**Karmali v Shah**

[2000] 2 EA 392 (CAK)

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 26 May 2000

**Case Number:** 178/97

**Before:** Akiwumi, Tunoi and Bosire JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Evidence – Documentary evidence – Documents produced by Plaintiff and not challenged by*

*Defendant – Weight to be placed on such documents – Whether such documents can form basis for*

*judgment in Plaintiff’s favour.*

**Editor’s Summary**

On 21 June 1994 the Appellant’s vehicle was involved in an accident with a vehicle belonging to the

Respondent. The Appellant then filed suit against the Respondent on the basis of negligence on the part

of the Respondent’s driver claiming damages for, *inter alia*, loss of user for the three weeks it took to

repair the vehicle. The parties subsequently agreed that the Respondent be liable for the cost of the police

abstract and investigator’s fees as well as 80% of the proved damages. At the trial, the only witness to

testify was the Appellant’s general administrator who gave evidence to establish the average monthly

income earned by the vehicle and produced various documents to back its claim in respect of loss of user.

The hearing was then adjourned by consent to 21 April 1997 for assessment of damages. On that date, the

Respondent applied for an adjournment of the hearing but the application was denied. Counsel for the

Appellant then made his submissions to which no submissions in reply were recorded. On 15 May 1997,

the trial Judge dismissed the Appellant’s claim for special damages for loss of user on the ground that the

Appellant had failed on a balance of probability to prove his claim for loss of use and income. On appeal.

**Held** – The documents produced by the Appellant were not challenged and provided *prima facie*

evidence of the special damages suffered. The fact that the documents were produced by the Appellant

did not mean that they were unreliable. Additionally, the circumstances of the case as a whole including

the Respondent’s behaviour in not really caring what happened in the case showed that the trial Judge

erred in rejecting the unassailed documentary evidence of

Page 393 of [2000] 2 EA 392 (CAK)

the Appellant. Accordingly, the appeal would be allowed and the Respondent ordered to pay the proved

special damages less the 20% agreed contributory negligence.

**Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Mbogo and another v Shah* [1968] EA 93

**Judgment**

**AKIWUMI, TUNOI AND BOSIRE JJA:** The Appellant’s large vehicle, a prime mover with a tanker

trailer, was on 21 June 1994 involved in an accident with the Respondent’s vehicle, a semi-trailer tanker.

The Appellant, alleging negligence on the part of the Respondent’s driver who at the time was driving the

Respondent’s semi-trailer tanker, sued the Respondent for damages for the extensive damage done to his

large vehicle and for the resultant loss suffered by him. In this respect, the Respondent sought special

damages, *inter alia*, for the cost of repairs and the pre-accident value of his large vehicle, and for loss of

user for the three weeks that it took to repair the large vehicle at the rate of KShs 25 000 per day making

a total of KShs 525 000. Subsequently, it was agreed by consent that apart from the Respondent being

liable in full for the cost of a police abstract of KShs 100 and the investigator’s fees of KShs 13 939, the

Respondent be only liable for 80% of the proved damages sustained.

Kenneth Karike, an advocate from Kampala who was employed as the legal adviser and general

administrator of the Appellant’s business, was the only one who gave evidence at the trial held by Juma

J. The purpose of his evidence was to establish the average income which, prior to the accident, the

Appellant’s large vehicle earned per month, and upon which the Appellant’s claim for loss of user could

be based. He said that this was between US$ 9 000 and US$ 9 100. In support of this, he produced

without any objection by the Respondent or the Learned Judge two invoices respectively, for trips made

by the large vehicle between 22 February and 17 March 1994, and during April 1994. He also produced

copies of the two letters from the Appellant acknowledging receipt of the payments made in respect of

the invoices. The validity of these invoices and the letter of acknowledgement of payment were not

challenged. After this, the matter was stood over by consent to 21 April 1997, for the assessment of

damages. On that date, the Respondent applied for an adjournment, which the Learned Judge dismissed

in the following significant words: “The hearing date was obtained by consent. It appears the Defendant

is not serious with this case. Previous applications for adjournment were at the request of the Defendant.

