REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 361 OF 2010

LINUS FREDRICK MSAKY ……………….............…………..APPELLANT

VERSUS

LAZARO THURAM RICHORO ………………..................…1ST RESPONDENT

HIGHLANDS MINERAL WATER COMPANY LIMITED …2ND RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of J. Ragot (Mrs) Principal Magistrate delivered on 31st August 2010 in Milimani CM CC No. 10435 of 2004. The appellant herein Linus Fredrick Msaky was the plaintiff whereas Lazaro Thuram Richoro and Highlands Mineral Water Company Limited who are the respondents were the defendants.

By a plaint dated 21st September 2004 the appellant herein claimed for special damages in the sum of kshs 133,666.00 from the respondents jointly and severally being repair costs, assessment fees, police abstract fee and loss of user. the appellant had claimed that he was the registered owner of motor vehicle registration number KAJ 765U whereas the 2nd respondent owned motor vehicle registration number KQP 843, while the 1st respondent was the 2nd respondent's authorized driver, agent, servant or employee.

That on or about the 2nd day of July 2004 while the appellant had lawfully and carefully parked his said motor vehicle registration No. KAJ 765U near Uchumi Supermarket located at Nairobi West Estate within Nairobi, the 1st respondent negligently drove, managed and or controlled motor vehicle registration No. KQP 843 that he caused the same to violently ram into the rear of the appellant's motor vehicle causing extensive damage to the motor vehicle KAJ 765U.

The appellant set out 8 particulars of negligence and alleged that as a result of the said negligent acts of the 1st respondent, the appellant's motor vehicle was extensively damaged and consequently the appellant suffered loss and damage for which the 2nd respondents were liable jointly and severally .

The case was heard by the trial magistrate Mrs J. Ragot Principal Magistrate who found that indeed there was an accident whose occurrence was attributed to the 1st respondent's negligence who reversed his motor vehicle without ensuring that it was safe to do so thereby knocking the plaintiff's motor vehicle . The 2nd respondent was to be vicariously liable for negligent acts of the 1st respondent. Nonetheless, the trial magistrate dismissed the appellant's suit on the ground that the appellant had

produced an invoice and receipts for repair of his vehicle but did not produce an assessment report which could have shown the extent of the damage and whether the said damages were a direct result of the accident. She therefore concluded that it was probable that the repairs might not only have been for damages from the accident, and dismissed the appellant's suit and ordered that each party bear their own costs.

Being dissatisfied with that finding and decision, the appellant filed this appeal on 9th September 2010 vide a Memorandum of Appeal dated 7th September 2010 faulting the trial magistrate for:

1. Holding that the plaintiff had not proved his case against the respondents on quantum despite the weight of the evidence on record.
2. Dismissing the plaintiff's case against the respondents when evidence on record showed otherwise.
3. Holding that the repair quotation form/assessment form produced in evidence by the appellant was not conclusive proof of damages contrary to the provisions of part IV of the Evidence Act Cap 80 Laws of Kenya.
4. Imposing a heavier burden of proof to the plaintiff than that which is required in civil cases.
5. Considering extraneous matters and going out of the ambit of the proceedings and evidence before her and hence arrived at an erroneous decision on quantum.
6. Failing to consider the plaintiff/ appellant's submissions thus arriving at an erroneous finding on quantum.

The appellant prayed that the appeal herein be allowed and the judgment on quantum as arrived at by the trial court be set aside and the claim be allowed with interest from date of institution of suit till payment in full; and that the court do make further relief as it may deem just to grant.

The appeal was canvassed by way of written submissions after all parties complied with procedural requirements for the hearing of the appeal.

In support thereof, the appellant through his counsel M/S Wangai Nyuthe & Company Advocates filed written submissions on 24th August 2015, and framed 4 issues for determination namely:

a. Whether the quotation report by the garage serves the same purpose as assessment report.

On this issue, the appellant submitted that the quotation report by Dhanjal Panel Beaters though christened as quotation was in actual sense an assessment report since it contained all the material information that would be in a standard assessment report. Further that the said quotation principally indicated the extent of the damage and estimated cost or amount incurred in repairing the accident motor vehicle hence it fulfilled the purpose of an assessment report.

