REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 129 OF 2019

JULIUS KARIUKI KIMANI..APPELLANT

-VERSUS-

EVANSON KARIUKI A.K.A EVANSON MWANIKI....1ST RESPONDENT

JUDGMENT

1. This appeal arises from the judgment delivered by the Lower Court on 26/07/2019 in Nakuru CMCC No. 833 of 2016. The case itself arose from a road traffic accident which occurred on 15/04/2016 along Nakuru-Eldoret Highway. It involved a matatu registration number KAW 805E belonging to the Appellant and motor vehicle registration number KCD 844W belonging to the Respondent.

2. The events of the accident are not disputed. Both PW1, No. 49807, CPL Jackson Nkonge and PW2 Julius Kariuki Maina (Julius) testified that the Appellant was driving towards Eldoret at Ngata area when the Respondent's motor vehicle hit his matatu from the back damaging it.

3. Julius, who is the owner-driver of the matatu, testified further that he used to make Kshs. 3000 daily from the matatu; and that after the accident, the vehicle was at the garage for 10 days undergoing repairs. He further testified that the vehicle stayed at the garage for one month because he did not have money to pay for the repairs and collect the same. That the repairs cost him Kshs. 174,000.

4. Julius also testified that the receipts for the repair of the matatu were with his SACCO which had given him a loan in order to pay for the repairs. As such, Julius explained that he could not produce the receipts. Instead, by stipulation by both parties, Julius produced a Vehicle Accident Assessment Report by AA Kenya. The report estimated that the repairs on the matatu would cost Kshs. 162,748/- inclusive of VAT.

5. The Parties entered into a consent on the question of liability at 80:20 if favour of the Appellant and left the issue of damages to the Court.

6. In his judgment, the Trial Magistrate awarded the Appellant Kshs. 5240 /- as special damages and Kshs. 24,000 for loss of user. He also awarded the Appellant costs of the suit plus interest from the date of filing.

7. The learned magistrate however declined the prayer for repair costs reasoning that:

> *The amount incurred in repairing the motor vehicle is as (sic) special damage which must not only be specifically pleaded but strictly proved. Although the Plaintiff (and the defendant) produced by consent the assessment report, the same in the absence of receipts, does not amount to evidence of*

the repair costs having been paid…

The claim for costs of repairs fails, in the circumstances, as the same is not proved.

8. The Appellant is aggrieved by the decision of the trial magistrate and has preferred the present appeal on the following grounds

> *1. THAT the learned trial magistrate erred in law and in fact by not awarding damages for costs of repair of the subject motor vehicle to the Appellant herein.*
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> *2. THAT the learned trial magistrate erred in law and in fact by not properly analyzing and or considering the evidence by all parties, applicable legal principles, and other materials on record while arriving at his decision/ finding on the award for costs of repair of the subject motor vehicle.*
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> *3. THAT the learned trial magistrate erred in law and in fact by holding that the claim for cost of repairs of the subject motor vehicle had not been proved.*
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> *4. THAT the learned trial magistrate erred in law and in fact by not dutifully and or as required considering the Appellant's submissions while reaching his finding/decision on the award for costs of repairs of the subject motor vehicle*
>
> *5. THAT the learned trial magistrate erred in law and in fact by not taking into account the legal/factual effect of consent on both liability and production of documents by both parties herein while reaching his decision/finding on the award for costs of repairs of the subject motor vehicle.*
>
> *6. THAT the learned trial magistrate erred in law and fact in rendering a judgment that is contradictory, skewed and not based on proper evaluation and consideration of the pleadings, evidence on record, submissions by all parties and the applicable law and principles for award of damages.*

9. Both parties filed submissions as per the directions of the Court. Both elected not to highlight those submissions. I have read them keenly.

10. I am conscious of my duty as a first appellate Court: To revaluate and scrutinize the totality of evidence on record and draw my own conclusions. See ***Coast Bus (Mbsa) Ltd v Harrison Kenga Hare [2017] Eklr; Selle & Another -vs-Associate Motor Boat Co. Ltd and Others [1968] E.A 123.***

11. In my view, the Appeal presents two legal questions for resolution. Both are related to the denial by the Learned Trial Magistrate to award costs for the repair costs. The first question is whether it was an error to award those costs because the Appellant did not produce receipts therefor and, instead, produced, by consent, the assessment report. The second question is whether the production of the Motor Vehicle Assessment Report by consent on its own obviated the need for production of any further proof of damages.

12. The Appellant also submits that the ratio in the trial court's judgment and that in ***Lawrence Maina Gathiga & Another v Daniel Wachira Karito [2014] eKLR***; relied on by the trial magistrate, do not reflect the correct position in the award of special damages.

