



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, OUKO & MURGOR, JJ.A.)

CIVIL APPEAL NO. 231 OF 2005

BETWEEN

MOHAMMED ALI

NIMO ALI.....APPELLANTS

AND

SAGOO RADIATORS LIMITEDRESPONDENT

(Appeal from the Judgment and Decree of High Court of Kenya at Nairobi (Ang’awa, J.) dated 23rd March 2004)

in

H.C.C.C. No. 149 of 1995)

JUDGEMENT OF THE COURT

This appeal is against the special damages awarded to the respondent, Sagoo Radiators Limited by the High Court on 23rd March, 2004 in Nairobi HCCC No. 149 of 1995.

Briefly, the facts of the case as can be discerned from the records are that on 24th September 1994 while the ***Buldev Chagar*** was riding the respondent’s motor cycle KAD 800, along Gitanga road. Upon reaching the junction of Gitanga and James Gichuru Road, collided with the appellants’ motor vehicle Registration Number KAC 632 W thereby causing extensive damage and loss to the respondent. The respondent then instituted a suit in the High Court against the appellants and sought the value of the damaged motor cycle, assessor’s fees and the fees for police abstract report all totaling to Kshs.653,215.20.

In its amended plaint the respondent revised that figure to Kshs.507,779.10.

The appellant on the other hand, generally denied having been the cause of the accident, which they stated was attributable to the negligence of the respondent’s agent or servant, ***Buldev Chagar***; and further denied that any special damages were due to the respondent.

The respondent called two witnesses, the first being, **Buldev Chagar** who testified on the particulars of the accident, and the second was **Sammy Luther** of Assessors East Africa Limited, who testified as an assessor, and produced an itemized list of spare parts for the repair of the motor cycle. The appellants did not attend Court, though their counsel cross-examined the respondent's witnesses. Both counsel made submissions before the High Court and cited various authorities.

In her judgment delivered on 23rd March 2004, Ang'awa J, found the 2nd appellant 100% liable for the accident, with the 1st appellant being held vicariously liable for the acts of his agent and or servant, the 2nd appellant. With respect to the claim for material loss the Learned Judge awarded a total sum of Kshs.312,294.40 being the cost of the spare parts, for the repair of the motor cycle plus cost of the suit and interest on the damages from the date of filing the suit.

Aggrieved by that decision, the appellants filed this appeal setting out five grounds of appeal to the effect that the learned Judge erred in law and in fact in awarding special damages which were not specifically pleaded and strictly proven as required by law; that the respondent was awarded repair costs without proof of the repairs being undertaken notwithstanding that the respondent had pleaded total loss; that the learned Judge did not assess the evidence before the Court, and did not consider the appellants' submissions and being predisposed towards the respondent arrived at the wrong decision.

Learned counsel Mr. Melly, holding brief for Mr. Munyu for the appellants submitted that special damages must be specifically pleaded and strictly proved but, in its amended plaint the respondent included particulars such as pre-accident value, salvage value, assessors' fees and the police abstract and claim a total sum of Kshs.507,779.10. Mr. Melly submitted that the learned Judge erred in awarding the cost of repairs which were not specifically pleaded. The respondent had pleaded total loss of the motor cycle. Mr. Melly further contended that the amount of repair charges relied upon were in respect of the assessors' estimates, and not actual expended amounts, as no receipts or payment vouchers were produced in evidence; that the Court had observed that no repairs were undertaken, but in any event relied on the assessors estimates to arrive at an amount in respect of special damages. Learned counsel then referred us to ***Khan vs Singh (1985) KLR 716***, and ***Ali vs Nyambu T/a Sisera Stores (1990) KLR 534*** and urged that the amount awarded by the Court in respect of special damages be set aside.

Mr. Shah, learned counsel for the respondent, contended that the respondent's particulars of special damages were specifically provided in the assessor's evidence, which comprised an itemized report with details of the spares that would be required to repair the motor cycle, together with the cost of the spares, all of which were imported from the United Kingdom; that the Court had awarded the lesser amount of Kshs.312,294.40 and not the amount specified in the plaint; that the assessors in their estimate had specified write off, but that the respondent had opted to repair the damage to the motor cycle; that though special damages required to be specifically pleaded and proved, the evidence before the Court was that the spares were imported and the repairs undertaken which evidence had gone unchallenged by the appellants, and which was accepted and relied on by the court. Learned counsel referred us to the case of ***The London Corporation (1935) CA 70***, ***Usha vs Bachubhai & Others (1965) EA 433*** and ***McGregor on Damages 13th Edition page 87*** in support of his submissions.

Having considered the pleadings, the evidence, judgment of the High Court and the submissions of learned counsel, we find that the issue for consideration is whether or not we should interfere with the award for special damages by the High Court.

