REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 93 of 2007

G.K. KAMURI & SONS LTD……………………………………….APPELLANTS

VERSUS

DANIEL GITHAKA KARAGU………………………….………….RESPONDENT

(Appeal arising from Kerugoya Senior Resident Magistrate's Civil Case No. 5 'A' of 2004 before J. N. Onyiego, Senior Resident Magistrate, delivered on 15th March 2007)

JUDGMENT

This judgment is the result of the appeal against the decision of the Senior Resident Magistrate's Court delivered on 15th March 2007 vide Kerugoya P.M.C.C.C. No. 5 'A' of 2004. The record indicates that motor vehicle registration No. KXJ 982 Isuzu owned by G.K. Kamuri & Sons Ltd., the Appellant herein, was driven along Kagio – Sagana road on 5th July 2003 when it veered off the road and crashed onto the premises standing on **PLOT NO. A30 KAGIO MARKET** and motor vehicle KAL 618N. The premises standing on **PLOT NO. A30 KAGIO MARKET** and motor vehicle registration No. KAL 618N are said to be the property of **DANIEL GITHAKA KARAGU**, the Respondent herein. The Respondent sued the Appellant vide the plaint dated 7th January 2004 claiming to be paid Kshs. 402,034/= being the damage he suffered as a result of the accident. The suit was heard by Hon. J. N. Onyiego, learned Senior Resident Magistrate, who in turn found the case in favour of the Respondent. The Appellant was unhappy with the aforesaid judgment hence this appeal.

On appeal, the Appellant put forward the following grounds in its Memorandum of Appeal:

1. ***That the learned trial magistrate erred in fact in his judgment in awarding the Plaintiff the amount prayed in the plaint of Kshs. 402,034 when it was clear that part of that amount (Kshs 115,045/=) was not supported by evidence showing that the Defendant was to blame for the same.***

2. ***That the learned trial magistrate erred in law and in fact in failing to consider the Defendant's argument that the loss of Kshs. 115,034/= was occasioned by third parties for whom the Defendant had no control over thus misapprehending and/or erroneously disregarding the maxim of** novus actus interveniens**.***

3. ***That the learned trial magistrate misapprehended the law and erred in fact and in law in awarding special damages which were pleaded but not supported by any evidence in proof as legally required.***
4. ***That the learned trial Magistrate erred in law and in fact in failing to properly consider the evidence on record hence arriving at an erroneous finding that the Defendant's driver was to blame for the accident the subject matter of the suit and holding the Defendant 100% to blame.***

5. ***The learned trial magistrate erred in the manner in which he conducted the trial as a whole, in disregard and shutting out the Defendant's evidence and as such occasioned injustice to the defendant.***

6. ***That the trial magistrate exercised his discretion wrongly in computing the amount awardable to the Plaintiff thus arriving at an excessive award on damages.***

When the Appeal came up for hearing , this court directed learned counsel appearing in the matter to file written submissions. I have reconsidered the case that was before the trial court and the written submissions filed by learned counsels from both sides. **DANIEL GITHAKA KIRAGU** (P.W.1) told the trial court that the lorry was being driven at a high speed and as a result the driver lost control when the lorry hit a bump. Consequently the lorry rammed into his building and lay on top of his motor vehicles registration No. KAL 618N and KAN 034 D. P.W. 1 was of the view that the lorry was being driven carelessly. He produced the valuer's report which amount indicated that the damage to his building assessed at Kshs. 260,000/- which he asked the trial court to award him. P. W.1 further averred that he paid the valuer his fees in the sum of Kshs. 9,280/-. He produced a loss assessors report indicating that motor vehicle registration No. KAL 618N was damaged to the extent of 115,045/= and that he paid Kshs. 5,000/- to the loss assessor. P.W.1 further produced receipts indicating the amount he spent to bring the motor vehicle to the road. In the end the Appellant produced documents showing that he suffered a combined loss of Kshs. 402,034/=. P.W.1 said the accident occurred while he was seated outside his building. On cross-examination the witness (P.W.1) admitted that he did not spend Ksh.260,000/= estimated by the valuers. **ALBERT KARUGURU MURIITHI** (P.W.2) stated that he assessed motor vehicle registration No. KAL 618 N and gave the estimates necessary to repair it. He said he inspected the motor vehicle whose engine had been dismantled. P.W.2

estimated the amount needed for repair to be Ksh.115,000/=. He charged a fee of Ksh.5,000/= and Ksh.9,900/= for court attendance fees. On cross-examination P.W. 2 said that the doors of the motor vehicle were okay and that the engine had been dismantled at the time of his assessment. **PETER GITAU NGIGI** (P. W. 3) told the trial court that he had been instructed to assess the damage visited upon the Respondent's building. He gave an estimate of Ksh.260,000/=. He charged a fee of Ksh.9,280/=. **CHRISTOPHER MWANGI** (P. W. 4) claimed he operated a business adjacent to the one of the Respondent. He said he saw the lorry moving at high speed in a zig zag manner. The same rammed onto the Respondent's premises and onto motor vehicle registration No. KAL 618 N.

The Appellant tendered the evidence of two witnesses in its defence before the trial court. **KENNEDY KINYUA** (D. W. 1) averred that on the fateful day he boarded lorry registration KXJ 982 to supply beer. The motor vehicle was driven by one Murage. He claimed that when the lorry approached Kagio they found many people on the road carrying stones. That is when the driver lost control and hit a building. D. W. 1 denied that the lorry was on high speed. D. W. 1 claimed the lorry lost control when the driver swerved to avoid hitting other motor vehicles. **JAMES GATITHI KIBUGI** (D. W. 2) stated that he engaged the services of a valuer to assess the damage caused to the Respondent's building. He produced a report indicating that the damage was estimated to be Ksh.83,792/70.

I have re-considered the evidence tendered before the trial court. It is obvious from the evidence tendered by both sides that the issue touching on liability is certain. The Appellant's driver is squarely to blame for the accident. Perhaps what is in dispute is the quantum of damages. There is no doubt the respondent claimed for special damages of Ksh.402,034/=. The particulars are given in paragraph 5 of the Plaint.

On appeal, the Appellant has put forward a total of six (6) grounds which were earlier reproduced in this judgment. Ground 4 cannot stand in view of the fact that liability cannot be apportioned in this case. The Appellant's lorry was simply driven in a reckless manner thus veering off the road and crashing on the Respondent's property. In ground 1 the Appellant has averred that the trial magistrate erred when he awarded Ksh.402,034/= which is inclusive of a claim of Ksh.115,045/= yet the evidence did not support such an award. In ground 2, it is stated that the loss of Ksh.115,045 was occasioned by third parties who were not under the control of the Appellant. In ground 3 it is also alleged that the trial magistrate awarded special damages which were pleaded but not proved. I will deal with the above grounds together. The Respondent pleaded to be paid special damages in the sum of Ksh.402,034/= particularized as follows:

(i) ***Damage to premises*** - ***Ksh.260,000/=.***
(ii) ***Costs of assessment*** - ***Ksh. 9,280/=***
(iii) ***Damage to KAL 618 N*** - ***Ksh.115,045/=***
(iv) ***Valuation fees*** - ***Ksh. 5,000/=***

(v) Police abstract - Ksh. 120/=

(vi) Total - Ksh.389,445/=

(vii) Expenses incurred in attempts to settle the matter out of court - Ksh.12,589/=

Total - Ksh.402,034/=

The law is well settled regarding claims in respect of special damage. In the case of **MOHAMMED HASSAN MUSA & ANOTHER =VS= PETER M. MAILANY & ANOTHER C.A. NO. 243 OF 1998** (unreported) the Court of Appeal at page 12 expressed itself *interalia* as follows:

"It has been held time and again that special damages must be pleaded and of course strictly proved."

In this appeal it is apparent that the Respondent pleaded to be paid Ksh.402,034/=. The question which must be settled is whether the respondent strictly proved his claim. Let me critically re-examine the sort of evidence tendered to establish the particulars of the claim. The Respondent claimed Ksh.260,000/= to be the cost of damage occasioned to the building standing on Plot No. A 30 Kagio Market. The Respondent heavily relied on the evidence of his valuer **PETER GITAU NGIGI** (P.W. 3). He said he was asked by the respondent to inspect his premises which had been damaged by a motor vehicle. P. W. 3 said he arrived at a figure of Ksh.260,000/= after taking into account the cost of reconstruct of the balcony, the damaged wall, window panes and labour charges. I have carefully looked at the report. The valuer clearly stated that the lorry crashed at the middle of the building and demolished the cantilever wall above the shops verandah. As a result, there were structural cracks on the ground floor wall and the window panes were broken. It is also concluded that there was no significant structural damage to the entire building but only on the point of impact and the cantilever wall. In his conclusion P.W.3 formed the opinion that the current replacement value of the damage caused by the lorry could fairly be estimated at Ksh.260,000/=. It would appear P. W. 3 merely gave an estimate. It would have been necessary for him to give the particulars of how he arrived at Ksh.260,000/=. The estimate given does not make sense because the bill of quantities was not submitted by a quantity surveyor. The amount required as labour charges was not stated. In fact P. W. 3 admitted in cross-examination that his report did not give the detailed calculation on how he arrived at the figure of Ksh.260,000/=. In the case of **DHALAY =VS= REPUBLIC [1995 – 1998] E.A. 29** the Court of appeal in part stated as follows:

"Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such an opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground (s) that the opinion though it be of an expert, is not

soundly based, then the court is not only entitled but would be under a duty to reject it."

I will apply the above principles to the evidence of P. W. 3 regarding his opinion as to the damage caused to the premises standing on **PLOT NO. A 30 KAGIO MARKET**. P.W.3 merely stated the particulars of damage but did not give the details as to how he arrived at Ksh.260,000/=. In fact the Respondent (P. W. 1) admitted in cross-examination that he did no spend Ksh.260,000/= estimated in the valuation report. In the light of the evidence and the circumstances of this case, I am entitled to reject the estimate given by P. W. 3. It was not supported by cogent evidence. The Appellant on its part tendered the evidence of two witnesses. The first witness merely referred to the report prepared by the safety surveyors Ltd. that report indicated that the cost of repair of the damaged building should be fixed at Ksh83,712/70. Unfortunately that assessment report was merely marked but was not produced. The evidence tendered by the Appellant will not assist this court in arriving at a just conclusion. The Respondent was required to strictly prove his claim but he was let down by his expert witness who gave a general estimate instead of giving details of how he arrived at Ksh.260,000/=. There is no doubt the building standing on PLOT A 30 KAGIO MARKET was damaged. The owner will have to spend some money to restore it to its original state. The figure given of Ksh.260,000/= is an exaggeration. If the same is given, it amounts to making the Respondent to unjustly enrich himself. The law in the circumstances of this case allows the court to give a reasonable estimate. The respondent admits he did not spend the aforesaid estimate. On this head I will award the Respondent half the sum of the Estimate i.e. Ksh.130,000/=. The other seriously contested issue is the award of Ksh.115,045/= representing the amount allegedly incurred by the respondent to repair motor vehicle registration No. KAL 618 N. According to the Appellant, the trial magistrate erred when he made an award of Ksh.115,045 instead of Ksh.16,000/=. It is said the sum of Ksh.16,000 is the only damage attributable to the accident. I have reconsidered the evidence tendered by both sides over the damage caused to motor vehicle registration No. KAL 618 N. The Respondent (P. W. 1) told the trial court that he bought spare parts to replace those which were inside the motor vehicle and stolen at the time of the accident. He claimed the items stolen were: a cylinder head and other accessories. He stated that he was not sure when the aforesaid spare parts were stolen. The Respondent also tendered the evidence of Instep Loss Assessors vide Albert Karuguru Muriithi (P. W. 2). P. W. 2 said that he was told by P. W. 1 that the motor vehicle engine had been dismantled for repair and that the engine parts had been kept inside the vehicle in a sack. The sack is reported to have been stolen in the commotion of the accident. The Appellant's evidence on the assessment of damage were merely marked for identification hence not produced in evidence as an exhibit. Consequently what remains on record is the documentary evidence of the Respondent. I have perused the Estimates required to make the motor vehicle registration No. KAL 618 N roadworthy. The loss assessor indicates in his report that the parts damaged were the windscreen, windscreen moulding, windscreen dam kits, left hand side front tyre, tube, Front panel and bush guard. The assessor fixed the value of those damaged items at Ksh.18,925. The cost of repainting is put at Ksh.12,000/= and the overall labour charge at Ksh.9,000/=. In my considered view, I am convinced that the

Respondent managed to prove by cogent evidence the damage he suffered as aforestated. In other words he was able to establish that the direct loss he suffered as a result of the accident was Ksh.39,925/=. He was, however, unable to establish that the cylinder head and the other accessories were lost as a result of the accident. It is possible that the same had been stolen from inside the motor vehicle before the accident. In his evidence he said he was not sure when the cylinder head and the other accessories which were kept inside a sack were lost. He did not specify in the Police abstract form, the loss of the aforesaid items. In a nutshell, there was no nexus between the accident and the loss of those items. The Appellant has alleged that the sum of Ksh.12,589/= claimed on account of expenses incurred in trying to settle the claim out of court is unjustified. I agree with the Appellant on this aspect. The respondent did not tender any cogent evidence to prove this claim. I find the other claims as having been proved.

In the end this appeal partially succeeds. The appeal is allowed in the following terms:

(i) **The award of Ksh.260,000/= on account of damage occasioned to the building standing on PLOT NO. A 30 KAGIO MARKET is set aside and substituted with an award of Ksh.130,000/=.**

(ii) **The award of Ksh.115,045 to repair motor vehicle registration No. KAL 618 N is set aside and is substituted with an award of Ksh.39,925/=.**

(iii) **The award of Ksh.12,589 on account of expenses incurred in attempting to settle the claim out of court is set aside. The amount set aside on appeal is Ksh.217,709/=.**

The end result is that the award of Ksh.402,034 is set aside and is substituted with an award of Ksh.184,325/=. Costs of the appeal and the suit is given to the Respondent based on the judgment sum on appeal.

Dated and delivered at Nyeri this 2nd day of June 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Mugambi for the Appellant and no appearance for Kahiga for Respondent.

MUGAMBI: Kindly mention this appeal on 11th June 2010.

COURT: Mention on 11th June 2010. Mention notice to issue.

J. K. SERGON

JUDGE