



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 134 OF 2002
RAVJI KERAI T/A RADHIES ENTERPRISES.....APPELLANT
VERSUS
NDAMBUKI NGONYO NZAI.....RESPONDENT

J U D G M E N T

1. The Respondent sued the Appellant claiming special damages in the sum of **Kshs. 497,000/=**. The claim arose out of an accident where the Appellant's motor-vehicle hit and extensively damaged the Respondent's building situated at **Salama Township, Plot No. Machakos/ULU/469**. The Respondent blamed the driver of the motor-vehicle registration number **KVG 318 Layland Lorry** for negligence that resulted into the motor-vehicle veering off the road thereby hitting the building.

2. The Defendant denied the occurrence of the accident. In the alternative they pleaded that if the accident occurred it was caused by circumstances beyond the Defendant's control.

3. The learned trial magistrate considered evidence adduced and entered judgment in favour of the Plaintiff in the sum of **Kshs. 475,350/=**, interest and costs.

4. Being aggrieved by the judgment and decree of the court, the Appellant appealed on the following grounds:

- There was empirical evidence to establish that the Appellant was not liable for the accident.
- Exhibits tendered by the Plaintiff were fabricated.
- The evidence of the valuer relied on did not determine the damage occasioned.
- Evidence relied on was hearsay.
- The Appellant's witness's evidence on valuation who was an expert was not considered.

5. The appeal was canvassed by way of written submissions, that I have taken into consideration.

6. This being the first appellate court, I must re-consider the evidence adduced at trial and come to my own findings and conclusions (**See Peters vs. Sunday Post Limited (1958) EA 424**).

7. Although the grounds of appeal as framed question liability in the matter, in the submissions the

Appellant's counsel stated thus:

“There is no issue being raised on liability.”

In any case it was not in dispute that the accident did occur which resulted into the Respondent's building being damaged.

8. The claim herein is for special damages. In such a case per principle laid down, the claimant must not only plead but also prove special damages. This was well put by **Lord Goddard CJ in Bonham Carter vs. Hyde Park LTD (1948) 64 TLR 177** thus:

“Plaintiffs must understand that, if they bring actions for damages it is not enough to write particulars and so to speak, throw them at the court, saying “this is what I have lost, I ask you to give these damages, they have to be proved.”

9. The sum pleaded as special damages was **Kshs. 497,000/=**. The sum for the cost of repair of the broken or damaged wall was **Kshs. 477,000/=**. To prove the case the Respondent adduced in evidence a valuation report authored by **Camp Valuers**. The assessment of damage caused was assessed by PW1 **James Githaga Thirikwa**, a registered valuer. Per his findings, the lorry hit the middle section of the building an act that affected the reinforced concrete slab roof, a beam and load bearing wall of the lowest basement and a column between the rear half and front half. As a consequence, the beam was destroyed and roof slab cracked. To remedy the situation he recommended demolition of the affected area of the concrete roof slab and beam and reconstruction of the same. Further, he assessed the resultant damages at **Kshs. 477,000/=**. The valuer did not give specific cost estimates. On cross examination he estimated the cost of repair as **Kshs. 100,000/=** and loss of rent at **Kshs. 72,000/=** which was included in **Kshs. 477,000/=** as part of the building had been rented. The valuer was paid **Kshs. 11,000/=**.

10. According to the Respondent as he reconstructed the building the rooms remained unoccupied for **10 months**. Rent for each room was **Kshs. 1,200/=**. He adduced in evidence receipts for materials that he purchased following instructions by the contractor which amounted to **Kshs. 208,350/=** while an agreement for labour charges was **Kshs. 110,000/=**.

11. The Appellant on the other hand relied on photographs taken of the damaged property and an assessment of the damage by a Quantity Surveyor who inspected the building on **18th December, 2001** after it was repaired. The Quantity Surveyor gave a cost of estimates based on contractors' average costs and came up with a sum of **Kshs. 33,506/=**.

12. In reaching his decision, the learned trial magistrate disregarded the Appellant's valuation report because the assessment was done long after the accident while the report produced by the Respondent was based on observation and assessment done soon after the accident.

13. The valuers retained by the Respondent (**Camp Valuers**) assessed damages that resulted from the accident at **Kshs. 477,000/=**. There was no estimate of costs that made them come up with the figure. On cross examination PW1 stated that he included an estimated cost of repair of **Kshs. 100,000/=** and loss of rent of **Kshs. 72,000/=**. This was however not itemized.

14. Provision of estimated costs of each item was necessary. It was not sufficient for the valuer to come up with an imaginary figure and leave it to the court to speculate as to what figure to award in damages.

15. I have perused the agreement purportedly entered into between the Respondent and **Kilome Modern Builders** to reconstruct the building. The agreement is undated. The cost of labour is indicated as **Kshs. 110,000/=**. It is further stated in past tense that the 1st and 2nd installments of **Kshs. 35,000/=** had been paid. The third installment was to be collected on completion of work. Whether or not it was collected was not indicated. These documents ought to have been disregarded.

16. Further, a perusal of receipts adduced in evidence show they were for purchase of building material in

the name of **Country Site Hotel**. No evidence was tendered to explain the relationship between the Respondent and the given name of the hotel. Admission of such documents in evidence was erroneous.

17. The report adduced in evidence by the Appellant that was disregarded by court on the other hand particularizes the nature of restoration works that could have been undertaken following the damage. A cost estimate based on the prevailing constructors average all in rates construction costs as published by the Government Building Council and Institute of Quantity Surveyors was given. The Quantity Surveyor also took into consideration assumed construction materials, skilled and unskilled labour. This was evidence to be considered as a basis of making the award.

18. It is not in dispute that the building was being used for commercial purposes. Therefore the claim for loss of business for **10 days** during the duration of repair which was not in dispute should be awarded.

19. From the foregoing, the appeal succeeds partially. Therefore, I set aside the order of the Lower Court entering judgment in the sum of **Kshs. 475,350/=** and substitute it with the following order:

- ***Judgment be and is hereby entered for the Respondent in the sum of Kshs. 53,506/= plus costs and interest.***
- ***The Appellant having succeeded partially in the appeal they will have half costs of the appeal.***

20. It is so ordered.

Dated at Kitui this 19th day of January, 2016.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 17th day of February, 2016.

P. NYAMWEYA

JUDGE