Case Number:	Civil Appeal 52 of 1990
Date Delivered:	22 Jan 1993
Case Class:	Civil
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Johnson Evan Gicheru, Joseph Raymond Otieno Masime, Mathew Guy Muli
Citation:	Marshall's East Africa Limited v Wilson Osoro [1993] eKLR
Advocates:	-
Case Summary:	**Marshall's East Africa Limited *v* Wilson Osoro** Court of Appeal, at Nakuru January 22,1993 Masime, Gicheru & Muli JJ A Civil Appeal No 52 of 1990 (Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Aganyanya J) dated 14/7/89 in HCCC No 30 1988) ***Lien*** *– chattels lien - unpaid repairer's lien over a chattel for the costs of its repairs – how the lien is created and how it may be lost – owner delivering a chattel for repair but the repair charges are not settled –whether the lien arises where the repairer looks to a party other than the chattel owner for the payment of the repair charges – where the third party fails to pay the charges – chattel having been released to the owner – whether any lien arising was lost once the chattel was released and the lien could not be recalled– whether the*

repairer could properly repossess the chattel and seek to assert his lien in such circumstances.

Insurance *– insurance claim – insured vehicle damaged in accident – insurer instructing the insured to deliver the vehicle to a designated repairer – insurer failing to meet the cost of repairs after vehicle had been repaired and released to the insured – vehicle repossessed and detained by the repairer – whether the repairer had a lien over the vehicle – suit by insured against repairer for loss of user of the vehicle – repairer counterclaiming for the repair charges – whether the insured was entitled to damages – whether the repairer was entitled to the repair charges.*

Damages *– special and general damages – damages for loss of user of a motor vehicle – whether such damages are special damages or general damages.*

The respondent was the owner of a motor vehicle which was covered under a comprehensive policy of insurance with Delta Insurance Company. In June 1987, the vehicle was involved in an accident as a result of which the respondent suffered serious injuries and the vehicle was extensively damaged. In due course, the respondent filed a claim for the cost of repairing the vehicle with the insurance company, which directed him to deliver the vehicle to the appellant for repair.

Although it was the respondent who had delivered the vehicle to the appellant, the estimate of the cost of repairs and the instructions to proceed with the repair were done by an assessor appointed by the insurance company. All the vouchers relating to the repair were on the account of the company and upon the completion of the repair work, the appellant handed over the vehicle to the respondent without requiring him to settle the repair bill.

Shortly afterwards, the insurance company ceased to be in business after it was denied registration to conduct insurance business. After the appellant's attempt to have the company settle the repair bill failed, it took the vehicle from the respondent and detained it.

The respondent sued the appellant claiming general damages for loss of user of his vehicle, though he did not give an indication of the loss he had suffered. For its part, the appellant filed a defence and couterclaimed for the cost of the repairs. In its judgment, the High Court (Aganyanya J) observed that the respondent's work involved travelling and that he must have suffered great inconvenience and awarded him Kshs 30,000 in general damages. The court, however, did not consider the appellant's counterclaim.

The appellant brought this appeal against the decision. The issues on the appeal were whether the appellant had a repairer's lien over the vehicle at the time it repossessed it; whether and to what measure the respondent was entitled to the award of general damages and whether the appellant's counterclaim should have been allowed.

Held:

1. If a chattel is in repair, the repairer acquires a lien on the chattel for the cost of repairs against the owner. Such lien, however, is lost on loss of possession by delivery of the chattel to the owner and it cannot be recalled.

2. Where the repairer does not look to the owner for payment of the charges the lien may not attach to the chattel in the first place. In this case, any lien that the appellant had on the respondent's vehicle was lost upon the delivery of the vehicle and it could not be recalled. The appellant's seizure of the vehicle was therefore unlawful.

3. Loss of user is an ascertainable item of loss. It is a special damage. As the trial court had held that it could not award special damages in the absence of evidence to support such a claim, the court could not substitute general damages for it. The trial court had misdirected itself in its decision on that issue.

