



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 310 OF 1999

SOCIETY OF SACRED HEARTAPPELLANT

VERSUS

MARY K. ODEMURESPONDENT

J U D G M E N T

On 5th March 1994 the appellants motor vehicle registration number KAA 181N was being driven along Kakamega – Webuye road when, at Shimalabandu, the defendant’s driver/servant and/or agent drove motor vehicle registration number KXP 103 in such manner that it was involved in a violent collision with motor vehicle registration number KAA 181 N as a result of which the plaintiff suffered loss and damage.

The defendant and/or her driver was blamed for the collision in negligence for:-

- (a) driving at an excessive speed in the circumstances,
- (b) attempting to overtake while knowing or having reason to believe it was not safe to do so;
- (c) failing to kept or have any proper look out for other road users and especially the plaintiff,
- (d) driving without due care and attention,
- (e) attempting to overtake the plaintiff’s vehicle in face of a vehicle coming from the opposite direction.
- (f) failing to stop, slow down swerve or in any other way manage or control motor vehicle registration number KXP 103 so as to avoid colliding into KAA 181N and that
- (g) as far as will be applicable, the plaintiff will rely on the doctrine of Res Ipsa Lequitor.

As a result of this accident, the plaintiff, through counsel filed a civil suit at the Court of the Chief Magistrate Milimani Commercial Courts, to claim special damages of Kshs.70,508.90 which it claimed were total repair charges and assessors fees on the basis that the defendant was negligent.

A defence and counter claim to this suit denied negligence and loss and damage alleged and, instead blamed the plaintiff for negligent driving which resulted in the accident.

The defendant then claimed from the plaintiff a sum of Kshs.228,068/= being repair charges to motor vehicle registration number KXP 103, towing charges assessors fees and investigations fees.

The case was then placed before the Senior Resident Magistrate (R.E. Ougo, Mrs) for hearing on 10th May 1999 who heard the evidence of two plaintiff witnesses and after counsel closed the plaintiff's case, the defence applied for an adjournment so as to be able to call defence witnesses.

This application was, however, rejected and the parties agreed to put in written submissions which they did by 25th May 1999.

The judgment was written and delivered by the learned magistrate on 2nd July 1999 in which she dismissed the plaintiffs claim for special damages because of lack of proof of the same but only awarded them costs of the suit.

She also dismissed the defendant's counter claim for lack of evidence but since no counter appeal has been filed herein I shall say no more about this.

Out of this decision the plaintiff, now the appellant, has appeal to this court in a memorandum of appeal listing five (5) grounds of appeal.

These grounds were that the magistrate erred in dismissing the appellants suit when overwhelming evidence was adduced before her; that she misdirected herself on the standard of proof required in civil actions; that she erred in dismissing the appellant's suit by holding that even though the repair estimate, invoice and satisfaction note were produced in evidence, the absence of payment receipt was fatal to the appellant's action; that she erred in dismissing the appellant's action though the appellant had proved on a balance of probabilities that it had suffered damage which evidence was not challenged and that had the learned magistrate considered the entire evidence before her correctly and sufficiently she should have come to the conclusion that the appellant had proved its case as per the standards required by law and entered judgment as prayed in the plaint.

The appeal was placed before this court on 17th July 2002 when counsel for the parties appeared to submit either for or against it.

Counsel for the appellant urged that, contrary to the magistrate's finding that there was no proof of payment for the repairs and assessors report, there was one in form of production by the appellant, of the assessor's report, invoices dated 27/5/97 for Kshs.2454/=, invoice from Eldo Tune for Kshs.67,954/90 and satisfaction note dated 28/5/97.

That these documents showed that the appellant had incurred loss and that the estimated value of loss was given. He prayed that this appeal be allowed with costs.

Counsel for the respondent opposed this appeal saying that the magistrate's judgment did not have any errors. That there was no actual payment made and that what was produced in court were estimated costs of repairs.

That although damages were pleaded herein, they were not proved. He prayed that the appeal be dismissed with costs.

These are the submissions tendered in this appeal for consideration and decision.

Clerk & Lindsell on Torts 13 th Edition page 220 at paragraph 352 "measure of Damages – General and Special Damages" quoted in the case of Ouma V Nairobi City Council [1976 KLR 297 at 304 describes special damages as

"the particular damage (beyond the general damage) which results from the particular circumstances of the case and of the plaintiff's claim to be compensated - - - - -"

At letter G on the same page the case of *Stroms Bruks Aktie Bolag V John & Peter Hutchison [1905] A.C. 515* was also cited and it sums up the position thus:-

“special damages on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary cause. They are exceptional in their character, and therefore, they must be claimed specifically and proved strictly.”

In the plaint subject to this appeal, a sum of Kshs.67,954/90 was given as total repair charges based on the plaintiff's exhibit No. 2.

But this exhibit was an estimate of repairs or summary estimate which was subject to replacement being available. This replacement could have been upwards or downwards.

Exh. 3 was an invoice for assessment on the motor vehicle which sought a sum of Kshs.2454/= while exhibit 4 was survey report and estimate form.

The passage in Clark & Lindsell I have quoted above talks about damage, which results from the particular circumstances of the case.

“and of the plaintiff's claim to be compensated.”

one cannot be compensated for a loss he has not incurred and one cannot be said to have incurred a loss by producing documents which give proposition of what he/she expects to incur at some future date.

Why were the assessors and repairers not called to confirm that they indeed claim the sums of money shown on the reports from the appellant? Perhaps in that case the court might have been inclined to consider the certainty of the claim.

Otherwise a claim in anticipation of loss is not in conformity with strict proof required in case of special damages.

I agree with the learned Senior Resident Magistrate that though the appellant specially pleaded the special damage in the plaint, it did not strictly prove it by evidence as required by law.

Regrettably, though, I dismiss this appeal with costs.

Delivered this 24th day of September, 2002.

D.K.S. AGANYANYA

JUDGE