REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 4081 OF 1994

EVANS CROPS CONTRACTORS.....…PLAINTIFF

(suing as a firm)

-VERSUS-

ISAIAH MINYONGA..…..……..……DEFENDANT

JUDGMENT

The plaint in this suit, dated 16th November, 1994 was filed on 17th November, 1994. As the defendant defaulted in entering appearance and filing defence within the prescribed period, judgment was entered and a decree issued in favour of the plaintiff on 1st February, 1999.

On 15th August, 2000 counsel on both sides wrote a consent letter to the Court, by which they agreed as follows:

> *"**By consent, judgment on quantum only be set aside. Judgment on the issue of liability to stand. Costs of this [suit] to the plaintiff. The [suit] to be set down for hearing on the issue of quantum only".***

The letter was filed on 18th August, 2000 and came up before ***Aganyanya, J*** on 27th September, 2000. The learned Judge on that occasion made an order as follows:

> ***"By consent the order of the Registrar of this Court dated 4th May, 1998 be and is hereby set aside so far as quantum of damages is concerned and this suit will be set down for hearing on that issue only at the Registry".***

Hearing commenced before me on the question of quantum of damages on 4th May, 2005 when the plaintiff was represented by ***Ms. Chatur*** while the defendant was represented by ***Mrs. Nyaencha***. Hearing, however, did not then proceed, until 23rd June,2005 when the plaintiff was represented by ***Mr. Savia*** holding brief for ***Mr. Nagpal,*** while the defendant was represented by ***Mr. Kamwendwa***.

Learned counsel ***Mr. Savia*** introduced the plaintiff's claim for certain amounts in damages. An accident had occurred on 22nd July, 1994 leading to the filing of suit. This was along the Nairobi-Nakuru Road where the plaintiff's vehicle registration number KNR 393 was involved in a collision with the defendant's vehicle, registration number KAD 911T. Liability had already been agreed at 100% in favour of the plaintiff; but prior to proof of damages a prayer was made for certain minor amendments to the plaint which would not prejudice the defendant: a rectification to the spelling of the defendant's name; and a modification in the heads of damages claimed, which would result in a reduction of the total claim

from Kshs.939,133/20 to ***Kshs.929,363/40***. Learned counsel ***Mr. Kamwendwa*** had no objection to these changes, and they were duly authorised. The plaintiff was seeking against the defendant Kshs.929,363/40 with interest from the date of filing suit, as well as costs of the suit.

In the evidence, ***Martin James Evans*** was sworn and testified that he was the sole proprietor of Evans Crops & Contractors, his firm being registered under the Registration of Business Names Act (Cap. 499). His firm owned the lorry registration number KNR 393 which had been involved in the accident giving rise to this suit. The accident took place close to Lanet, in the neighbourhood of Nakuru, on a rainy day, as the plaintiff's lorry was proceeding towards Nairobi bearing a load of tractors lodged in its trailer. After the lorry driver, one ***James Mwangi*** informed PW1 of the accident, PW1 arranged for a photographer and an investigator (Securex) to come to the *locus in quo*. The lorry had been hit on the side, and extensively damaged. Plaintiff's exhibit No.1 was the towing-charge receipt: on 22nd July, 1994 the lorry had been towed to the Police Station in Nakuru; and on 27th July, 1994 it was towed to Rongai Workshop, for repair. The investigator's report, and the finding of guilt against those in the defendant's employ, in other cases, led to the filing of suit. For the investigation report, the plaintiff had paid Kshs.***11,192/=*** to Securex (Plaintiff's Exhibit No. 2). The plaintiff engaged a professional loss-assessor, McNaughton Service Station in Eldoret, to assess the loss; and the total amount assessed for damage was Kshs.151,441/20; there was also an assessment fee of Kshs.8,000/= (plaintiff's exhibit No. 3).

The plaintiff's lorry was repaired at the Rongai Workshop for a total of Kshs.147,577/90 including Value Added Tax (plaintiff's exhibits No. 4 and 5). It was necessary to replace one of the lorry's tyres damaged in the accident; and this with its tube cost Kshs.22,093/50 (plaintiff's exhibit No. 6A).