13. First, he argues that the strict proof of special damages is not the production of receipts but rather, the character of the acts that produce the damage. He relies on the cases of ***Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd [2004] eKLR***, ***Moses Ndolo Ndambuki v Andrew Linge Mutua [2020] eKLR*** and ***Antique Auctions Ltd v Pan African Auctions Ltd [1993] eKLR.***

14. Secondly, he argues that the cost of repairs ought to be awarded even when the same are yet to be spent since there is no standard way to prove special damages. He relies on the cases of ***Thomas Kabaya Nyaruiya & 2 Others v David Chepsisror [2012] eKLR*** and ***Moses Jomo Olengeben v Samson Masea &***

another [2020] eKLR. The Appellant also relies on an excerpt **from McGregory on Damages 19th Edition para 35-007 Page 1230** and the case of ***Mohammed Ali & Another v Sagoo Radiators Limited [2013] eKLR***

15. The Appellant therefore submits that the absence of receipts should not be used to deny him the cost of repairs. The Appellant relied on the cases of ***Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR*** and ***Samuel Kariuki Nyagoti v Jonathan Ditelberger [2017] eKLR.***

16. He submits that the Motor Vehicle Assessment Report was sufficient proof of the Appellant's claim for costs of repairs and relies on the case of ***Nkuene Dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiya [2010] eKLR*** and ***Ishmail Kimutai Tarus & Another v Mark Kipyego [2019] eKLR***

17. The Appellant also submits that the learned magistrate failed to take into account the consent regarding liability and the production of the assessment report. He relies on the case of ***Mugoya Construction & Engineering & Another v Harrison W. Muidni [2004] eKLR***. He submits that the costs of repairs having been a liquidated claim and consent entered on liability, the same encompassed judgment on the sum for repairs and the same ought have been awarded. He relies on the case of ***Simon Mburu Wanjiku v Charles Wambugu Wamiti [2009] eKLR***

18. He therefore asks that this court allow the appeal and award him costs of the appeal.

19. The Respondent agrees with the finding of the trial magistrate and submits that the trial court followed and applied the correct principles in arriving at its decision. He submits that the court ought not to interfere with the finding of the trial court and relies on the case of ***Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR***

20. He submits that the damages for costs of repairs was special damages and ought to have been specifically proven under the laid down principles. He relies on the case of ***Sande Vs Kenya Co-operative Creameries Ltd., [1992] LLR 314 (CAK).*** He submits that there was no proof availed to show that the amount contained in the assessment report was expended and cites the case of ***Lawrence Maina Gatiga and another v Daniel Wachira Karitu [2014] eKLR***

21. The Respondent also argues that the consent on liability did not mean that the Appellant was absolved from adducing proof of the amount spent on repairs. That liability and quantum are distinct.

22. He submits that the magistrate considered submissions filed by both parties and that in any event, submissions are not binding on the court and are only meant to be used as a guide.

23. Lastly, he submits that authorities relied on by the Appellant refer to instances where a party seeks to recover an estimated amount and ought to be distinguished from the present case since the Appellant's motor vehicle was already repaired.

24. I will reverse the analysis and begin with the second question. What was the effect of the consent judgment on liability coupled with the stipulation of both parties in the production of the Motor Vehicle Assessment Report? Was the double effect to automatically obviate the need to produce further evidence as proof of the liquidated damages for vehicle repair?

25. The rule of law suggested by the Appellant is that once parties have stipulated to the production of a document, then that production becomes categorical proof of the contents of that document. With respect, that is not the legal position. Stipulation to the production of a document is not the same as stipulation to the contents of that document. Stipulation to the production of a document obviates the need to call the maker of the document by stipulating to its authenticity. It does not mean that the opposing party has automatically established the contents of the document. In this case, therefore, the production of the Motor Vehicle Assessment Report did not *automatically* mean that the assessed amounts therein became established by evidence.

26. This takes me to the first and most consequential question: in the circumstances of this case, was it unjust for the Trial Magistrate to deny recovery for the costs of repairs yet it was established by evidence that the accident occurred; that the motor vehicle was, in fact, repaired; and that both parties agreed on the Motor Vehicle Assessment Report?

27. The Learned Trial Magistrate relied on the rule that special damages must be strictly proved to deny recovery under this heading. He cited the High Court decision in Lawrence Maina Gatiga & Another v Daniel Wachira Karitu (Nakuru Civil Appeal No. 44 of 2012). In that case, the Appellant protested the Trial Court's reliance on Motor Vehicle Assessment Report as a basis for awarding repair costs. The High Court, sitting as a first appellate Court stated:

> *Photographs of the damaged motor vehicle and the assessment report were produced in Court – these did not appear to be contested and the Trial Magistrate took these into consideration as an important factor – as shown in the last paragraph of her judgment. It is not even disputed that the motor vehicle was repaired (which would naturally attract costs) nor is it suggested that the repairs were done without any charges……The photos and assessment report from AA need support to demonstrate that the Respondent actually incurred those expenses. I take into consideration the estimates do not necessarily mean that the sum shown is what was spent. It could be higher or lower, depending on where the repairs were done, and where the purchase of the parts were made. Even if the motor vehicle was sold along with the receipts, the Court was not told of any difficulty in*
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> *(a) in getting the receipts or invoices from the subsequent purchaser or (b) getting copies of receipts or even a letter from the repairer, confirming that so much money was spent on repairs.*