Application for adjournment refused”.

After this ruling, the Learned Judge upon the application of the Appellant dismissed the Respondent’s

counterclaim for non-attendance by the Respondent. Counsel for the Appellant then made his

submissions and with respect to the loss of use, drew attention to the invoices and the letters of

acknowledgment and to the current rate of exchange of the US Dollar to Kenya Shillings namely, KShs

56 to the US Dollar. According to him, the first and second

Page 394 of [2000] 2 EA 392 (CAK)

invoices and their corresponding letters of acknowledgement demonstrated respectively, a loss of use at

the rate of KShs 24 128 and KShs 24 656 a day. He then asked for KShs 25 000 a day for three weeks

namely, KShs 525 000. Counsel for the Respondent does not seem to have made any submissions in

reply.

The matter was then stood over for judgment on 15 May 1997. On that day, the Learned Judge

dismissed the Appellant’s claim for special damages for loss of use and income. The pertinent part of his

judgment is as follows:

“To prove his claim for loss of income the Plaintiff produced his invoice to Peninsular Oils Ltd and his letter

of acknowledgment to the said company confirming payment. Whereas I agree that the Plaintiff’s said vehicle

was used in transporting cargo from Mombasa to Kampala, I am not persuaded as to the cost of hiring the

vehicle. There was no sufficient evidence in this respect. One cannot expect the court to rely on documents

solely produced or authorised by the Plaintiff. There was no Hire Agreement produced between the Plaintiff

and his customers. One would have expected at least a document from the customer either forwarding

payment or acknowledging the invoice. On the evidence before me I hold that the Plaintiff has failed to prove

on a balance of probability his claim for loss of use and income. That aspect of the claim is therefore

dismissed”.

It is against this part of the judgment of Juma J that the Appellant has appealed. The main ground of the

appeal is that the Learned Judge, having regard to the evidence given at the trial, erred in dismissing the

Respondent’s claim for special damages for loss of use and income. We are aware of the celebrated case

of *Mbogo and another v Shah* [1968] EA 93 where it was held that a Court of Appeal should not interfere

with the exercise of the discretion of a judge unless it is satisfied that the judge misdirected himself in

some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole

that the judge was clearly wrong in the exercise of his discretion and that as a result, there has been

injustice.

It is clear from the evidence adduced before the Learned Judge that the documentary evidence

produced by the Appellant to prove its claim for special damages for loss of use and income in respect of

its damaged and undeniably commercial vehicle, which was not challenged, was *prima facie* evidence as

to the special damages suffered by the Appellant. These documents it is true, were produced by the

Appellant, but that does not mean that they must be unreliable merely because of this. These documents

also show that the Appellant had received money for the hire of its vehicle, which is taxable, something

which in normal circumstances, one is unlikely to openly admit when one has not really received such

money. Indeed, this is why we find the following categorical principle expressed by the Learned Judge to

be a clear misdirection: “one cannot expect the court to rely on documents solely produced or authored

by the Plaintiff”.

But apart from that, it is manifest from the case as a whole – the uncontested admission, or challenge

of the veracity, of the invoices and letters of acknowlegment produced by the Appellant and indeed, the

behaviour of the Respondent as already referred to by the Learned Judge, in not really caring what

happened in the case – that the Learned Judge was clearly wrong in the exercise of his discretion in

rejecting the unassailed documentary evidence of the Appellant, and which in our view, resulted in an

injustice.

Page 395 of [2000] 2 EA 392 (CAK)

We have considered all the authorities cited in this appeal and have come to the conclusion that in the

particular circumstances of the case, the Appellant was able to establish that on an average, the special

damages claimed for loss of use and income for the three weeks amounted to KShs 525 000. We,

therefore, allow the appeal and order that the Respondent pays to the Appellant the sum of KShs 525 000

by way of proved special damages for loss of use and income less 20% agreed contributory negligence on

the part of the Appellant, plus interest at court rates. The Appellant will also have its costs of this appeal.

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*