was not in dispute that the accident led to the appellant's vehicle being extensively damaged and that the loss assessor did give evidence on the extent of the loss and produced the loss assessment report. He was the expert and ought to be given some leeway regarding assessment of vehicles damaged as a result of an accident. In any event, the trial court did agree with him on the assessment of the pre-accident value and ought to also believe him on the constructive value loss as well as the salvage value.

In Amosam Builders Developers Ltd vs Betty Ngendo Gachie& 2 other (2009) eKLR the Court of Appeal stated;

"In the case before us, there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it……''

21. As regards to the special damages for total loss, PW2 produced the valuation report in which the assessor found that the pre-accident value of the vehicle was Kshs 2,980,000/=while the salvage value was found to be Kshs 350,000/=. There was no objection to the production of that report. Accordingly, there can be no valid objection to the contents of the said report. In any event, the respondent opted not to tender any evidence in rebuttal. In **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** the Court of Appeal expressed itself as follows

"The onus was on the appellant to prove the special damages strictly. The payments made by the appellant for the various purchases are certainly consistent with the damage noted by the police in the certificate of inspection issued to the appellant and produced as an exhibit without objection. The purchases were supported by proper documents and there was no reason why the appellant could not produce them in court as he sought to do. The documents were admissible and ought to have been admitted and considered by the trial court. The omission to do so invites the court's intervention and the appeal is allowed. The appellant pleaded the cost of repairs at Kshs. 700,000/= although he stated the amount was more than that. That, however, was not specific pleading and there was no leave sought to amend the pleading to insert the correct figure. In the result, although the appellant proved a higher figure for repair charges, he can only be awarded the amount pleaded at Kshs 700,000/=."

22. It is therefore my view that the said report was properly admitted and its contents relied on. In any event the respondent did not

controvert the said report by calling their own expert and further failed to call evidence in defence and hence the trial court had to go by what had been availed by the appellant. It was however submitted that the pre-accident value ought to have been factored in and the salvage value subtracted from the pre-accident value. The Court of Appeal in **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998** was of the view that:

"Where there is no proof of actual repair the plaintiff is only entitled to the pre-accident value less the salvage value."

23. In those circumstances I agree with the appellants that to award the Appellant the pre accident value less salvage. It follows that the salvage value ought to be subtracted from the pre-accident value.

24. The determination of the pre accident value depended on the conflicting evidence of the professionals that were presented before the court. Such evidence is opinion evidence and **section 48 of the Evidence Act** makes provision for it. There is no doubt that the witness called by the Appellant was an expert qualified in motor assessment. That, notwithstanding, as a general rule, evidence by experts being opinion evidence is not binding on the court, the court has to consider it along with other evidence and form its own opinion on the matter in issue.

25. The principle is also enunciated in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that;

"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

26. The trial court in addressing this issue stated;

"I have seen the report of the assessor produced herein in support of the plaintiff's claim. The pre-accident value is Kshs 2,980,000/= less salvage Kshs. 350,000.

I also note from the same report that the cost of repair is Kshs. 2,132,000/=. It appears to me that the cost of repairs is lower than the pre- accident value of the motor vehicle."

27. It seems to me that the learned trial magistrate was trying to weigh between two devils and chose the lesser one in terms of cost and that is where he went into error because the assessment report was stark clear that the vehicle had been declared a write off and hence the only way out to compensate the victim was to allow the pre-accident value less the salvage as the vehicle could not be economically viable to repair it. Hence, the amount due to the appellant will be Kshs 2, 2980,000/ less Kshs 350, 000/ which comes to the sum of Kshs 2, 630,000/.

28. In the result, it is my finding that the appeal has merit. The same is allowed. The trial court's judgement is hereby set aside and substitute it with judgement being entered for the appellant in the sum of Kshs 2, 630,000/ being the pre-accident value less salvage value as well as the sum of Kshs 27,200 being proved special damages. The appellant is awarded the costs of the appeal.

29. It is so ordered.

DATED AND DELIVERED AT BUNGOMA 9TH THIS DAY OF DECEMBER, 2021.

D. Kemei

Judge

In the presence of:

Nanzushi for Anwar for …….Appellant

Mrs Wakoli for Onyikwa for…….Respondent

Wilkister ……...Court Assistant