The appellant's counsel emphasized that the significance of an assessment report is to help the court in ascertaining the actual and extent of damage suffered and that therefore that role was fully fulfilled by the said quotation as it comprehensively stated the damage suffered by the appellant's vehicle and the cost that would be incurred in repairing the same.

Reference was made to the **Black's Law Dictionary 6th Edition page 116** where the term "assess" is defined as the ascertaining or fixing the value of something or a valuation or a determination as to value of property and that **Black's Law Dictionary 9th Edition page 1370 which** defines the term "quotation" as stating a commodity's current price.

For the above reasons, it was submitted that the document produced by the appellant served a similar purpose of stating the value of the subject matter they were dealing with which was the value/cost of repair of the appellant's motor vehicle.

The appellant's counsel cited **Court of Appeal decision in CA No. 310 of 2005 Abdi Ali Dere V Firoz**

Hussein Tundal & 2 Others [2013] e KLR where the Court of Appeal referred to the case of **Kenya Industrial Industries Ltd V Lee Enterprises Ltd [2009] KLR 135** where it was stated:

> ***"Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction."***

b. On the issue of whether the repairs were conducted as per the quotation report, the appellant submitted that the repairs were carried out as per the quotation and neither did is surpass nor go below the quoted amount as evidenced from the invoice dated 16th September 2004 and receipts dated 16th September 2004 and 17th December 2004 from Dhanjal Panel Beaters.
c. On whether the trial magistrate placed a higher standard of proof than required in a material damage claim, it was submitted by the appellant's counsel that the standard of proof in civil cases is on the balance of probabilities and not beyond reasonable doubt. That in this case the appellant had produced documents to achieve that standard and that the trial magistrate's finding that lack of an assessment report in guiding the court on the extent of the damage sustained and the approximate cost of fixing the damage was elevating the standard of proof in civil cases above that required on a balance of probabilities and therefore wrong, especially in the absence of any evidence by the respondents to the contrary in respect of the estimated cost of repair as well as the actual amounts incurred by the appellant for repairs at the trial.
d. On the issue of whether the trial magistrate erred in denying the appellant the claimed damages, it was submitted that the trial magistrate erred in failing to consider the quotation report as adequately providing the relevant information as to the extent of damage and estimated cost of repair of the appellant's vehicle which denied the appellant justice and a valid claim. The appellant's counsel relied on the previously cited case of **Adi Ali Dere V Froz Hussein Tundal & 2 Others** (supra) to the effect that it was wrong to dismiss the claim of special damages and evidence adduce in support of them due to a small anomaly, and that each head of special damages should be considered independently as prayed and granted or dismissed individually on the weight of evidence adduced in support thereof. Further, that in the said case the court was clear that the burden of proof in civil cases was on a balance of probabilities and not beyond reasonable doubt . They prayed that the court do allow the appeal and overturn the trial magistrate's decision.

The appeal herein was vigorously opposed by the respondents through their counsel's firm K. Macharia & Company Advocates who filed their submissions dated 13th October 2015 on the same day out of time initially granted but with leave of court...

The respondents supported the decision of the trial magistrate for reasons that the evidence was that after the accident, the motor vehicle was driven away to different destinations but the appellant admitted that he first drove to his house and that during cross examination, the appellant stated that the only damage to the car at the scene was the rear bumper and the exhaust pipe. However, the damages which were repaired were so many and are not consistent with what the appellant stated in court and therefore the court could not be sure if these damages were as a result or direct result of the accident or were there before or afflicted later after the accident. Further, that the vehicle was not inspected and neither was the assessment of the damages done. That an inspection would have helped the court to ascertain the direct damages as a result of the accident and assessment would have given a comparative figure of the repairs to be carried out. That by driving the vehicle to his house no one could tell what might have happened in between hence the benefit of doubt must go to the respondents as it was not possible to prove whether the damages claimed were as a result of the accident involving the respondents' and appellant's motor vehicle on 2nd July 2004. The respondents urged this court to dismiss this appeal.

