



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. 43 OF 2016

WELLS FARGO LIMITED.....APPELLANT

VERSUS

PETER OWOUR NYABONDO.....RESPONDENT

(Being an Appeal from the Judgment of Hon Patrick Olengo P.M in Nyando SPMC No.18 of 2014 delivered on 9th June 2014)

JUDGMENT

Peter Owour Nyabondo (hereinafter referred to as respondent) sued **Wells Fargo Limited (hereinafter referred to as appellant)** in the lower court claiming damages of Kshs. 171,000/- for damages occasioned to his motor vehicle Registration Number KAU 508V on 9.1.14 after it collided with appellant's motor vehicle Registration Number KBA 482A allegedly due to the negligence of the appellant.

The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

In a judgment delivered on **9th June 2014**, the learned trial Magistrate **apportioned liability at 100% as against the appellant and** awarded the respondent special damages in the sum of Kshs. 171,000/-.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 9th March 2015 which set out 6 grounds that:-

- 1. The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability and quantum and the applicable law before him superficially and consequently coming to a wrong conclusion on the same**
- 2. The Learned trial Magistrate did not in the alternative consider or sufficiently consider the applicable law contained in the submissions filed by the appellant**
- 3. The Learned trial Magistrate misdirected himself in ignoring the principles and the authorities cited in the written submissions presented and filed by the appellant**
- 4. The Learned trial Magistrate erred in awarding the sum claimed by the plaintiff notwithstanding the fact that the claim was in respect of special damages which had not been strictly proved**

5. The Learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular failed to appreciate that the receipts produced which only totaled Kshs. 22,000/- lacked any revenue stamps and hence were inadmissible in evidence under the Stamp Duty Act

6. The Learned trial Magistrate erred in awarding the sum of Kshs. 5,000/- in respect of assessor's charges when the said sum was not pleaded

SUBMISSIONS BY THE PARTIES

Appellant's submissions

When the appeal came up for hearing on 4.4.17, the appellant's Counsel Mr. Oduor submitted that the appellant challenges the learned trial Magistrate's finding on liability firstly because there was no evidence of speeding or inexperience on the part of appellant's driver. He further submitted of the sum of Kshs. 171,000/- awarded to the respondent, only Kshs. 22,000/- was supported by receipts.

Respondent's submissions

The respondent's Counsel Mr. Oyuko submitted that the appellant's failure to call witnesses to contradict the plaintiff's evidence was an admission of liability. He further submitted that appellant's driver was charged in Nyando Traffic Case 79 of 2014 with careless driving and his conviction and sentence is evidence that liability at 100% against then appellant was properly apportioned. It was also submitted for the respondent that he did not have receipts for the repair costs assessed at Kshs. Kshs. 150,800/- since he did not have money to pay for the repairs.

The evidence

The respondent stated that after the accident; his vehicle was towed and he produced 2 receipts for Kshs. 10,000/- and Kshs. 7,000/- as PEXH. 1 and 2 respectively. He stated that the vehicle was assessed by Regent Automobile Valuers & Assessors Ltd who prepared an assessment report showing the cost of repair to be Kshs. 171,000/- but that the vehicle has not been repaired because he did not have money. He produced a receipt for Kshs. 5,000/- paid to the assessor as PEXH. 8.

Analysis and Determination

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where Sir Clement De Lestang stated that:

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270).”

In **Makube v Nyamuro (1983) KLR 403**, the Court of Appeal reiterated that

“a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.

I have perused the entire record of appeal and considered the submissions by counsels for both parties. I note that the appeal revolves around both liability and which I shall consider as hereunder.

i. Quantum

I have considered 47A of the Evidence Act Chapter 80 Laws of Kenya which provides:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

On liability, the learned trial magistrate rightfully found that the appellant's driver had been charged with careless driving in ***Nyando Traffic Case 79 of 2014*** and had been convicted and fined Kshs. 40,000/-. On that basis, he rendered himself that the defendant was liable at 100%.

To my mind, the trial magistrate considered the acts and omissions that contributed to the accident. I therefore find no reason to interfere with his finding on liability.

On quantum, the respondent produced 3 receipts for a total sum of Kshs. 22,000/- made up of towing charges of Kshs. 10,000/- and Kshs. 7,000/- (PEXH. 1 and 2 respectively) and Kshs. 5,000/- paid to the assessor PEXH. 8. He stated that repair costs were assessed at Kshs. 150,800/- but that the vehicle has not been repaired because he did not have money.

It is trite law that special damages have to be specifically pleaded and strictly proved. This has been reinstated in ***Francis Mchee Nthiga v Davis N. Waweru (2014) eKLR, William Kiplagat Maritim & Another v Benson Omwanga, Charles Sande v KCC Ltd CA154/92, and Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR*** cited by the appellant.

The assessment report produced as PEXH. 7 shows that respondent's vehicle was examined, and each of the items required to be replaced in the vehicle was documented. The assessment report shows that the spare parts cost, the panel beating costs and other incidental were taken from the market value of the day. The items to be replaced or repaired are itemized to include the labour and VAT costs. The cost is no doubt the consequence of the action complained of.

The record of appeal shows that the respondent's claim was specifically pleaded. The sum of Kshs. 5,000/- for assessment fees that was proved but not pleaded was not awarded. The issue for determination is whether the respondent claim can only be proved by way of receipts. If so, does it therefore mean that an injured party such as the respondent, who is unable to first pay for the damage before filing suit, has no recourse in law? I do not think that the just, purposive and meaningful reading of the term "***specifically pleaded and proved***" has the aim of driving litigants such as the respondent from the seat of justice.

For the reasons given on the assessment above, I find that the trial court's decision was based on evidence and there being no evidence that learned trial magistrate acted on wrong principles in reaching his conclusion, the appeal is dismissed in its entirety. The lower court's decision is confirmed. The respondent will have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 20TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Winnie

Appellant No Appearance

Respondent Mr Oyuko.