



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO.224 OF 1999

NATION NEWSPAPERS LIMITED.....APPELLANT

VERSUS

DANIEL WILLIAM MUTICHIRO.....RESPONDENT

JUDGMENT

This is an appeal from the judgment of the Senior Principal Magistrate delivered on 11th May 1999 in Milimani CMCCC No. 7159 of 1994 in which she dismissed the Appellant's claim with costs.

This was a material damage claim which arose from a road traffic accident on 25th December 1991 at Bukuga near Vihiga along Lwanda/Majengo road involving the parties' vehicles. After hearing the evidence in the case, the learned trial magistrate quite correctly found the Respondent wholly to blame for the accident. She nevertheless dismissed the Appellant's claim on the ground that this having been a material damage claim, it was not proved to the required standard.

This being a first appeal I am alive to my duty in the matter. I am obliged to re-evaluate the evidence on record and reach my independent conclusion bearing in mind the caution that having not had the advantage of seeing the witnesses testify to enable me and assess their demeanour I should be slow to reverse the trial court's finding of fact **Mwanasokoni Vs Kenya Bus Services Ltd. [1985] KLR 931.**

With this caution in mind I have examined the evidence on record and considered the submissions by counsel for the parties. It is true as the learned trial magistrate held that claims for special damages should not only be specifically pleaded but should also be strictly proved. **Herbert Hahn Vs Amrik Singh (1982-88) 1 KAR 738; Corporate Insurance Co. Ltd. Vs Loice Wnjiru Wachira C.A. No. 151 of 1995 C.A and Sande Vs Kenya Co-operative Creameries Ltd., [1992] LLR 314 (CAK)**

In this case the claim was specifically pleaded. As I have pointed out it was dismissed because, in the opinion of the learned trial magistrate, it was not strictly proved as require by law. The evidence on record is that the Appellant' vehicle was towed from Vihiga in Western Kenya to Top Job Motors in Nairobi. Hannington Ganya, PW2, a professional assessor testified and produced his report **Exh, 2** in

which he assessed the cost of repair at Kshs.125,678/60. In the absence of another assessment report by the Respondent the learned trial magistrate accepted that figure as a reasonable cost of repair. PW 3 produced, without any objection, the invoice **Exh. 5** which is stamped paid for Kshs.135,056/60. PW3 testified that upon receipt from their insured of the satisfaction Note **Exh. 4** duly signed by the Appellant and acknowledging that the vehicle had been repaired by the said Top Job Motors to its satisfaction, they paid a sum of Kshs.135,057/= to the said Top Job Motors. He also produced the letter (**Exh.6**) dated 7th April 1992 forwarding to Top Job Motors cheque No. 077976 for the said sum of Kshs.135,057/=.

This evidence notwithstanding, the learned trial magistrate was of the view that in the absence of a job card or any other document showing the actual repair works carried on the vehicle, the claim was not strictly proved.

With respect I think she erred. I have already pointed out that the Respondent did not carry out any assessment on the vehicle and that the learned trial magistrate actually accepted the estimate in PW1's report **Exh 2** as a reasonable cost of repair. That report has details of the repair works that were to be carried out. If no repairs were carried out, the Appellant could not have issued to its insurers the satisfaction Note **Exh. 4**. If the vehicle was not repaired then it means that the Appellant lied to get its insurers pay a third party and remain with an unrepaired vehicle. That would be totally unreasonable.

True as I have pointed out the law requires such claims to be strictly proved. But we should not forget the fact that even in such claims the standard of proof is still on a balance of probabilities. To require more or "better" evidence than that adduced in this case which was not controverted by the Respondent would be raising the standard of proof to a fetish level way beyond a balance of probabilities.

I am satisfied that the claim was proved as required by law. Consequently I allow this appeal, set aside the learned trial magistrate's order dismissing the Appellant's claim and substitute it with one entering judgment for the Appellant as prayed in that suit. The Appellant shall have the costs of this appeal.

DATED and delivered this 12th day of July 2011.

**D.K. MARAGA
JUDGE**