**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**H.C.C.A. NO. 50 OF 2011**

**GACHANJI MUHORO & SONS LTD.....PLAINTIFF**

**V E R S U S**

**TITUS MWALA NDUVA.....RESPONDENT**

*(Being an appeal from the Judgment of the Senior Principal Magistrate at Kangundo, Mr. Ngeno delivered on 17.3.2011 in Kangundo PMCC No. 26 of 2009)*

**JUDGMENT**

1 In the suit before Lower Court, the Respondent, TITUS MWALA NDUVA sued the Appellant, GACHANJA MUHORO as the owner of motor vehicle KAM 317Y. The Respondent's claim was that on 26.7.2007, the said motor vehicle was carelessly driven, managed and/or controlled and rammed into the Respondent's property known as Plot No. 55A and 55B Kangundo Township.

The Respondents claim was for special damages in the sum of Kshs. 500,000 together with interest of Kshs. 15% from the date of the accident, general damages, costs and interest.

2 The claim was denied as per the statement of defence dated 5.3.2009. In the alternative the Appellant blamed the accident on the negligence of unknown third parties.

3 During the trial, the Respondent testified (PW 1). He produced a letter from the Kangundo Town Council which reflects that he is the owner of Plot No. 55A and 55B. He also produced a copy of records from KRA which reflects the owner of the motor vehicle in question as the appellant and a police abstract which reflects that an accident occurred between the building on the said plot and the motor vehicle in question. A quantity surveyor's report produced assessed the damages to the building at Kshs. 400,800/-.

4 The Appellant on the other hand called a loss adjuster, DW 1 EVAN MUTUA NKALAL who produced a quantity surveyor's report which assessed the loss at Kshs. 27,000/-.

5 In his judgment, the trial magistrate entered judgement for the special damages at Kshs. 500,200/-, costs and interests.

6 The Appellant was dissatisfied with the said judgement and appealed to this court

as follows:

***1 The Learned Senior Principal Magistrate erred in law and in fact and grossly misdirected himself by holding the Appellant 100% liable for negligence when no evidence was tendered in respect thereof by the Respondent and his witness.***

***2 The Learned Senior Principal Magistrate erred in Law and in fact by awarding the sum of Kshs. 400,800/- as general damages when the Plaintiff's claim was in the nature of special damages which was not specifically proved.***

***3 The Learned Senior Principal Magistrate erred in Law and in fact when he disregarded the evidence of DW – 1, a Loss Adjuster, whose evidence was unchallenged and was to the effect that the Plaintiff was entitled to the sum of Kshs. 27,000/- only.***

7 The appeal was argued by way of written submissions which I have duly considered.

8 This being the first appellate court the court is duty bound to re-evaluate the evidence on record and come to its own findings. ***(See Selle -Vs- Associated Boat Company Limited (1968) EA 123).***

9 On the issue of liability, although it is observed that the plaintiff was not at the scene at the material time, he produced a police abstract which reflects that the accident occurred between the motor vehicle in question and the plaintiff's building. This evidence is uncontroverted by any other evidence. Ordinarily, motor vehicles do not ram into buildings. The motor vehicle must had been negligently driven.

10 On whether the accident was caused by the negligent acts of a third party, it is noted that the appellant was the registered owner of the motor vehicle according to the copy of records produced from KRA. As stated by the Court of Appeal in

***Kenya Bus Services Limited Vs. Humphrey (2003) KLR 665: (2003) 2 EA 519 the Court of appeal held that:***

***"...where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver."***

I find the Appellant 100% liable to the accident.

11 Was the plaintiff's claim for special damages specifically proved? The Respondent produced a quantity surveyor's report which gives the cost of repairs to the building at Kshs. 520,800/-. On the other hand, the Appellant produced a quantity surveyor's report which gives the cost of repairs as Kshs. 16,800/-. Kshs. 10,000/- for the preparation of the assessment report and Kshs. 200/- for the obtaining of the police abstract were added to the figure to make a total of Kshs. 27,000/- adjusted loss plus Kshs. 16,800/- cost of repairs making a total of Kshs. 43,800/-.

12 The quantity surveyors report produced by the Appellant reflects that "the canopy roof sheltering was hit by a truck at a point about 1/3 length of the building measured from the left hand side causing a major impact to the front wall. The major impact was transmitted by the trusses to the walls and led to major cracks at the joint, back and even the residential units."

The proposed figure of Kshs. 43,800/- for the Respondent's loss was described by the trial magistrate as "out of tune with the reality in the construction sector." I agree with this observation. The quantity surveyor's report produced by the Appellant's side is clearly unrealistic. The assessment by the Respondent's side is more probable.

13 As stated by the Court of Appeal in Mohamed Ali & Anor. Vs. Sagoo Radiators Limited (2013) eKLR

***"In our view special damages in a material damages claim need not be shown to have been incurred. The claimant is only required to show the extent of the damage and what it would cost to***

***restore the damage item to as near as possible the condition it was in before the damage complained of. 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 particulars of damage and the value of the repairs were given with some degree of certainty. In Ratcliffe Vs. Evans (1892) 2OB 524 Bowen LJ said,***

***"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 particularity and certainty must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances 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".***

14 With the foregoing, I find no merit in the appeal and dismiss the same with costs.

**……**

**B. THURANIRA JADEN**

**JUDGE**

**Dated** and **delivered** at **Machakos** this **21st** day of **December 20**15.

**……**

**B. THURANIRA JADEN**

***JUDGE***