REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 20 OF 2001

SAMUEL WANJOHI.....1ST APPELLANT

PRESTIGE PACKAGING CO. LTD.....2ND APPELLANT

VERSUS

MICHAEL NDIRANGU KARUKU.....RESPONDENT

JU D G M E N T

The respondent filed suit against the appellants seeking to be paid damages which he particularised as loss of business, building repairs, police abstract form and loss of profits. The cause of action arose from an accident which occurred involving motor vehicle registration number KAD 580E owned by the appellants while it was eing driven along Naivasha - Karagita road on the 3lst of May, l998. The said motor vehicle veered off the said road and crashed into a building owned by the respondent thereby damaging it. When the appellants were served with the plaint they duly entered appearance and filed a defence denying liability for the said accident and responsibility

for the resultant damages that the respondent has sought in this suit. After hearing the suit, the trial magistrate in the lower court found the appellants to have been solely liable for the said accident. The respondent was awarded the sum of Ksh.l00,000/=, costs and interest. The appellants were aggrieved by the said decision of the trial magistrate and have appealed to this court.

The appellants raised five grounds of appeal which may be summarised as hereunder; The appellants were aggrieved that the trial Magistrate had found for the respondent whereas the respondent had not proved his case as pleaded in his plaint;

The trial Magistrate had awarded special damages to the respondent yet the respondent had failed to plead the said special damages in his plaint. The appellants were further aggrieved that the trial Magistrate had disregarded the submissions made on behalf of the appellants and thus arrived at an erroneous decision making a finding in favour of the respondent. The appellant faulted the trial Magistrate for making an award of damages under the heading of costs of repairs and loss of business in the absence of pleadings and evidence in proof of the said damages awarded.

At the hearing of the appeal, I heard the submissions made by Mr Mahida, earned Counsel for the appellants and Mr Motende, learned Counsel for the respondent.

Before considering the said submissions made, I will briefly set out the facts of this case.

PW1 Michael Ndirangu Karuku *(the respondent)* testified that on the 31st of May 1998, motor vehicle registration number KAB 850E (he meant KAD 580E) crashed into his building at Karagita Trading centre. The said motor vehicle was owned by the 2nd appellant and driven by the 1st appellant. The respondent reported the accident to the police. He was issued with a police abstract report which he produced as an exhibit in the case. PW1 blamed the first appellant for causing the said accident. He testified that the 1st appellant drove the said motor vehicle at very high speed that causing it to hit his building. The 1st appellant was charged and convicted for careless driving in Naivasha Principal Magistrate's court **Traffic case No.3855 of 1998**. The respondent testified that the building was used for mending shoes. There was also a hotel at the building. The respondent could not tell how much he earned from his business per day. At the time of the trial, the respondent had not rebuilt the building damaged by the said motor vehicle. The respondent testified that he had constructed the said building using mud but had plastered it using cement. He testified that he had rented out one part of the building which was being used as a hotel. The other part he used for his business of mending shoes. He asked the trial court to award him general damages for loss of business, cost of repairs and interest in the suit. The respondent did not call any other witness.

The appellants called one witness. DW1 Pius Ndambuki testified that he investigated the accident involving motor vehicle registration number KAD 850E which had occurred at Karagita Trading Centre within Naivasha. He visited the scene and saw the damage to the respondent's building. DW1 estimated the costs of repairing the said building to be about Kshs.6000/-. He prepared a report which was produced in evidence as defence exhibit No.1. After the close of both respondents and the appellant's case, they both made written submissions of their respective case.

This being a first appeal, the hearing of this appeal will be by way of a retrial. As was held in **Selle & Anor –Vs- Associated Motor Boat Co. Ltd [1968] E.A. 123** at Page 126 by Sir Clement De Lestang V-P,

> ***"…The Principles upon which this court acts in such appeal are well settled. Briefly put they are that this court must reconsider the evidence evaluated it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with evidence in the case generally."***

The main thrust of the appellant's appeal is that the trial Magistrate made awards under special damages which special damages were neither pleaded nor proved. The issue for determination by this court is whether the appellants have established that indeed the trial Magistrate erred in awarding the said damages to the respondent.

I have carefully considered the submissions made by the parties to this appeal and also re-evaluated the evidence adduced before the trial Magistrate. Certain facts are not disputed in this case. It is not disputed that the 2nd appellant's motor vehicle registration number KAD 590E while being driven by the 1st appellant rammed into the building owned by the respondent. The 1st appellant was charged for the offence of careless driving and duly pleaded guilty to the said charge. The evidence adduced by the appellants did not dispute the fact that it was the appellant's motor vehicle which damaged the respondent's building. The lower courts finding on liability cannot therefore be faulted. On re-evaluation of the evidence, I do therefore hold that the appellants were solely liable for causing the said damage to the respondent's building.

