



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 95 OF 2015**

**ANUPKUMAR SEDANI.....APPELLANT**

**VERSUS**

**CROWN BUS SERVICES LIMITED.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree by Hon. A. Odawo (RM) in Kisumu CMCC NO.252 OF 2014 delivered on 21st October 2015)*

**JUDGMENT**

**Anupkumar Sedani sued (hereinafter referred to as appellant) sued Crown Bus Services Limited (hereinafter referred to as respondent) in the lower court claiming damages for the loss he suffered on 23rd July 2011 when his motor vehicle KBL 607V was rammed by the respondent's motor vehicle KAW 936G which was negligently driven.**

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

In a judgment delivered on **21st October 2015**, the learned trial Magistrate awarded the appellant Kshs. 31,040/- which was subject to the agreed 90:10% liability ratio.

**The Appeal**

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 18th November 2015 which set out 5 grounds of appeal to wit:-

- 1) The Learned Magistrate grossly misdirected herself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same**
- 2) The Learned Magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities cited in the written submissions presented and filed by appellants**
- 3) The Learned Magistrate proceeded on wrong principles when assessing the damages to be awarded to the appellant and failed to apply precedents and tenets of law applicable**
- 4) The Learned Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it presented an entirely erroneously estimate *vis-a-vis* the appellant's claim**

5) The Learned Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law

## SUBMISSIONS BY THE PARTIES

### Appellants' submissions

When the appeal came up for mention on 28.3.17; Mr. Oduor, advocate for the appellant submitted that the repair costs were assessed at Kshs. 146,972/- but that the appellant was able to prove only Kshs. 31,040/- which he was able to pay since he did not have money to pay for the balance. To this end, counsel cited Wells Fargo Limited v Peter Owour Nyabondo [2017] eKLR.

### Respondent's submissions

Mr. Kalya, advocate for the respondent submitted that special damages must be specifically pleaded and proved. He further submitted that invoices are not prove of payment and urged that the appeal be dismissed.

### The evidence

Appellant testified that his motor vehicle KBL 607V was damaged He produced an assessment report and a fee note for repair costs in the sum of Kshs. 146,972/-. He produced fee notes for Kshs. 15,200/- for inspection report, assessors' fees Kshs. 1,740/- and investigator's fee Kshs. 13,500/-. The learned trial magistrate found that the sum of Kshs. 146,972/- which was based on an invoice had not been proved and awarded Kshs. 31,040/- on the basis of fee notes.

### Analysis and Determination

This being a first appeal, this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of Kiruga Vs Kiruga & Another [1988] KLR page 348 where the Court of Appeal held

***“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution.”***

I have perused the entire record of appeal and considered the submissions by counsels for both parties.

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 quantum which I shall consider as hereunder.

On quantum, the appellant produced 3 fee notes for the total sum of Kshs. 30,440/- but declined to award Kshs. 146,972/- which was supported by an invoice.

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 an exhibit shows that appellant's vehicle was inspected, 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 plaint shows that the appellant's claim was specifically pleaded. The issue for determination is whether the appellant's claim can only be proved by way of receipts. If so, does it therefore mean that an injured party such as the appellant who for one reason or another is unable to produce receipts has no recourse in law. I do not think so. In the case of Wells Fargo Limited v Peter Owour Nyabondo (Supra), this court stated that the just, purposive and meaningful reading of the term "specifically pleaded and proved" does not have the aim of driving litigants such as the appellant from the seat of justice.

In the result, the appeal is allowed to the extent that the trial court's decision dismissing the appellant's claim for repair costs is set aside and substituted with an award for the sum of Kshs. 146,972/- which is subject to the agreed 90:10% liability ratio. The appellant will have costs of this appeal and of the trial in the lower court. It is so ordered.

**DATED AND DELIVERED THIS 24th DAY OF August, 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Appellants - Mrs. Onyango h/b for Mr. Oduor

Respondent - N/A