This being a first appeal, this court is forever reminded of its primary duty as espoused in section 78

of the Civil procedure Act namely:- to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions though it should always bear in mind that it neither saw nor heard the witnesses as they testified and should make an/due allowance in that respect. Secondly, that the responsibility of the appellate court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. (See **Kenya Ports Authority V Kuston (Kenya) Limited [2009] 2 EA 212) CA.**

Re-examining the evidence on record, the appellant testified as PW1. He did not call any witness. Regarding the damages caused to his vehicle which is material to this appeal since there is no dispute regarding liability, the appellant stated that after the accident the police carried out investigations and he was given a police abstract. After that, he repaired the motor vehicle at Dhanjal Panel Beaters. Quotation and assessment was made. The quotation was dated 16th September 2004 total cost was 103,066.00 which he produced as P exhibit 3. The vehicle was repaired to his satisfaction. An invoice was raised for kshs 103,066.00 by Dhanjal dated 16th September 2004. He produced it as P exhibit 4. He paid by receipts of shs 60,000 on 16th September 2004, P exhibit 5 and shs 43,066 dated 17th December 2004 produced as P exhibit 6. The vehicle was released to him after paying full amount. He was satisfied with the repairs and was issued with a satisfaction note dated 6th October 2009(sic). He also stated that the 1st respondent hit him from the rear while reversing as the appellant was stationery off loading a consignment at Uchumi Supermarket. He prayed for the reimbursement of repair loses and assessment fees and for the abstract. He did not have evidence of loss of user. He also stated that it took 2 months to repair the vehicle.

In cross examination by Mr Macharia counsel for the respondents, the appellant responded that after police took statements, he drove the vehicle to his house and the next day he took it to the garage. He stated that the vehicle was assessed on 5th September 2004. He denied that the vehicle was examined by a motor vehicle examiner. He stated that they took photos of the accident.

The 1st defendant/respondent Lazarus Thuram Richoro testified as DW1. He did not call any other witness. According to him, the appellant's vehicle was reversing when its bumper and exhaust touched the 2nd respondent's motor vehicle which was in motion and that he would have repaired the bumper.

As earlier stated, upon the trial magistrate finding that the respondents were liable for the accident, nonetheless dismissed the appellant's suit for lack of evidence of the damages caused to the vehicle, stating that there was no assessment report which could have shown the extent of the damage and whether those damages were a direct consequence of the accident, and that in the absence of the assessment report, it was probable that the repairs might not only have been for the damages from the material accident.

I have carefully considered this appeal; the evidence in the court below, the submissions by both parties' advocates in the court below and in this appeal, as well as the authorities relied on by the appellant's counsel. The respondents did not cite any past decision but they fully supported the findings and decisions of the trial magistrate, contending that indeed the appellant's testimony did not support his documentary evidence on the damages caused to the vehicle and that in the absence of an assessment report, the court could not tell whether the repairs could have been for damages other than those occasioned by the accident.

The appellant maintained that the trial court erred in law and fact in dismissing his case when there was sufficient evidence adduced on a balance of probabilities to prove that the vehicle's damages were assessed and the value of damages costed/estimated and the repair done to his satisfaction upon which he paid for the assessment/quotation and the repair charges.

From the evidence on record and the above two rival positions by the parties, the only issue for determination in this appeal, in my view, is whether the appellant proved on a balance of

probabilities, the special damages pleaded, as having been a direct consequence of the accident and therefore whether the trial magistrate erred in law and fact in dismissing his case. There are other ancilliary questions that this court may have to consider while answering that main question.

There is no dispute that an accident did occur involving the appellant and 2nd respondent's motor vehicle as driven by the 1st respondent. There is also no dispute that the vehicles were owned by the appellant and 2nd respondent respectively as described in the plaint. There is further no dispute that motor vehicle registration no. KAJ 765 U Toyota Camry belonging to the appellant was hit by the 2nd respondent's motor vehicle KQP 843 while the latter was being reversed by the 1st defendant. There is no dispute that the trial magistrate after hearing both parties evidence she found that the defendants were negligent jointly and severally for the material accident. That finding on liability of the respondents has not been challenged by way of any cross appeal. the question is whether the appellant proved material damages that were allegedly repaired at a cost and that the damages were as a direct result of the accident and therefore whether the appellant was entitled to be compensated for the loss and damage totaling kshs 133,666 as pleaded.

