



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 163 OF 2009**

**MICHAEL KIMANI MUNYAKA.....1<sup>ST</sup> APPELLANT**

**NATION MEDIA GROUP.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ISAAC RUTO.....RESPONDENT**

***(Being an appeal from the original judgment and decree of I. Maisiba, Resident Magistrate, in Eldoret CMCC No. 32 of 2008 delivered on 4<sup>th</sup> September 2009)***

**JUDGMENT**

1. The appellants are aggrieved by the judgment of the lower court dated 4<sup>th</sup> September 2009. The appellants were the defendants in the lower court. The respondent sued for general and special damages arising out of a road traffic accident. He claimed that on 17<sup>th</sup> September 2007, the 1<sup>st</sup> appellant negligently drove the 2<sup>nd</sup> appellant's pick-up truck registration number KAW 772G causing it to ram into the respondent's *matatu* registration number KAQ 653D.
2. The parties agreed on liability at the ratio of 80% to 20% in favour of the respondent. After considering the evidence, the learned trial magistrate awarded the respondent the following sums: Kshs 125,581.60 being cost of repairs; Kshs 5,000 for assessment fees; Kshs 28,000 for loss of user for fourteen days; Kshs 500 for a police abstract; and, Kshs 3,000 for a letter before action. The respondent was also granted costs and interest.
3. The appellant has challenged those findings through a memorandum of appeal dated 2<sup>nd</sup> October 2009. There are five grounds of appeal. They can be condensed into *three*. First, that the learned trial magistrate fell into error by awarding special damages which were not specifically pleaded; secondly, that the damages were exorbitant; and, thirdly, that the lower court erred in holding that the case was proved on a balance of probabilities.
4. The appeal is contested by the respondent. The respondent relied on his written submissions filed on 29<sup>th</sup> January 2015. He submitted that the appellants never called a witness to rebut his claim; that assessment of damages was based on documents produced by consent; and, that the 1<sup>st</sup> appellant was charged, pleaded guilty, and was fined for causing the accident. That was in Eldoret Chief Magistrates Criminal Case 2681 of 2007. It was the respondent's case that the appellants cannot re-open the issue of liability in this appeal. I was implored to dismiss the appeal with costs.
5. On 31<sup>st</sup> May 2016, I heard brief oral submissions. Like I stated, the respondent relied on his written submissions. The appellants relied on a list of authorities dated 14<sup>th</sup> May 2012. The appellants' learned counsel, Mr. Kamau, submitted that the entire appeal can be determined on *one* point: whether the special damages were *specifically* pleaded in the plaint. I have considered the memorandum of appeal, the record of appeal, the pleadings in the lower court, the evidence,

- the precedents and rival submissions.
6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
  7. There was no contest about the occurrence of the accident; or, that the respondent's vehicle was extensively damaged. Doubt is removed completely by the 1<sup>st</sup> appellant's plea of guilty in Eldoret Chief Magistrates Criminal Case 2681 of 2007; and, the assessment report and estimate of repair costs by Wareng Auto Insurance Loss Assesors (exhibits 10 [a] and [b]). Furthermore, on 22<sup>nd</sup> May 2009, the parties recorded *consent* in the following terms: the police abstract was admitted as exhibit 7; and, liability was agreed in the fraction of 80% to 20% in favour of the respondent. The only live matter in this appeal is *whether* the respondent *proved* the damages.
  8. This claim was principally for *special damages*. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Coast Bus Service limited v Sisco E. Murunga and others*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported). The degree of *certainty* and *particularity* of proof depends on the circumstances and nature of the acts themselves. See *Hahn v Singh* [1985] KLR 716. In the present case, the *damage* to the respondent's vehicle was *certain*; and, the *specific* costs of *repairs* or *loss of use* were known. The respondent was thus obligated to plead *specifically* to those *amounts*.
  9. I have carefully studied the claim. The respondent filed a *plaint* dated 14<sup>th</sup> February 2008. At paragraphs 6 and 7, he itemized *nineteen* areas of damage to his motor vehicle. But there was *no* specific *sum* of *repair costs* pleaded. There was also *no* specific sum claimed for *loss of use*. The only special damages specifically pleaded were two: *Kshs 500 for a police abstract; and Kshs 3,000 for the demand letter before action*. I have studied the record carefully. There is no evidence that the *plaint* was ever *amended*.
  10. From the evidence of PW3, the motor vehicle assessor; and, exhibits 10 (a) and (b), there is no doubt that the repairs were *estimated* to cost Kshs 125, 581.60. No receipt for the *payment* of repairs was produced. The assessor was paid Kshs 5,000 as fees. With great respect to the learned trial magistrate, the sums for repairs or assessment fees were not *specifically pleaded*. It followed that they could *not* be proved in evidence.
  11. In his brief judgment, the learned trial magistrate also stated as follows: "*I would award loss of user for 14 days at the reasonable rate of Kshs 2,000 per day which is Kshs 28,000*". Again, with great respect, the sum was *not* specifically pleaded; and, there was *no* evidential basis for the award. As I have observed, the *only* sums specifically pleaded and proved were two: *Kshs 500 for the police abstract; and, Kshs 3,000 for the letter before action*.
  12. The upshot is that this appeal is allowed. The judgment and decree of the lower court are hereby set aside. Liability is entered by *consent* against the appellant at the ratio of 80% to 20% in favour of the respondent. The awards of special damages of Kshs 125,581.60 for *cost of repairs*; Kshs 5,000 as *assessment fees*; and, Kshs 28,000 for *loss of user* are all *set aside*. Instead, there shall be judgment in favour of the respondent against the appellants for Kshs 3,500 only being the cost of the police abstract and the letter before action.
  13. Costs follow the event and are at the discretion of the court. In the interests of justice; and considering the predicament the respondent finds himself in; I order that each party shall bear its own costs both in the lower court and in this appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 28<sup>th</sup> day of June 2016.**

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:-**

No appearance by counsel for the appellants.

Mr. Isaac Ruto (in person).

Mr. J. Kemboi, Court clerk.