The plaintiff took possession of the lorry on ***24th September, 1994*** following the accident which occurred on ***22nd July, 1994;*** and in-between those dates the vehicle was off the road. The vehicle, while in normal use, would transport bulky goods – such as tractors, hay, cement etc. and it would generate income. The plaintiff produced a bundle of invoices (plaintiff's exhibit No. 7) in respect of the lorry's transport services for the period running from 22nd May, 1994 to 19th July, 1994; the total earned for that period was Kshs.724,000/=, which works out to an average of Kshs.90,500/= per week. So, for the two months during which the plaintiff's lorry was out of service, he suffered a loss of income in the order of some Kshs.724,000/=. He was claiming that loss; with the result that his claim broke down as follows:

(i) Repair cost	:	Kshs.147,577/90
(ii) Investigation fees:		. 11,192/00
(iii) Towing Charges:		16,500/00
(iv) Loss of income:		724,000/00
(v) Assessment fee:		8,000/00
(vi) Tyre & tube replacement:		22,093/50
TOTAL		Kshs.***929,363/40***

The plaintiff prayed for interest as from the date of filing suit, and for costs.

On cross-examination, PW1 testified that his lorry, registration number KNR 393 had been used for the transportation of general goods, and it was insured. The witness explained his decision, following the accident, to appoint investigators as having been dictated by the concern to show how the accident had happened.

PW2, ***Colin Patrick McNaughten***, was sworn on 20th September, 2005 and testified that he was a retired valuer and assessor. He had been in active practice in 1994, and he is the one who prepared the assessment report on the accident which is in issue herein. He prepared the report (dated 29th July, 1994) after examining the vehicle, and estimated the cost of repairs at Kshs.151,441/20. He was paid for his services Kshs.8,000/=, and he now produced the report as plaintiff's exhibit No. 8. PW2 had also been paid mileage claims and also paid, for his subsistence, and for attendance in Court. He had travelled from Eldoret and he was to return there, covering a total distance of 700 km, and for which he was claiming Kshs.21,000/= — including an allowance for personal accommodation for two nights. He had already been paid as agreed, as was shown in a letter from the plaintiff dated 1st September, 2005 (plaintiff's exhibit No. 9). He had issued a receipt (plaintiff's exhibit No. 10) showing that he had been paid a total of Kshs.26,000/=.

Cross-examined on his assessment report, PW2 averred that he had taken photographs at the accident scene to guide him as he prepared his report – even though these had not been produced. The witness testified that the tyre had featured as a special item in the estimated costs, because it had been hit in the accident and it bore a major impact; the tyre got cut, and burst. PW2 averred that all the figures which he had set out in his assessment report were estimates.

On re-examination, PW2 testified that his report reflected his findings, and it contained full details. The prices he used had been the subject of contention at an earlier stage, and in the end he took up the matter with the workshop, and the said prices had been agreed. The witness averred that the prices he had set out were accurate, and they could very well increase though not decrease.

Counsel appeared before me on 9th October, 2006 for the purpose of highlighting their written submissions earlier-on filed and served.

Learned counsel ***Mr. Savia*** submitted, correctly, with respect, that the evidence in this case had been quite straightforward; and that the defendant had called no evidence to dispute the plaintiff's case. Counsel urged:

> *"The evidence and testimony of the plaintiff and his witnesses are therefore unchallenged and must be taken as conclusive. It is therefore our submission that the plaintiff has proved to the required standard the quantum of the loss sustained by him as a consequence of the accident for which the defendant is 100% liable …"*

Learned counsel ***Mr. Kamwendwa*** for the defendant agreed that "the only issue for determination is on quantum of damages payable to the plaintiff."

However, learned counsel had doubts whether the plaintiff had indeed "specifically pleaded and proved" his material-damage claim which inherently is a claim in special damages. He disputed the figure of Kshs.147,577/90 attributed to the repair of the plaintiff's lorry-cum-trailer, Registration Number KNR 393, ZA1204. Counsel had a quibble regarding the price of tyre-and-tube for one wheel.

