



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1620 OF 1995

GILBERT MWIRIGI.....PLAINTIFF

Versus

ELIJAH MUTHURI.....DEFENDANT

JUDGMENT

On 4th December 2000, the parties recorded a consent order on liability at 70% to 30% for the plaintiff and defendant respectively.

The issue before me for determinations is the quantum of damage.

This suit arises for damages incurred as a result of an accident that occurred on 18th June 1993 along the Nairobi Thika Road, and involving the two vehicles owned by the parties hereto.

The plaintiff claim a sum of Shs.157,584.00 these being sums paid for towing the vehicle to the garage, labour charges for the repair, costs of materials being the cost of the spare parts for the vehicle and fees paid for the Police Abstract Report by way of special damage. He also claims general damages for loss of user for a period of 72 days when the vehicle was undergoing repairs. The defendant disclaims liability and although he had counterclaimed he did not adduce evidence in support of that claim.

The plaintiff testified that after the accident, he organized for his vehicle to be towed from a place near Thika to Nairobi. The vehicle was inspected on 23rd June 1993 and one can thus safely assume that though he paid Shs.4000/- the towing charges on 18th June 1993, the vehicle was not towed until the 23rd of June 1993 and on which day repair costs were assessed in Nairobi. That being two days after the accident.

The vehicle was to the premises of Jambo Panel Beater and Spray Painters where an assessment was carried out by Top Assessors on 23rd June 1993 who assessed the repair costs as Shs.168,134. He paid their fee of Shs.4500. This was confirmed by the Motor Assessor who gave evidence and produced his report. Thereafter he instructed the abovementioned garage to proceed with the repairs and he testified that he paid Shs.33,000/- for labour costs. He also testified that he paid for the spare parts, receipts of which were produced as Exhibit and whose total sum amounted to Shs. 120,484.00. He also paid Shs.100/- for the Police Abstract report. This evidence was not controverted, nor did the defence counsel challenge it

. Although the plaintiff intimated that he had lost the income which the vehicle used to earn him in his matatu business, this he treated as general damage. In my humble opinion, loss of user being a claim that can be quantified is a specific claim, which should fall under claims for special damages, and not general damages. I shall therefore disregard that aspect of his claim because, it being a claim in special damage, it was not specially pleaded in the plaint. The general rule is that special damage must not only be specially pleaded, but they must be specifically proven. Not having been so pleaded I regret, lack the jurisdiction to make any award for loss of user.

Be that as it may, I find that having specially pleaded a claim for Shs.157,584.00, he has been able to specifically prove the claim, by producing relevant receipts for payments made in the following instances:

| | |
|----------------------------|----------------|
| Towing charges | Shs. 4,000.00 |
| Labour charges | Shs. 33,000.00 |
| Materials | Shs.120,484.00 |
| Police Abstract Report fee | Shs. 100.00 |
| Assessors Report | Shs. 4,500.00 |
| Total | Shs.162,084.00 |

In the circumstances, judgment having been entered for the plaintiff on 4th December 2000 and liability agreed upon at 70% in favour of the plaintiff. I do therefore award him a sum of Shs.113,458.80 being the proportionate sum payable to him, and on which interest shall accrue at court rates from the date of filing suit until payment in full.

I also award him costs of this suit, at the lower scale and interest thereon at court rates.

Dated and delivered this 31st day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:

Mr. Kaai for the plaintiff

No appearance for the defendant