



During the trial, the Plaintiff called several witnesses. He himself testified as PW4, that motor vehicle Registration No. KAR 376R was his although he had given the same to his brother, PW3 who was driving same during the alleged accident. He testified further that when he finally sold the salvage of his said motor vehicle which had been declared a right-off by the motor vehicle assessor, he sold it at Kshs.70,000/-. That it had cost him Kshs.11,000/- to tow the salvage after the accident and that he paid for car assessment. He believed that what he could properly claim out of the sum of Kshs.404,700/- pleaded, was Kshs.394,700/- which was arrived at after taking into account the pre-accident value, the sum received for the salvage, the assessor's fees and the towing charges.

The Plaintiff called the assessor who testified as PW1. The assessor said that the pre-accident value of the car was Kshs.450,000/-. He said he charged Kshs.3,500/- for the assessment report and confirmed the salvage value as Kshs.60,000/-, while his assessment fees was Kshs.5,000/-. He produced receipts into evidence.

The Plaintiff also called his brother, John Mwangi Macharia, as PW3. The witness confirmed that he was driving the car at the material time when he stopped along the Nairobi-Naivasha road, where another accident had occurred. That that was when the Appellant's Motor Vehicle Registration No. KAE 694Y rammmed into his vehicle Registration No. KAR 376R and caused the damage the subject of the claim. He blamed the driver of the Appellant/Defendant's vehicle for the accident because the said driver was in such high speed that he could not manage or control it to a stop. He also said that the road condition was dry and fair but that the driver of KAE 694Y was over speeding at an estimated 80KMH for a lorry with a trailer.

The Plaintiff/Respondent had also called PC Vincent Anyango of Kikuyu Police Station to testify. The witness said that the two vehicles had been involved in the alleged accident but that the offending one was the KAE 694Y/Z 7664, driven by the Defendant or Defendant's driver or servant. He produced an abstract report showing who was to blame and confirming that the driver of Motor Vehicle KAE 694Y/Z 7664 was never charged with any traffic offence because he had thereafter absconded.

When he/it was given a chance to give evidence in support of the pleadings in defence, the appellant/Defendant did not call witnesses. However, both parties filed written submissions.

The honourable trial magistrate considered the pleadings and the evidence adduced. In his short judgment he noted that the Defendant failed to adduce evidence to controvert the Plaintiff's evidence in support of his case. He clearly appears to have believed the plaintiff/Respondent's evidence that the Defendant's driver was over speeding at the material time and was reckless. He, as did the Plaintiff's evidence, blamed the Appellant's driver for the occurrence of the accident and went ahead to find the appellant wholly liable. He then noted that the Plaintiff/Respondent had specifically proved the sum of Kshs.394,700/- out of the sum claimed which had amounted to just over Kshs.404,000/-. He accordingly, awarded the said sum of Kshs.394,700/- plus 5,000/- for assessor's court attendance. He also awarded costs and court interests.

The Appellant became aggrieved of the trial magistrate's above findings and filed this appeal. In his grounds of appeal, the appellant in summary complained that the Honourable trial magistrate erred in finding that the Plaintiff had proved his claim in respect to showing that the Defendant's driver, drove negligently and/or that there was sufficient evidence to prove liability on the balance of probabilities. He asserted that the trial court failed to properly consider several relevant issues including the issue of proof of ownership of Respondent's vehicle and the award of a sum of Kshs.394,700/-, not specifically pleaded. The Appellant also raised the issue of the Defendant's written submissions contents which he said, were not properly considered.

I have carefully perused the pleadings, the evidence adduced during trial, the parties written submissions in the court below and before this court, the trial magistrate's judgment and the grounds of appeal. I am satisfied however that the evidence adduced by the Plaintiff/Respondent was not only credible and reliable, but was also sufficient on its own, to properly support the Appellant's pleading to prove the claim on the balance of probabilities. Further to that, the Appellant/Defendant failed to controvert the

Plaintiff's evidence.

In my further view, the evidence proved that the Appellant's driver was in high speed for a lorry with a trailer, that it was unable to manage the motor vehicle to a stop where there was a check point at an earlier accident spot, and where all approaching drivers were being slowed down and/or stopped. I accept the evidence that the Respondent's driver in the said circumstances, rammed into the Respondent's vehicle whether directly or through other motor vehicles in front of him.

I further agree that since the Appellant failed to controvert the Plaintiff's evidence, the same remained uncontroverted in its strong state as already found. In the circumstances it was inevitable for the trial court and now this court, to find the Defendant/Appellant negligent and wholly liable as the Appellant raised no evidence of contributory negligence.

As to the level of damages which were special damages, I observe that the Plaintiff/Respondent proved a less figure of damages than the one he had pleaded. The lower court awarded only what it thought the Plaintiff had proved. That in no way contravened the rules or principles of proving special damages. On the contrary, it confirms that the court will award only those special damages which are proved notwithstanding the fact that much more was claimed in the pleadings.

Finally, the trial magistrate appears to have arrived at his findings after considering the pleadings, the evidence produced, failure of appellant to controvert the Respondent's evidence and the standard of proof in civil cases. I find no evidence of the failures alleged on his part by the appellant in this appeal. I accordingly find no legal or factual grounds upon which I should interfere with the honourable magistrate's findings.

In the above circumstances, I find that this appeal has not merit. It is dismissed with costs here and below. I order so.

**DATED and DELIVERED at** Nairobi this 7<sup>th</sup> day of December, 2012

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**D.A. ONYANCHA**  
**JUDGE**