Mr. Kamwendwa's doubts also arose from the fact that "whereas the plaintiff in this suit is Evans Crops and Contractors, some of the receipts produced in Court were in the name of Martin Evans and others in the name of Evans Crops Limited". The answer to this point is summarised in ***Mr. Savia's*** submissions: "PW1 explained that he, ***Martin Evans***, was the sole proprietor of the firm called 'Evans Crops & Contractors', so that any receipts that may have been in his name are as good as being in the name of the firm since both are one and the same person. Furthermore, an examination of the receipts in question will reveal that they all relate to expenses incurred in respect of the accident involving the subject vehicle. In any event, PW1 testified under oath that he as the plaintiff paid the costs reflected in the receipts, which testimony has not been disputed by the defence which called no evidence".

Learned counsel ***Mr. Kamwendwa*** disputed the claim in respect of lost earnings during the period of repair of the plaintiff's motor vehicle: "the plaintiff did not plead the amount of income it was earning per day for it to be entitled to a claim for the loss of use for the period the motor vehicle was being

repaired."

Counsel urged that only an award of Kshs.35,692/= be made to the plaintiff comprising Kshs.16,500/= as towing charges; Kshs.8000/= as assessment fees; and Kshs.11,192/= as investigation charges. He urged that the claim for costs of repair and loss of use be dismissed "since the same were not specifically pleaded and proved on a balance of probabilities as required by law".

The record shows that judgment in favour of the plaintiff, on the question of liability, had been entered on ***4th May, 1998***. The Registrar's judgment on that occasion thus reads:

> **"Defendant Isaiah Minora having been duly served and having failed to enter appearance and on the application of the advocate for the plaintiff I enter judgment as prayed".**

The consent reached between the parties on 18th August, 2000, so far as I apprehend from the record, did not compromise the *liability* which had been expressed in the judgment of 4th May, 1998. That liability was founded on the plaintiff's pleadings, and in those pleadings special damages are set out in respect of: (i) assessor's report; (ii) cost of recovery of the vehicle; (iii) cost of investigation; (iv) ***"loss of user and income while the truck and trailer were undergoing repairs from 22/7/94 to 23/9/94."***

So, there is no question that the claims now being disputed by the defendant were, indeed, *pleaded.* The purpose of these proceedings is a limited one: formal proof of damages. And the plaintiff has produced invoices showing what he had earned in the two-month period immediately preceding the disablement of his lorry by the accident. The two-month duration, I would hold, provides a dependably large number of days out of which mean daily earnings could be computed; and I see no other, more reasonable basis for arriving at daily earnings, given that these would, in the very nature of business, keep fluctuating from day-to-day. I would, therefore, accept the plaintiff's indication of loss of user, in the sum of Kshs.724,000/=, as reasonable in every respect. I have also not been able, with respect, to believe learned counsel on his challenge to the very detailed documentation proffered by the plaintiff in respect of repair costs.

Consequently, I find in favour of the plaintiff, and against the defendant, and make a decree in the following terms:

1. The defendant shall pay damages to the plaintiff as follows:

(a) Cost of repairs: Kshs.147,577/90

(b) Investigation fees: Kshs.11,192/00

(c) Towing Charges: Kshs.16,500/00

(d) Loss of income: Kshs.724,000/00

(e) Assessment fee: Kshs. 8,000/00

(f) Tyre & tube replacement: Kshs. 22,093/50

(g) Costs in respect of PW2's

travel to and from Nairobi,

subsistence, and Court

appearance Kshs.26,000/00

2. The sums of money payable under paragraph 1 (a), (b), (c), (d), (e) and (f) of this decree shall bear interest at Court rate, as from the date of filing suit until payment in full.

3. The sum of money payable under paragraph 1(g) of this decree shall bear interest at Court rate with effect from the date of this judgment, until payment in full.

4. The costs of this suit shall be borne by the defendant, and the same shall be payable with interest at Court rate, as from the date of filing suit until payment in full.

5. Should there be any application or motion whatsoever arising in the wake of this judgement, it shall be heard and determined within the Civil Division of the High Court.

DATED and DELIVERED at Nairobi this 27th day of October, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For Plaintiff: Mr. Savia, instructed by M/s. O. P. Nagpal & Co. Advocates.

For Defendant: Mr. Kamwendwa, instructed by M/s. N. M. Kamwendwa & Co. Advocates.