



## Material Damage

**Car accident  
Collision between  
two vehicles. Material  
Damage to plaintiff'  
vehicle - a pick up**

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE 2333 OF 1997

SPELLMAN & WALKER COMPANY LTD. .... PLAINTIFF

VERSUS

ANITA WILSON ..... DEFENDANT

### JUDGEMENT

Spellman & Walker Co. Ltd. are a limited liability company (herein referred to as the company). It is not disputed that they are the owners of a motor vehicle registration KAB 101Z Datsun pick-up. They sue Anita Wilson (herein referred to as Anita) for negligence in tout. Anita is alleged to be the driver of the vehicle registration number 29 CD 168K a land cruiser. The company alleged that through her negligence she caused an accident collision whereby their vehicle was damaged.

According to their Plaint at para 4 (filed on the 18.9.97 and dated the 17.9.97), on the 30th of November, 1996 at about 7.00 p.m. the company's servant and or agent was driving the company's vehicle along the lower Kabete road when a vehicle Reg.29 CD 168K negligently driven by Anita caused and collided with their vehicle.

The company prayed that they be compensated for the assessed costs of repairs by way of Special Damages. They prayed for General Damages, cost of this suit interest and any further relief by this court.

Anita entered and filed through her advocate a Memorandum of Appearance and defence. She denied the allegations of negligence and attributed it to the company causing the vehicle to be left on a road and in the path of on coming vehicle.

When this case came up for trial on the 10th of February, 2000; the company called PWI - an operations manager attached to the said company.

He gave evidence to the fact he recalled the said motor vehicle KAB 101Z had an accident. The accident was reported to the police. He went and obtained an abstract police report, an assessors report with photographs, a small note which was an admission note from Anita. He further claimed that the vehicle was repaired and had receipts to this effect.

The company/plaintiff then closed its case. The defence called no evidence.

I turn to the agreed issues which I answer as follows:-

Issue 1 Was the defendant the driver of motor vehicle registration 29 CD 168K?

PWI was the only witness called by the company. He never informed this court through his evidence that Anita was the driver of the said vehicle. This evidence would have been simply recovered by an eye witness, together with a report from the police of this fact. A police abstract report would also have been of assistance.

According to the defence para 3 it states:-

“save that the defendants vehicle was involved in an accident on the date specified, the defendant denies the allegation...”

There is no proof whether the defendant, Anita was the driver or not.

Issue No.2 Did an accident occur on the 30th November, 1996 along

lower Kabete road?

It is not disputed whether an accident occurred or not. I hold that an accident did occur by the admission of the parties. Issue No.3 Was the accident caused due to the negligence of

defendant or his agent?

There was no evidence to show negligence in this case.

The plaintiff/company should have called actual eye witnesses to the accident. I believe the best person here would have been their driver and or agent who was in possession of the said vehicle. The police officer who was at the scene investigating the accident.

No evidence has been called by the plaintiff/company on this. PW1 only stated that an accident occurred. He did not know anything more. He was not at the scene of the accident.

In the case of:-

Mary ayo Wanyama & Others V Nairobi City Council

Court of appeal civil appeal No.252 of 1998

An appeal from the decision of Khamoni J. The Hon. Judge had heard the plaintiffs case, a widow. No witnesses were called whilst the defendant did not testify and led no evidence.

“The plaintiff who gave evidence was not at the scene of the accident at the time of the accident and could not tell the court how the accident occurred.

Since she was the only witness, I am left with no evidence proving the alleged negligence of the defendant ..... “

The judge dismissed the suit. On appeal to the court of appeal, it was held that the Hon. Judge was correct in dismissing the case for lack of proof.

I find that the same situation arises in this case. The plaintiff/company has not produced any evidence to prove negligence on the defendants part of this accident.

I therefore hold that negligence on the part of the defendant had not been proved.

This takes care of issue No.5 as to whether the plaintiff contributed to the accident.

The issue on liability is hereby dismissed.

As to issue No.4 as to whether the plaintiff suffered any loss or damage?

I dismissed the case on liability nonetheless the law requires that I apportion damages if I had otherwise held.

The first prayer is of Special Damages for Ksh.190,559/-. PWI claimed Ksh.187,459/- (according to the plaint, for cost of repairs).

Special Damages must be pleaded and proved. The plaintiff/company pleaded this special damages. The advocate for the defendant objected to the plaintiffs document stating that he wished the maker thereof to be called.

I believe all the plaintiff/company should have done was to file a list of documents 30 days before summons for directions (see order 10 r11a CPR) and serve the defendant.

He would have also served the defendants with a notice to admit documents with a notice to admit documents (see order 12 r 3 CPR) He would have produced these documents. They failed to do so. They failed to produce their evidence. I would not have granted them this prayer.

If they had proved Special Damages the amount pleaded would have been awarded namely Ksh.187,459/-. The rest of claim or Special damages had not been proved. As to the prayer of General damages, this would relate to various heads such as pain and suffering, loss of user, loss of earning.

I note there has been no claim of any personal injury. There has further been no claim pleaded of loss of use of the motor vehicle or quantified.

I am unable to make any award. In the event that the plaintiff/company was successful in their case on that head.

The defendant stated they were to raise a Preliminary Objection in this case but this was never raised.

I would dismiss this suit for lack of evidence on liability on negligence.

No evidence was led to this effect. This suit is hereby dismissed with costs to the defendants.

Dated this 11th day of February, 2000 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**