Starting with loss of user, of kshs 25,000 it is important to note that the claim was a special damage which must not only be specifically pleaded, but it must be strictly proved by evidence. In this case, the appellant conceded in his evidence that he had no evidence of loss of user and that being the case, I need not delve further other than to find that there was no proof of loss of user hence the claim could not have been awarded as pleaded. See **Douglas Odhiambo Apel & another Vs Telkom (K) Ltd CA 115/2006; Patlife V Evans [1892] 2 QB S 24; Kampala City Council V Nakaya [1972] EA 446 & Hahn V Singh [1985] KLR 716.**

In all cases, the burden of proof is always cast on the party who alleges (see Sections 107-109 of the Evidence Act Cap 80 Laws of Kenya). On the claim for police abstract, the court has seen police abstract produced as P exhibit 2 No. 606651 but there is no receipt for kshs 100 as pleaded. Accordingly that claim is also rejected for want of proof.

Then there is the main or substantive claim for the repair cost amounting to kshs 103,066.00 as a result of the damage caused to the plaintiff's/appellant's motor vehicle. Indeed as the trial court did find, that although the appellant alleged that his motor vehicle was damaged, the assessment report was not produced in evidence and that without it, it was not possible for the court to establish whether the damage was a direct result of the accident and therefore the estimated cost of repairs. Okwengu J (as she then was) in **Omari Gulea Jana V BM Muange [2010] e KLR** held as follows in a case of similar facts:

> ***"Although it was alleged that motor vehicle KAC 996F was damaged, the assessment report was not produced in evidence. This was crucial evidence as without the assessment report it was impossible for the court to establish the damage to the motor vehicle on the estimated costs of repairs. The fact that UAP insurance paid a sum of kshs 271,874 to Unity Auto Garage is not sufficient to establish that payment was in respect of repairs to the damage to motor vehicle KAC 996F arising from the accident subject of this suit. I find the evidence adduced by the respondent was inadequate to strictly prove his claim. The trial magistrate appears to have been swayed by the fact that the appellant did not call any evidence. The trial magistrate apparently lost sight of Section 107 of the Evidence Act which placed the burden of proof squarely upon the respondent. Her judgment cannot be supported."***

In the instant case, albeit the trial magistrate did not base her decision of any past decision no doubt, she made her finding similar to the one made above by Honourable Okwengu J (as she then was). Similarly in **Gachanja Muhori & Sons Ltd & Another V Catholic Diocese of Machakos [2014] e KLR,** B. Thuranira Jaden J in her determination of an appeal where the appellant complained that there was no proof of repair works done and or that the respondent's motor vehicle sustained damages, the Learned Judge, in observing that no motor vehicle assessor was called to give evidence, stated that :

"There was nothing to show if the sum stated by the respondent was properly spent to put the motor vehicle back on the road. The best evidence in this report would have been supplied by the motor vehicle assessor …….(see David Bagine V Martin Bundi CA Nairobi 283 of 1996)"

The Learned Judge went further to state that: ***"Without the motor vehicle assessor's report, it is difficult to tell what duration it would take to repair the motor vehicle ….. The award of loss of user for a period of 90 days was therefore not based on any cogent evidence."***

In my humble view, albeit the above decisions are persuasive, they espouse the principle that repair costs constitute a material damage claim and therefore should not be denied where there is proof of such damage and loss.

In this case, the plaintiff/appellant pleased for repair costs. He did not state the damages which were occasioned to his motor vehicle, necessitating he repairs. It is not enough to state that I repaired my vehicle. The quotation document produced as P exhibit 3 from Dhanjal Panel Beaters did not state the exact or actual damages that required repair. The said document dated 5th July 2004 States:

"Quotation only"

To repair to accident damage to (sic) at rear end and to repair damaged parts etc

- Labour shs 18,500
- Painting (metallic) shs 25,000
- Gas/Miscellaneous 4000
- Under seal 2000
- Spares: UHS – rear tail lump Assy -8500
- Rear bumber bar 28,000
- Rear B/Bor end Holding bracelet 2850/-
- UH/S rear wing (to repair)
- UHS rear wing liner panel (to repair)"

		88.850
	+ 16%VAT	14 216
Total		103,066/-

Kshs one hundred three thousand and sixty six only.

