REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 77 of 2005

DANIEL KARIUKI FRANCIS…....……APPELLANT

VERSUS

JOHN GICHOVI NJIRU…….……..RESPONDENT

JUDGMENT

This is an appeal from the Judgment of ***L. W. Gitari Senior Principal Magistrate in Civil Suit No. 98 of 2005***. In the suit, the plaintiff had sued the defendant for special damages amounting to Ksh.356,501 as particularised in paragraph 6 of the plaint. He also asked for cost of the suit plus interest thereon at court rates. The cause of action arose out of a collision of the plaintiff's motor vehicle with the defendant's motor vehicle on 8/4/2004 along Embu-Kiritiri Road. The defendant filed a defence and denied liability in toto. The matter proceeded to hearing with the plaintiff calling a total of 3 witnesses. The defendant did not adduce any viva voce evidence but both counsel filed written submissions and cited several authorities on the issue of the quantum of damages to be awarded. The learned trial magistrate after considering all the evidence found in favour of the plaintiff and awarded him Ksh.329,936 as special damages less 13% defendant's contribution to the accident. The defendant was dissatisfied with that judgment hence this appeal. Apparently, the issue of liability and the apportionment thereof has not been disputed. The appeal is based on 4 grounds of appeal as per the Memorandum of Appeal. This being a first appeal, it is incumbent upon me to re-evaluate the evidence adduced before the subordinate court and consider the grounds of appeal raised and arrive at my independent decision as to whether the award in question can be sustained or not. Since however the collision is admitted and the apportionment of liability is not in issue, I will only revisit the evidence related to the special damages.

According to the plaintiff, after the accident, the motor vehicle was towed to Embu Police Station. A police abstract was issued which abstract was produced as Exhibit 1. An assessment report for the damage on the motor vehicle was also prepared. The same was produced in court as Exhibit 3. The plaintiff produced a receipt of 4,000/= for the said report. According to the report, the repairs would cost the plaintiff a total of 320,838/=. This report was produced as Exhibit 4. The plaintiff went ahead and bought spare parts of 330,000/=. He was issued with a pro-forma invoice for the same which was produced as Exhibit 5. He said that the motor vehicle was then repaired at Ramogi garage where a further 35,000/= was paid Exhibit 7 was evidence in support of that item. The assessor's fees of 5,000/= was also paid and the receipt produced in evidence. The mechanic who carried out the repairs testified as pros. He confirmed that the spare parts for the motor vehicle cost 33,000/= and a further 4,000/= for other spare parts which were not included in the pro-forma invoice. That item along with the entire item 6 (d) in the plaint was disallowed on the basis that it was not specifically particularised and strictly proved as required by law. I will not therefore go into that item. All the parties in this suit including the learned trial magistrate appear to be well appraised of the fact that special damages must be specifically pleaded and strictly proved. That indeed is the law. The only issue this appeal raised is whether items (a) and (b) were strictly proved, and further whether the 5,000/= for assessors fees and the 4,000/= for other spare parts which were not specifically pleaded could be awarded. As stated hereinabove, it is trite law that special damages must be specifically pleaded and strictly proved.

As far as the assessors fees of 5,000/= and the extra 4,000/= is concerned, the plaintiff's prayers are mute on the same. They cannot be included in the claim for "***other expenses"*** which the learned trial magistrate rightly declined to award. My view therefore is that although receipts were produced in evidence for those 2 items, they needed to have been specifically pleaded in the prayers in the plaint.

They were not pleaded and the receipts could not have been admitted in a vacuum. The learned trial magistrate therefore erred in law in awarding the 9,000/= which had not been pleaded. That amount is disallowed.

On item (a), I agree with the learned trial magistrate and counsel for the plaintiff that it is common knowledge that a police abstract costs 100/=. That is knowledge which the court cannot ignore and a fact calls for judicial notice. The magistrate did not therefore err when she awarded the 100/= in absence of the production of a receipt for the same. Ground (a) on the memorandum of Appeal must therefore fail.

On ground 2, I note that the plaintiff produced a pro-forma invoice for 330,000/= A pro-forma invoice is raised to show the market value of the specified goods, with the goods being paid for before dispatch. Unlike a normal invoice therefore which is a normal invoice therefore which is raised after the goods have already been released to the buyer, the goods which are the subject of a pro-forma invoice have to be paid for before their dispatch. This therefore means that the 3 spare parts indicated in the pro-forma invoice ie Exh.p5 were paid for PW2 –Patrick Ochieng confirmed that indeed the spare parts in question cost them 330,000/= and that he fitted them in the vehicle. This evidence in my considered view offered corroboration to the plaintiff's evidence and the pro-forma invoice that the amount in question was paid for the spare parts. Whereas I admit that a pro-forma invoice is not the equivalent of a receipt, my finding is that once the goods on the pro-forma invoice have been collected, then prima facie this proves that they have been paid for. I am in agreement with counsel for the plaintiff and the learned trial Magistrate that there was ample evidence here that the said amount was paid for and utilized for the repairs of the plaintiff's motor vehicle. The case of ***JACOB AYIGA MARUJA and ANOTHER –V- SIMON OBAYO – Civil Appeal No. 167 of 2002*** comes into play.

In this case, the Court of Appeal awarded special damages for funeral expenses in absence of production of receipts holding that

"***a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses"***. What is "***reasonable and legitimate"*** however differs from case to case and depends on the peculiar circumstances of each case. In this case, the plaintiff's motor vehicle was extensively damaged. He repaired the same. The witness who did the repairing testified and confirmed to the court that they had paid the amount on the pro-forma invoice plus more which was infact disallowed by the court. There was no evidence that the cost of the spare parts was exaggerated and so it would defeat justice to allow that item. My finding therefore is that in the spirit of the ***Jacob Ayiga Case***, the cost of repairs of the plaintiff's motor vehicle which is claimed as item (b) must be allowed. Ground 2 of the appeal therefore fails.

In sum therefore this appeal only succeeds in part as far as the 5,000/= claimed as assessors fees and the 4,000/= are concerned. This appeal therefore succeeds in part with the court confirming the award of 320,936/= less the 13% plaintiff's contribution plus of the suit subject to the same contribution. Each party will bear its costs of this appeal since the appeal succeeded partially.

Orders accordingly.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this15th day of October, 2008.

In presence of;-