28. In this case, the Appellant insists that the ratio in this case is wrong and urges this Court not to follow it. It urges the Court to follow a string of other cases which, to his mind, have opposite ratios. In particular, the Appellant cites ***Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd [2004] eKLR***. In that case, the Court of Appeal while dealing with an analogous issue had the following to say regarding the question of assessors' report and the rule that special damages must be strictly proved:

> *"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry….*
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> *There was a specific pleading in this case of the special damage suffered and a valuation for it. The challenge is that there was no strict proof. What amounts to strict proof must of course depend on the circumstances as was stated in **<u>Ratcliffe's case,</u>** that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. It is not lost to us that insurance is in the nature of an indemnity contract. The sum insured in this matter was upto **Shs.3,080,000/=**. That figure would not simply be paid without verification by the Insurer, both on liability and quantum. In point of fact the insurer here instructed loss assessors to verify the claim and the circumstances surrounding it. The insured also made his report to the police and he itemized and quantified his claim. The figure appearing in the police report is **Shs.631,550/=.** He also itemized the claim and showed a figure of **736,550/=** in the amended plaint. We have compared both itemized lists and values put against each item and found that they are identical. The difference is in the total figure appearing on each list. We have also crosschecked the additions and found that the police report figure was erroneous. The total amounts to **Shs.736,550/=** and not 631,550/=. It was purely a mathematical error. There was no cross-examination of the insured on the valuation he put against each item. There was no valid other evidence to challenge those valuations*. (Internal quotations removed.)

29. The three other cases cited by the Appellant in this regard are in accord.

30. The question in this appeal, then, is whether the Trial Court should have relaxed the strict rule on proof of special damages in the circumstances of this case. The Court of Appeal in ***Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR*** stated as follows:

> *We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.*
>
> *However, the claim herein did not fall in that class.*

31. It is true that the common thread in the cases cited by the Appellant is that there in those three cases the receipts to prove the special damages had not yet come into existence: In the ***Virani case,*** for example, the payments were based on an insurance contract. Insurance contracts are indemnity contracts where the claim is based on the extent of premiums paid by the Claimant. In the ***Moses Ndolo Ndambuki Case*** the Appellant was yet to repair his vehicle. The court reasoned that since there was no proof of actual repairs, the appellant was only entitled to the pre-accident value less the salvage value.

32. In the ***Thomas kabaya Ngaruiya*** case, even though the amount claimed was yet to be spent/ paid, the Claimant had already received the services and had been invoiced for the same.

33. Does the Appellant's case fall into this category of cases? In my view it does. In the present case, the Appellant testified that he took the Motor Vehicle for assessment. He produced the Assessment Report with the stipulation of the Respondent. He also testified that he then took the Motor Vehicle for repairs. He said that he paid Kshs. 174,000/- for the repairs. He testified that he did not have the amounts to pay for the repairs so he was forced to take a loan from his SACCO and that the SACCO retained the receipts as proof of his need for the loan. He explained that that is why he was unable to produce the receipts. The Respondent's counsel not only stipulated to the production of the Motor Vehicle Assessment Report but did not cross examine the Appellant on the veracity of his testimony that he incurred the expenses alleged. Neither did counsel cross-examine on the claim that the receipts were retained by the SACCO. Both of these facts are taken as established on the basis of the Court record. To, then, pivot with the formalistic rule that special damages must be strictly prove as a reason to deny recovery in this instance seems to me to elevate technicalities beyond substance; to put the formal before the just.

34. The aim of Tort law is to, as much as possible, return the victim to where he would have been if he had not suffered the tort. 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 will be permitted or otherwise demonstrate with the permitted degree of certainty what loss or amount he will suffer in the future.

35. In the present case, the Appellant demonstrated with reasonable certainty what loss he had suffered. He explained why he could not produce the receipts for the repairs. He was not cross-examined on it. It would be absurd to deny him relief on this head. I, therefore, reverse this finding by the Learned Magistrate.

36. The upshot is that the appeal succeeds. The Appellant will awarded special damages for the repair of the Motor Vehicle less the liability for contributory negligence which was entered by consent.

37. The orders out of this appeal, then, will be as follows:

> **a. The appeal is allowed to the extent that the Appellant is awarded the costs of the repair of the Motor Vehicle in the sum of Kshs. 162,748 less 20% contributory negligence.**
>
> **b. All the other aspects of the judgment of the Lower Court are affirmed.**

c. **The Appellant will also have the costs of the Appeal**.

Dated and Delivered at Nakuru this 26th day of August, 2021

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JOEL NGUGI

<u>JUDGE</u>

NOTE: *This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic*.