Those are the scanty details given on the quotation form on owner's instructions. The invoice P exhibit 4 issued to the appellant by the same firm for kshs 103,066 dated 16th September 2004 show or describes " repaired to accident damage to above vehicle as per our quotation of 5th July 2004 and per your authority dated 4th August 2004. The receipts for payments are also produced as P exhibit 5 and P exhibit 6 for kshs 60,000- and 43,066 respectively, dated 16th September 2004 and 17th December 2004. The appellant also produced a satisfaction note signed by him on 6th October 2004.

The question is, would that evidence of quotation for repairs without a valuation or assessment report on the actual accident damages constitute sufficient evidence for this court to award damages for the damage and loss? I think not. In the case **of Douglas Odhiambo Apel & Another V Telkom (K) Ltd** (supra) the Court of Appeal held that:

"…….a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or submissions. Cases are decided on actual evidence that is tendered before the court………Unless a consent is entered into for a special sum, then it behoves the claiming party to produce evidence to prove the special damages claimed. Submissions, as he correctly observed, are not evidence……….."

In **Nkuene Dairy Farmers Cooperative Society Ltd & another V Ngacha Ndeiya [2010] e KLR**, the court rendered itself thus:

"In our view special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. <u>An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty</u>."(Emphasis added).

From the above decision, the court is saying that it is not enough to say my vehicle was damaged as a result of an accident and I incurred costs of repairing it. The claimant must plead with certainty the alleged damages. He must also testify or adduce evidence, both orally and documentary to prove that the damages that were pleaded are the ones that were actually occasioned and for which repairs were done or effected at a cost. Having examined the plaint filed by the appellant, it only claimed for "repair costs". The actual damages were never ascertained and pleaded. Secondly, in his evidence in chief, the appellant never stated with any precision the damages that were occasioned to his vehicle necessitating repairs and the cost incurred in repairing it. He did not get any accident assessor to assess the accident damages and assign a value thereto.

In my view, the appellant was simply throwing receipts and other documents at the court. The so called quotation and his attempt to define what a quotation and an assessment is does not persuade this court to accept on the evidence available that the damages that were occasioned by the accident are the ones which were repaired at the given cost of repairs. In other words, there was no degree of certainty of the actual damages and hence the repair costs could not be precisely be assigned to the accident damages. And in the absence of any evidence of the extent of the damage, the repair costs would be an irrelevant consideration.

In **Patcliffe Vs Evans [1892]2 QB 524 (CA)** the court stated that:

"In all actions accordingly, on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these 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 the pleading and proof of damage, as is reasonable, having regard to the circumstance 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."

In this case the court finds that the gist of the appellant's case in the lower court was one of special damage caused to his vehicle as a result of negligence driving of the offending vehicle by the 1st respondent, as established by the trial court. The law places a heavy burden on a party who alleges that they suffered special damages to specifically plead those damages and strictly plead the amounts assigned to each specific damage.

In the case of damages to a motor vehicle, it was critical that the specific damages or the nature of the damage itself be pleaded and strictly proven. The court would not assess damages which are not specifically pleaded. Only a specialist and qualified motor vehicle assessor would have examined the vehicle and set out the exact damages before stating what parts required replacement or repair as the case may be. It was not enough for a garage to quote for repairs without an accident

assessment report on the specific damages caused by the accident and the value estimated for each damaged part.

Therefore, on the evidence, the law and submissions, I find that the trial magistrate did not err when she dismissed the plaintiff's suit for want of proof of special damages allegedly caused to his vehicle following the material accident. The appellant's pleadings and evidence fell short of proving damages to his motor vehicle capable of occasioning costs of repairs. The appellant did not discharge the burden of proof on a balance of probabilities and neither did he dispel the doubt whether the amount claimed as repair costs did not also cover pre-accident damages to the appellant's vehicle, since he did not even take his vehicle to the police for inspection and an inspection report issued on the accident damages that may have been noted.

It is for those reasons that I uphold the trial court's decision and dismiss this appeal with costs of the appeal to the 2nd respondent only.

Dated, signed and delivered in open court at Nairobi this 18th day of February 2016.

R.E. ABURILI

JUDGE