4. However, the trial court was in the circumstances entitled to award nominal damages to the respondent. Such damages would be assessed at Kshs 100 per day for the 85 days that the vehicle was detained, totalling to Kshs 8,500.

	5. Regarding the appellant’s counterclaim, the fact that the insurers did not meet the repair charges did not alter the fact that the respondent obtained value from the appellant in the repair of his vehicle. In these circumstances, the appellant’s counterclaim ought to have been allowed. *Appeal allowed, judgment of the High Court set aside, judgment entered for the appellant on the counterclaim.* **Cases** No cases referred to. **Texts** Hailsham, Lord *et al* (Eds) (1979) *Halsbury’s Laws of England;* London: Butterworths & Co 4th Edn Vol XXVIII p 3 paras 537, 540, 550 **Statutes** No statutes referred.
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed, judgment of the High Court set aside, judgment entered for the appellant on the counterclaim
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAKURU

(Coram: Masime, Gicheru & Muli JJ A)

CIVIL APPEAL NO 52 OF 1990

MARSHALL'S EAST AFRICA LIMITED …….….........……APPELLANT

VERSUS

WILSON OSORO ……………………………………RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Eldoret (Aganyanya J) dated 14/7/89

in HCCC No 30 1988)

JUDGMENT

At all times material to this suit, Wilson Osoro (the respondent) owned a motor vehicle registration number KUQ 442 a Peugeot 304 station wagon. He insured that vehicle comprehensively with Delta Insurance Co Ltd. In June 1987 the respondent was involved in an accident at Maseno in which he was seriously injured and the vehicle was extensively damaged. The respondent made a report of the accident to his insurers and made a claim to cover the necessary repairs.

When the respondent came out of hospital he, at the direction of his insurers, took the vehicle to Marshalls (EA) Ltd (the appellant) at their Eldoret Workshops for repairs. The insurers instructed a Mr McNaughton, an assessor, to inspect the vehicle, obtain an estimate of the cost of repairs and if satisfied with it to authorize the appellant to carry out the repairs. In due course the assessor authorized and the repairs were carried out upon the respondent paying a sum of Shs 2500/- being the mandatory excess under his insurance policy. Apart from an unavailable gutter moulding the car was ready for collection and was collected by the respondent on 30th October, 1987. The respondent was told he would be advised when to return the car for fitting of the gutter moulding.

As regards the costs of repairs the appellant prepared and issued a workshop invoice to Delta Insurance Co Ltd. It appears that shortly later the insurance company was denied registration to conduct insurance business according to a letter which the respondent received on 23rd November,1987 giving notice of cancellation of his insurance policy. At the same time the insurers advertised the fact in the press and advised that a firm of lawyers would henceforth handle their dealings with the public. Despite this assurance however, the appellant's effort to get their repair charges amounting to Shs 37,255.60 in respect of the respondent's vehicle paid were fruitless. It appears to us that in the circumstances somebody at the appellant's Eldoret workshop remembered that the gutter moulding for the respondent's car was still to be fitted and used the excuse to repossess the car. The respondent was telephoned to take the car back to the garage and when he did so the car was promptly taken into custody for the non-payment of the repair charges.

The respondent was surprised and instructed counsel who wrote a demand letter to the appellant on 11th February, 1988 and filed suit on 8th March, 1988 seeking the release of his car, general damages, unspecified special damages, costs and interest. The appellant on being served with the summons appeared and filed a defence and counter claimed the cost of repairs and costs of the suit.

The learned trial judge having heard the suit held that the appellant had no *lien* over the vehicle and that consequently the impounding of the vehicle was irregular. He assessed and awarded the respondent Shs 30,000/= by way of the general damages for loss of use of the vehicle. The learned judge however said nothing about the appellant's counter claim. It is from these decisions of the trial court that this appeal arises.