On quantum, the respondent pleaded as follows in his plaint as regard his claim for damages; -

> *"6. As a result of the 1st defendant's negligence, the plaintiff suffered loss and damage.*
>
> PARTICULARS OF LOSS AND DAMAGE
>
> (a) Loss of business
>
> (b) Building repairs
>
> (c) Police abstract form
>
> (d) Loss of profits
>
> *Particulars of a – d above to be provided at the hearing hereof.*
>
> *7. And the plaintiff claims damages."*

During the hearing of the case, the respondent did not adduce any evidence or produce any document to support his claim as he had undertaken when he filed his plaint. In any event such imprecise pleadings are not allowed by the Civil Procedure Rules. It is a habit which litigants ought to be discouraged from adopting as normal practice. The respondent attempted to introduce the quantification of his claim when he filed his written submissions before court. Unfortunately, the trial Magistrate erred in adopting the said submissions by the respondent. The figures suggested by the respondent in his submissions were not supported by evidence.

As was held by the Court of Appeal in, **Coast Bus Services Ltd –Vs- Sisco E. Murunga Ndanyi & others C.A Civil Appeal No. 192 of 1992 (Nairobi)** (unreported), special damages must be specifically pleaded and during the hearing of the case, specifically proved. In **Eldama Ravine Distributors Ltd & Anor –Vs- Samson Kipruto Chebon C.A. Civil Appeal No. 22 of 1991** (unreported) Cockar J.A (as he was then) held that;

> ***"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma –Vs- Nairobi City Council [1976] K.R 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J. quoted in support the following passage from Bowen L.J's judgment on pages 532- 533 in Ratcliffe -Vs- Evans [1892] 2Q.B 524. an English leading caseof pleading and proof or damage:***
>
> > ***"The Character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularly with which the damage done ought to be stated and proved.***
>
> ***As much as 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."***
>
> ***"Reference to Ouma's case with approval is also made in Kenya Bus Services & Another –Vs- Fredrick Mayende [1991] 2 KAR 235:***
>
> > ***"In this case the claim for transport expenses which is a claim for special damage has not been pleaded at all in the***

plaint. Unfortunately the respondent was not represented by an advocate during the trial before the superior court which fact would perhaps explain why evidence relating to a claim for special damage which had not been pleaded was allowed to be introduced and accepted in evidence. In my view, the award of Shs.14,000/- by way of transport charges must be disallowed."

In this case, the respondent did not properly plead the special damages that he was seeking. Neither did he prove the said damages when he testified before the trial court. What the respondent did was to state that his building had been damaged. He then stopped there. He did not proceed to particularise the damage that he had suffered. In the circumstances therefore, the finding of the trial Magistrate awarding the respondent the sum of Kshs.50,000/- being loss of business and another sum of Kshs.50,000/- being the costs of the repair of the building, cannot stand. The said finding is not supported by the evidence on record. On re-evaluating the said evidence adduced, it is clear that although the respondent established that his building was damaged, he failed to provide the court with material evidence which the said trial court have made an appropriate award in his favour. As it were, the respondent expected the trial Magistrate to pluck a figure from the thin air and award him damages. The trial Magistrate may be sympathising with the respondent's plight, duly obliged. This court cannot however uphold the said decision. The said award of damages of the sum Kshs.100,000/- made by the trial Magistrate is thus set aside.

The circumstances of this case clearly points to the fact that the respondent was et down by his advocate when the said plaint was drafted. Matters were not helped when he was insufficiently led in evidence during the hearing of the case before the trial Magistrate. Much as I may sympathise with the respondent, this court can only award the respondent the sum of Kshs.15,000/-. The appellants' witness assessed the cost of the repair of the damaged building to be Kshs.6,230/-. I have awarded the respondent Kshs.15,000/- after taking into consideration incidences of inflation and the escalated cost of building materials. That was the only evidence which was adduced during the trial that would support any award being made in favour of the respondent. Matters were further complicated by the fact that the respondent choose not to plead to be awarded general damages.

In the premises, the appeal filed herein is allowed. The sum of Kshs.100,000/- awarded to the respondent by the lower court is hereby set aside. The respondent is awarded special damages of Kshs.15,000/-. In view of the peculiar circumstances of this case, I will make no orders as to costs on this appeal. The respondent shall however have the costs of the suit in the lower court.

DATED at NAKURU this 3rd day of August 2005.

L. KIMARU

JUDGE