



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 849 of 2001

APOLLO INSURANCE CO. LIMITED.....APPELLANT

VERSUS

PETER KIMANI NJUGUNA.....RESPONDENT

JUDGMENT

On 10/12/01 the appellant herein, APOLLO INSURANCE CO. LTD. moved to this court, on appeal, challenging the judgment of the lower court in PMCC 2395/00, delivered on 13/11/01 on the following grounds:

1. The Learned Magistrate erred in law and in fact in not finding that the Plaintiff/Appellant had proved its case on a **balance of probabilities**.
2. **The Lower Court erred in law and in fact in holding that the evidence given by the loss-assessor of the vehicle on behalf of the appellant was doubtful.**
3. **The Lower Court erred in law and in fact in failing to award the appellant the special damages and the interest sought in the plaint.**
4. **The Lower Court erred in awarding the Respondent the costs of the suit.**

Wherefore the appellant prays that the judgment of the lower court be set aside and substituted with a judgment in favour of the appellant; and that the appellant be awarded costs for this appeal and costs of the suit in the court below.

The FACTS in this case are briefly that:

On 11/10/1998, the Plaintiff's driver, was driving vehicle KAH 003N along Naivasha Nairobi road, at Kinale area, when the Defendant's driver, in KAH 464D, so negligently collided with the Plaintiff's vehicle thereby resulting to damage on the said vehicle. The Plaintiff alleges that the Defendant's vehicle was driving on the wrong side of the road. It was also alleged by the Plaintiff that the Defendant's vehicle was driving at high speed in the opposite direction and on nearing the Plaintiff's vehicle, the rear tyre of Defendant's vehicle burst, causing the vehicle to lose control and move into the direction of the Plaintiff's vehicle. Seeing the imminent collision, the Plaintiff's driver swerved his vehicle to his side, but it was too late and the Defendant's vehicle collided into the rear of the Plaintiff's vehicle.

The Plaintiff further averred that when the police came to the scene, they blamed the Defendant's driver for the accident.

Arising from the accident, the Plaintiff claims special damages for the repair of the vehicle; the assessors fees, charges for investigations and the Police Abstract.

In defence, the Defendant's case is that there was no damage to the Plaintiff's vehicle, as evidenced from the photographs taken and produced in court; and if there was any damage it was as a result of the vehicle landing in the ditch. There was no tyre burst in the Defendant's vehicle, and Plaintiff's pleadings did not state that. The Plaintiff failed to explain how the accident occurred. Defendant's case is that as he drove his vehicle along Ol-Kalou- Nairobi road, a donkey cart suddenly came onto the Road on the side of the coming traffic causing the driver of the Plaintiff's vehicle, KAH 003N, to swerve with a view to overtaking the cart. Result was that the vehicle came onto the Defendant's side, as he tried to swerve to avoid the collision. That is when he landed into the ditch. The Defendant's driver was not charged with any traffic offence. This shows that he was not in any way to blame.

On the basis of the above, the lower court held that the Plaintiff had failed to prove his case and dismissed the same with costs to the Defendant, prompting this appeal.

I have reviewed the evidence on record and considered the submissions by learned counsel for both sides and I have reached the following findings and conclusions.

The evidence of both the Respondent and the assessor/witness for the appellant confirmed that there was no actual contact between the vehicles and the damage to the appellant's vehicle could have been caused when the vehicle fell in a ditch. That evidence further shows that the two vehicles swerved to avoid each other resulting in each of them landing into a ditch. I feel that conclusion was wholly and properly supported by the evidence before the Learned Magistrate.

Accordingly, the lower court's holding that the Appellant had failed to prove its case was proper. That the Appellant's vehicle might have suffered damage is not tantamount to pinning that damage on a causal action by the Respondent.

Put differently, for the Respondent to be liable for damage, if any, to the appellant's vehicle, the appellant bears the burden of proving negligence on the part of the Respondent arising from which the damage to the vehicle was occasioned. That burden of proof has not been discharged by the appellant herein.

Accordingly, in the absence of liability, there is no legal basis for any claim against the Respondent. This finding and holding is sufficient to dispose of the need for going into the issue of special damages.

However, even if liability had been established (which is not the case herein) the sums claimed are not payable under the head "special damages." By law, such damages must not only be pleaded but also proved. Here there is only a claim, but no proof.

What the record before me shows is that there are invoices and payment vouchers filed by the appellant. But those are not proof of special damages.

As held in ZACHARIA NJOROGE THUKU V. SAMUEL NJOROGE THUKU HCCCA NO. 445 OF 2003 at Page 7 ".....**an invoice would not suffice. Only a receipt, for the payment will meet the test** [of proof of special damages]

For all the above reasons, the appeal herein is dismissed with costs to the Respondent both at this appeal and the costs at the court below.

The judgment of the lower court is hereby upheld.

DATED and delivered in Nairobi this 11th Day of June, 2007.

O.K. MUTUNGI

JUDGE