REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU JJ.A)

CIVIL APPEAL NO. 154 OF 2005

BETWEEN

NKUENE DAIRY FARMERS CO-OP SOCIETY LTD.....1ST APPELLANT

JAMES KIMATHI .....2ND APPELLANT

AND

NGACHA NDEIYA .....RESPONDENT

(Appeal from judgment and decree of the High Court of Kenya at Meru (Onyancha J.)

dated the 28th day of July 2004

in
H.C.C.C. NO. 73 OF 2000)
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JUDGMENT OF THE COURT

By his plaint dated *3rd July 1997* **Ngacha Ndeiya**, the respondent in this second and final appeal, set out in paragraph 5 particulars of damage to his motor vehicle registration No. KZC 257, arising from a motor traffic accident.
In paragraph 6 of the plaint he averred that the aforesaid motor vehicle was repaired at a total cost of **Kshs.131,443/=** inclusive of spares and labour charges. He claimed that amount from Nkuene Dairy Farmers Co-operative Society Limited and James Kimathi, the owner and driver respectively of motor

vehicle registration No. KAE 811 B, which allegedly collided with his vehicle as a result of which the particularized damage resulted. He also claimed loss of user of the motor vehicle during the period it was under repair at the rate of **Kshs.1000** per day for 60 days.

In a joint statement of defence the appellants herein as defendants in the suit, denied liability alleging that the respondent was negligent in the manner he managed and controlled his motor vehicle as a result of which the accident leading to the damage of his aforesaid car occurred. They also denied any repairs were carried out to the said vehicle.

In his evidence the respondent stated that he was using his motor vehicle in transporting shoes to various markets for sale. In the accident complained of, upon colliding with the motor vehicle KAE 811 B, the respondent's motor vehicle rolled as a result of which it was extensively damaged. He blamed the 2nd appellant for the accident. Neither the 1st nor the second appellant called any evidence to controvert the respondent's evidence as to the cause of the accident. The respondent however called Jackson Gatheru who at the material time of the accident, was driving his vehicle. He testified that the vehicle was hit near the rear wheels thereby forcing it to overturn. The 2nd appellant as the driver of the 1st appellant's vehicle was driving on the wrong side of the road. He was eventually charged with the traffic offence of careless driving.

John Waweru Njoroge, a motor vehicle assessor, testified on behalf of the respondent on the extent of the damage to his vehicle and the cost of repairs for the damage. He gave the pre-accident value of the vehicle as **Kshs.300,000/=** and the estimated repair cost as **Kshs.132,000/=.** He was not cross-examined. He produced his report but apparently the appellants did not include it in the record of appeal. We are not therefore able to scrutinize it. Be that as it may, the trial magistrate, N.H. Oundu, in a short judgment, accepted the unchallenged evidence of the respondent and his witnesses as to the cause of the accident, and also the assessor's report as to the cost of repairs which was given as **Kshs.131,443/=** inclusive of labour charges. He then proceeded to give judgment for that sum less **Kshs.16,800/=** as labour costs.

The superior court on first appeal was invited to find that the claim of the respondent having been for special damages, was not proved to the standard required. Onyancha J. who heard the appeal was satisfied that an assessor's valuation report was sufficient proof of the extent of the material damage to the respondent's vehicle, more so because it was not challenged in any way whatsoever. In the end he concluded that the trial magistrate was fully entitled to accept and rely on the assessor's valuation report to prove the exact value of spare parts and other material which were required to repair the respondent's vehicle. He therefore dismissed the appeal. The learned judge observed that the trial magistrate improperly disallowed the element of labour charges as in his view the same was proved by the assessor's valuation report.

This being a second appeal only issues of law fall for consideration. **Section 72(1)** of the Civil Procedure Act Cap 21 Laws of Kenya provides circumstances when a second appeal shall lie from the appellate decrees of the High Court. A careful reading of the section shows that such appeals are, as a general rule, confined to issues of law only. The grounds of appeal set out in the appellants' joint memorandum of appeal are couched in such a way as to imply that the appellants are challenging findings of fact, more specifically that the motor vehicle's Assessor's report was insufficient to prove the particulars of special damages pleaded in the plaint.

The appellants did not call any evidence in support of their case. As stated earlier they filed a written statement of defence denying liability and blamed the respondent's driver for the accident. However, since they did not call any evidence either to prove their averments or to rebut the evidence the respondent adduced to establish his claim, a bare assertion that the respondent did not adduce sufficient evidence to prove his case will not do.

Mr. Kaburu for the appellant submitted before us that special damages once pleaded must be strictly proved. It was his view that no evidence of repairs carried out was adduced. In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged 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 v. Evans** [1892]2QB 524 Bowen L.J. 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 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 pendantry."

Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counter checked and either accepted or disproved. The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged and we think Onyancha J. was right in describing him as an expert, and his report as being opinion evidence. The court had the right to accept or reject his opinion if the circumstances so dictated. The respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to. Indeed the decision of **David Bagine v. Martin Bundi** Civil Appeal No. 283 of 1996 which Mr.Kaburu cited to us, does state that a motor vehicle Assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle. This Court differently constituted there said, as is material, as follows:

"He said he had not at all repaired the vehicle as he could not afford it. This seems far-fetched. If he was earning as he said shs.5000/= to shs.9000/= a day he could easily have repaired the vehicle and put it back on the road. The best evidence in this respect could have been supplied by an automobile assessor."

In the result we agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim. We dismiss this appeal with costs to the respondent.

Dated and delivered at Nairobi this 10th day of December 2010
S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR