REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 31 of 1998

LEONARD NJOGU ………………..……………..…………APPELLANT

AND

ROBERT KATUU…………..……..……..…….…………1ST RESPONDENT

H.K. MEHTA…………………..……….……….………2ND RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. H.M. Okwengu (Mrs.) Ag C.M. (as she then was) in Nairobi CMCC No. 9110 of 1996 dated 15th October 1999)(sic)

J U D G M E N T

1. This is an appeal emanating from the Judgment/Decree in Nairobi Chief Magistrate's Civil Case No. 9110 of 1996 filed in court by the Appellant herein on 22/08/1995. The plaint was amended on 21/01/1997. The Plaintiff's claim in the lower court arose out of a road traffic accident which is said to have occurred on 16/06/1995 and which accident resulted in material damage to the Plaintiff's car. The Plaintiff claimed the following reliefs:-

(a) Kshs.18,300/= being repair charges and assessor's fee.

(b) Loss of user at Kshs.2000/= per day from the date of the accident to say (19th June 1995) until the date of payment 3rd July 1995.

(c) Costs of this suit

(d) *Interest on (a)* and (b) at court rates.

2. When I took over the conduct of this appeal on 3/02/2009, M/s Karanja appeared for the Appellant while Miss Njagi for Mr. Desai appeared for the Respondent. Miss Karanja told the court that the appeal had already been heard by Amin J (as he then was) and written submissions filed. Miss Karanja asked the court for directions regarding the writing of judgment. On her part, Miss Njagi told the court that the Appellant's submissions were ineligible and requested the court to order appellant to file a readable copy of the submissions. She said that because of the ineligible copy of submissions, the Respondents had

filed their application dated 22/07/2008 in which they sought the following orders:-

(1) THAT directions be given for judgment

(2) THAT in the alternative, the Applicant's/Respondent appeal be dismissed with costs to the Respondent's/Applicants

(3) THAT the costs of this application be borne by the Appellant/Respondent

3. When the parties again appeared before me on 19/02/2009, Miss Karanja for Appellant and Miss Mwangi for the Respondent said that they had agreed to take directions as to a judgment date. On perusal of the court file, I found that on 5/06/2000, his Lordship Amin J (as he then was) ordered that the parties would argue their appeal by way of written submissions, hence this judgment.

4. The Defendants in the lower court (Respondents in this appeal) filed their amended defence on 4/04/1997. While admitting that their motor vehicle KAE 067E was involved in the accident that gave rise to the suit herein, they denied that the said accident was caused by the negligent acts on the part of themselves. They attributed the accident to the Plaintiffs driver, servant and/or agent. The Defendants also averred that if the Plaintiff was entitled to any damages, the amount thereof was limited to Kshs.5000/- as agreed between the two parties. The Defendants asked the court to dismiss the Plaintiff's claim against them.

5. At the hearing before the lower court, the Plaintiff gave evidence. His evidence was that the Defendant's vehicle rammed into the left hand front side of the Plaintiff's vehicle when the Defendant's vehicle failed to give way before entering a main road. The Plaintiff also testified that the Defendant admitted liability in writing. He also said that the Defendant paid him (Plaintiff) Kshs.4000/= as deposit for the repairs but that they failed to agree on the actual repair charges. The Plaintiff testified that when the Defendant failed to make arrangements to have the Plaintiff's vehicle repaired at a garage of the Defendant's choice, he (Plaintiff) took the vehicle to his own garage for repairs at a total cost of Kshs.22,300/= inclusive of assessment fee of Kshs.1300/=. Plaintiff also testified that while the car was undergoing repairs, he hired a taxi from 19/06/1995 to 3/07/1995 at the rate of Kshs.2000/= per day to take him to the office and his son to school. He produced as PExhibit 4 receipts for payment of taxi charges. The Plaintiff denied that he and the Defendant agreed on the repair charges before hand, and that the amount was Kshs.5,000/=.

6. During cross examination, the Plaintiff stated that though Muthithi garage had estimated the repair charges at Kshs.5000/= he (Plaintiff) disputed the amount. He said that he disputed the assessment because Muthithi garage was located in a residential area. The Plaintiff however admitted receiving Kshs.4000/= from the Defendant but denied there was a balance of only Kshs.1000/= to be paid by the Defendant. The Plaintiff's case was that the Kshs.4000/= paid by the Defendant was merely an advance towards the repair charges. The Plaintiff also denied that his car had many pre-accident damages.

7. The Defendant's witness, DW1 was Hiran Kumar Kishorbhai Mahetha. He said he was the driver of motor vehicle KAE 067E along Mpaka Road on the morning of 16/06/1995 at about 7.30 a.m. He said he was doing 40 kph and that while at the junction of Mpaka and Parklands Roads, the Plaintiffs motor vehicle failed to stop at the junction and knocked his (Defendant's) car. He said that the only damage to the Plaintiff's car was at the front corner and that neither bonnet nor mudguard was touched. DW1 said he agreed to pay Plaintiff Kshs.5000/= out of which Defendant paid Kshs.4000/= on that same day. DW1 said he signed a note admitting liability. DW1 stated further that the Plaintiff refused to go with the Defendant to the Defendant's garage of choice for repairs. DW1 also stated that when they took Plaintiff's car to Muthithi garage for assessment of damage, he (DW1) noticed that the Plaintiff's car was also damaged on the right hand side. DW1 stated that he was ready and willing to pay the Defendant the balance of Kshs.1000/= out of Kshs.5000/= which was the amount to be charged by Muthuthi garage.

8. During cross examination, DW1 admitted that he failed to give way to the Plaintiff's car. DW2 was Kuldip Singh. He said he was the owner of a garage at Muthithi Road. That he assessed the damage on

motor vehicle KVH 111 a vehicle that was taken to him by both the Plaintiff and DW1 and estimated cost of the repairs as roughly between Kshs.5000/= and 6000/=. He said that if he had repaired the car, he would have taken about 2 days to do so. DW2 stated that he had repaired cars for between 25 and 30 years, though such work was being done as a hobby.

9. In her judgment delivered on 26/01/1998, the learned trial magistrate made the following findings:-

(a) that DW1's garage was not a registered garage

(b) that the Plaintiff was driving his motor vehicle KVH 111 on the main road while the 2nd Defendant was coming from a feeder roads

(c) that the 2nd Defendant failed to give way at the junction of the minor and major road

(d) that the 2nd Defendant's failure to give way caused the accident

(e) that the 2nd Defendant admitted liability for the accident and paid some Kshs.4000/= to the Plaintiff towards repair charges

(f) that no expert evidence was adduced by the Plaintiff to confirm whether the assessment done by Action Auto on behalf of the Plaintiff was done by a professional or not and how long the repairs would take

(g) that the 2nd Defendant all along disputed the Plaintiff's assessment of the estimates by Action Auto.

10. On the basis of the above findings, the learned trial magistrate concluded that the Plaintiff had not proved his case regarding the cost of repairs on a balance of probability. The learned trial court also found that there was no justification for the claim for loss of user for the period of three weeks. The learned trial magistrate dismissed the Plaintiff's case. Each party was to bear its own costs.

11. Being aggrieved by the judgment of the learned trial magistrate, the Appellant appealed. The Appellants Memorandum of Appeal dated 16/02/1998 has 5 grounds of appeal, namely:-

1. THAT the learned magistrate erred in law in holding that the Plaintiff had not proven his case on a balance of probability.

2. THAT the learned trial magistrate erred in law and infact in holding that the Plaintiff's failure to call the assessor as a witness was fatal to his claim

3. THAT the learned trial magistrate erred in law and in fact in holding that the assessment may not have been done by a professional when this was not an issue in dispute

4. THAT the learned trial magistrate erred in law and fact in holding that the evidence of the taxi driver was required in order for the Plaintiff to prove his case.

5. THAT the learned trial magistrate erred in law and fact in placing upon the Plaintiff a burden of proof that was so onerous as to be beyond that which is required in civil proceedings.

12. The Appellant prays that the judgment of the learned trial magistrate be set aside and that judgment be entered for the Appellant as prayed in the plaint. The Appellant also prays for costs of this appeal and of the suit in the lower court.

The Applicant's Submissions

13. The Appellant filed his submissions on 3/07/2000. The Appellant contents that the learned trial magistrate erred in law and in fact in holding that the Appellant had not proven his case on a balance of probability. The Appellant argues that having found the Respondents liable she should have gone ahead to assess damages. The Appellant further contends that the learned trial magistrate erred in law in holding that the Appellant's failure to call witnesses was fatal to his claim. This argument was based on the ground that a notice to admit documents had been served upon the Respondents as required by Order XII of the Civil Procedure Rules and that having failed to file a Non-Admission notice meant that the Respondents admitted the documents sought to be relied on by the Appellants in accordance with Order X rules 2 and 3 of the Civil Procedure Rules. In my view, Order X rule 3 of the Civil Procedure Rules is irrelevant to the matter before court, but rule 2 provides as follows:-

"*2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the court; and in deciding upon such application the court shall take into account any offer, which may be made by the party sought to be interrogated, to delivered particulars or to make admissions, or to produce documents relating to matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court shall consider necessary either for disposing fairly of the suit or for saving costs.*"

14. Learned counsel for the Appellant contends that since the learned trial court admitted the receipts produced by the Plaintiff to support the Plaintiff's claim, it was erroneous for the court to turn round and to hold that the assessment was not done by a professional. It is the Appellants further contention that in light of the documentary evidence, it was not necessary to call the taxi driver. The Appellant further contends that the court placed a burden of proof on the Appellant that went beyond proving the case beyond any reasonable doubt.

The Respondent's Submissions

15. Learned counsel for the Respondent filed their submissions on 19/07/2000. Counsel contends that the judgment of the trial court was in line with the law and the evidence in that the Appellant did not specifically prove special damages as claimed in the plaint. The Respondent argues that the Plaintiff's documents were admitted under Order XII Rules 1 and 2 of the Civil Procedure Rules; that Notice of Non-Admission was not filed and that though the documents were admitted, the Plaintiff was still required to prove his claim; that the court was under a duty to examine these documents with a view to satisfying itself as to their authenticity.

16. The Respondent also contends that for the Appellant to have proved the special damages, he needed to call the assessor to confirm the actual damage suffered and that it was only the assessor who could give such evidence production of the receipts notwithstanding. Counsel for the Respondent fortified this argument by saying that the receipts for payment were not under seal; and further that the taxi driver needed to be called to ascertain that he carried the Plaintiff in his taxi and was paid the amount of money which the Appellant alleged to have paid. Counsel for the Respondent contends that it was important for the Appellant to call the person who assessed the damage to the Plaintiff's car with a view to clearing any doubts created by the Respondent that on the same morning after the accident, DW1 noticed pre-accident damages on the Appellant's car.

17. Counsel for the Respondent further contends in his written submissions that it was not for the court to assess damages payable to the Plaintiff since this was not a case of general damages. Counsel says that special damages are not only to be specially pleaded but they are to be strictly proved, a burden which counsel says the Appellant failed to discharge. Counsel for the Respondents cited the case of **Ratcliff – vs- Evans (1892) 2 QB 524 (CA).** The court said the following at page 532 of the judgment,

"*In all actions accordingly on the case where the damage actually done is the gist of the action, 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 certainty and particularity 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.”

The Findings

18. The court has now considered the whole of the evidence laid before the trial court and also considered the submissions made thereat. The court has considered the Appellant’s complaints against the judgment of the trial court and the submissions made on appeal; together with the authorities cited by both parties. The finding of the court is that the gist of the Appellant’s case in the lower court was one of special damage caused to his car as a result of the admitted negligent acts of the 2nd Defendant. The law places a heavy burden on a party in a special damage claim to strictly prove the amount(s) claimed. The court is not under a duty to assess any such damages. The duty of assessing damages falls upon the court when the claim is for general damages.

19. On assessment of the evidence, the law and the submissions, I find that the Appellant failed to meet the strict standard of proving the special amounts claimed. No evidence from the assessor was adduced by the Appellant; and more so when the receipts produced by the Appellant in support of the amounts claimed were not under seal. The Respondent herein raised sufficient doubt as to the authenticity of the Appellant’s claim. The Respondent also raised sufficient doubt as to whether the amount claimed as repair charges did not also cover pre-accident damage to the Appellant’s car. Further, the payment receipts for the repair charges – Pexhibit 3 (bundle) are not consistent with regard to the recipient of the sums allegedly paid. The receipts for the amounts allegedly paid to the taxi driver do not indicate whether the Appellant went to work everyday, including Saturdays and Sundays and whether the Appellant’s son also went to school every day of the week. The Appellant’s evidence was that the taxi was hired to take him to work and to take his son to school. In any event, the **Action Auto Repairs** invoice does not have the rubber stamp of the Garage similar to what appears on the “Estimate” document dated 19/06/1995. There is therefore doubt as to whether the repair charges as claimed were actually paid.

20. For the above reasons, the court sees no reason for interfering with the trial court’s judgment. The appeal is therefore found to lack merit. The same be and is hereby dismissed. Each party shall bear its own costs.

It is so ordered.

Dated and delivered at Nairobi this13th day of November, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

No appearance For the Appellant/Plaintiff

Mr. Sarvia (present) for the Defendants/Respondents

Weche – court clerk