Our duty as a first appellate court, is to re-evaluate as well as examine afresh the evidence and to arrive at our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated in ***Selle vs Associated Motor Boat Company (1968) EA 123 page 126***, in the following words:

".....this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should make due allowance in that respect" See Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425".

The question that is before this Court is whether the Court below was in order to base the award for special damages on the assessors' estimates of the repair costs and if so, whether the claim for special damages was specifically proved. In answering this question this Court has variously stated that in the consideration of an award for special damages, it is trite law that special damages, must be specifically pleaded and strictly proved. In the case of Hahn vs Singh (1985) KLR 716, this Court stated thus:

“.....special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves”

From the record, the testimony of **Sammy Luther** outlined the evidence in respect of special damages, wherein an itemized list of spares provided details of spares required to repair the motor cycle, and the estimated cost of the spares. It is common ground that no evidence was produced to prove that actual costs were incurred to purchase the spare parts for the motor cycle, import duty, or even the labour costs. Invoices for the assessors report and police extract, were produced, but no receipts or payment vouchers demonstrated that payment had been made in respect of these items.

In considering the quantum of special damages the learned judge stated thus:

“From the evidence, PW1 of Assessor East Africa Limited made a report of the estimated repair costs His comment was that he took photographs of the motor cycle. He then listed all the parts and price required for the repair to the said motor cycle.

.....The assessor came to the conclusion on obtaining the correct pricing of all the missing items that the total costs of spares would be Kshs.312,294/40. All these parts required to be imported at the cost of Kshs.109,303/- being the import duty. This gives a total of Kshs.421,597/40. Value added tax would be charged at Kshs.76,967/-. Add labour Kshs.5,000/- and miscellaneous Kshs.1,000/- a total of Ksh.504,564.40 would be arrived at.”

In the case of Nkuene Dairy Farmers Coop Society Limited & James Kimathi vs Ngacha Ndeiya (2010) eKLR, in respect of whether an assessors report was sufficient to prove the value of material damage, this court stated thus:

“In our view special damages in a material damages claim need not be shown to have been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damage item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty. In Ratcliffe vs Evans (1892) 2 QB 524 Bowen LJ said,

“The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty, and particularity with which the damage done ought to be stated and proved. As much particularity and certainty 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”.

In this case, in arriving at an award for special damages, the learned Judge relied upon the assessors' estimates, and computed the amount awarded as follows:

“1) Material loss

2) Motor cycle/motor vehicle collision

3) *Non injury claim*

4. *Claim for damages to motor cycle*

a. <i>Pre-accident value</i>	<i>Ksh.850,000/=</i>
b. <i>Salvage (possible)</i>	<i>Ksh.200,000/=</i>
c. <i>Repairs</i>	<i>Ksh.312,294.40/=</i>
d. <i>Import duty</i>	<i>Ksh.109,303.40/=</i>
e. <i>Labour</i>	<i>Ksh. 5,000.00/=</i>
f. <i>Miscellaneous</i>	<i>Ksh. 1,000.00/=</i>
g. <i>Vat</i>	<i>Ksh. 76,957/=</i>

Add excess *Ksh. 85,000/=*

Ksh.419,564/=

Total *Ksh.504,564/=*

h. *Assessment fee*

Not proved *Ksh. 3,115/=*

i. *Police abstract fee*

Not proved *Ksh. 100/=*

Plaintiff opts to repair motor-cycle instead of writing the same off. Is entitled to normal damages only Ksh.312,294/40 for spare parts repairs. The balance of claim is dismissed.

5. *Liability 100% against the 1st and 2nd defendants severally and jointly is entered accordingly.*

Total *Ksh.312,294/=*"

It is clear, from the judgment that the assessor's estimates specified in detail the spare parts required for the repairs, and the cost of each spare part. The total cost of the spares was specified to be Kshs.312,294.40, which evidence remained unchallenged. The High Court accepted and relied on the estimates as the basis upon which it arrived at a finding for special damages for the cost of the spare parts, and as such, awarded the sum of Kshs.312,294.00, but declined to award any costs for the other items claimed.

Consequently, we agree that, the assessors' estimates were sufficient proof of the cost of the spares, and the failure by the respondent to produce receipts and payment vouchers, did not affect the claim for special damages in respect of the spare parts. We therefore find that the respondent pleaded and moved his claim as required. In our view the appellant has absolutely no reason to complain. Had the respondent proceeded with the original claim of total loss, the trial court would no doubt have awarded a much larger sum.

In circumstances, we see no reason to interfere with the judgment of the High Court with the result that this appeal fails and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 18th day of October, 2013.

D. K. MARAGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR

/jkc