The memorandum of appeal contains some 20 grounds of appeal but there are only three issues which were canvassed before this Court:

a) Did the appellant have a repairer's *lien* over the respondent's car at the time it repossessed it"

b) Was the respondent entitled to general damages and if so was the award of Shs 30,000/- just"

c) Should the appellant's counter claim have been allowed"

It was common ground that although the respondent delivered his vehicle to the appellant for repairs the estimate of the cost of repairs and the instructions to proceed with the same were by Mr Mchoughton, the agent of Delta Insurance Co Ltd. That is borne out by exhibits D1 and D2 the repair estimates duly signed by the assessor. The respondent for that reason did not sign Exh 6 which are the repair instructions – against the customer's signature. Only the insurance claim number is shown and the account is shown to be for the insurance company. All other vouchers relating to this job show they were for the account of the insurance company and on completion of the repairs on 30th October, 1987, the appellant handed over the vehicle to the respondent without requiring him to settle the repair bill. Indeed, the satisfaction note signed by the respondent states that the payment of account for the repairs by his insurers would discharge his claim against the insurers.

If a chattel is in repair, the repairer acquires a *lien* on the chattel for the cost of repairs against the owner. Such *lien* is however lost on loss of possession by delivery of the chattel to the owner and cannot be recalled. See *Halsbury's Laws* Vol 28, 4th Ed sect 3 paras 537, 540 and 550. It would appear to this Court that where as in this suit, the repairer does not look to the owner for payment of the charges the *lien* may not attach to the chattel in the first place. In the light of the above legal position any *lien* that the appellant had on the respondent's vehicle was lost upon delivery of the vehicle and could not be recalled. The appellant's seizure of the vehicle when it was returned to their workshop for the fitting of the gutter moulding was therefore unlawful.

The appellant detained the vehicle from 9th February, 1988 until it released it on 5th May, 1988 some 85 days. The respondent originally claimed special damages for loss of user at the rate of Shs 500/= per day but this particularized damage was abandoned at the trial and the respondent was content to claim general damages. In his evidence at the trial the respondent claimed loss of user of the vehicle in the form of general damages and gave no indication what loss he suffered. Despite this the learned trial judge says:

"…….. in view of the fact that his work involved travelling he must have suffered great inconvenience during the period the vehicle was repossessed by the (appellant). Considering the evidence and all the circumstances of the case and doing the best I can, I would award him a lump sum of Shs 30,000/- as

general damages for loss of user of the vehicle."

With respect, the learned judge misdirected himself in so deciding. Loss of user is an ascertainable item of loss or put another way a special damage. As the learned judge held that in the absence of evidence of special damage he had no basis upon which to award any, he could not substitute general damages for it. In our view however, the learned judge was entitled in the circumstances to award nominal damages to the respondent and we assess these at Shs 100/- per day making in all Shs 8,500/-. We therefore set aside the award of Shs 30,000/- and substitute therefore the sum of Shs 8,500/- plus costs thereon.

We now come to the question of the appellant's counterclaim. As we have stated the trial judge did not deal with this at all. The primary responsibility for payment of repair charges for the vehicle was the respondent's. Because he was insured for the accident damage to his vehicle however, he looked to the insurers to meet the repair charges. The fact that for reasons we need not go into the insurers did not meet the charges does not alter the fact that the respondent obtained value from the appellant in the repair of his vehicle. In these circumstances the appellant's counterclaim against the respondent ought to have been allowed and we hereby allow it with costs. We therefore enter judgment for the appellant against the respondent as claimed in the counter claim plus costs.

In the result the appeal is allowed and the judgment of the superior court is set aside and substituted to the extent shown and judgment entered for the appellant on its counter claim. In view of this result we make no order as to the costs of this appeal.

Orders accordingly.

Dated and Delivered at Nakuru this 22nd day of January, 1993

J.R.O MASIME

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JUDGE OF APPEAL

J.E. GICHERU

………………………….

JUDGE OF APPEAL

M.G. MULI

………………………….

JUDGE OF APPEAL

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