



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 25 OF 2016

**ROSEMARY WAITHIRA MWANGI (Being the legal representative of
the estate of IRENE WANJIRU MWANGI (Deceased.....APPELLANT**

-VERSUS-

SAMUEL KIPLANGAT KIPCHUMBA.....1ST RESPONDENT

JOEL CHEBII KIPTUM.....2ND RESPONDENT

**(Being an Appeal from the decision of Hon. C. K. Kisiangani (Resident Magistrate) in the Chief Magistrate's Court at Machakos in
Cmcc No.194 of 2015 dated the 9th day of March 2016)**

JUDGEMENT

1. The appeal herein arises from the judgement of Hon Kisiangani(RM) in **Machakos Cmcc No. 194 of 2015** dated 9.3.2016 wherein she entered judgement for the appellant against the respondents for general damages of Kshs 650,000/, special damages of Kshs 284,169/ plus costs of the suit. The appellant was aggrieved by the same and lodged the present appeal.

2. Vide amended Memorandum of Appeal dated 16th of November 2018, the Appellant sought the following orders;

a) The appeal be allowed.

b) The assessment of general damages for pain, suffering and loss of amenities in the lower court dated 9th of March 2016 be set aside and the same be assessed accordingly or be enhanced.

c) The award under special damages be revised to include Kshs. 31,500/-

d) The appellant be awarded the costs and interest in this appeal.

3. The grounds in support of the appeal are that;

a) The trial magistrate erred in law and in fact in awarding an inordinately and manifestly low amount under the head of general damages for pain and suffering and loss of amenities, even after taking into account the fact that the injuries that the Appellant suffered were serious and had led to disability which requires her to be on full time support for her daily needs.

b) The trial magistrate erred in law and in fact by failing to include Kshs. 31,500/= special damages in her award for special damages even after noting in her judgement that the same were proved and produced as evidence.

4. The genesis of the suit arose out of a road traffic accident which occurred on 9th of April 2011 along Masii- Tawa road whereby consent the 2nd Respondent was found to be vicariously liable for the acts of the 1st Respondent. Liability was thus settled at 100% by consent.

5. The appellant did not take the stand as it was indicated to the court that she was unwell. It was agreed by consent that the appellant's witness statement dated 15th March 2013 be adopted as her testimony. It was her evidence that she was travelling in the Respondents vehicle which was being driven at a high speed and after passing Masii town, they approached a slope at a high speed. It was her evidence that the driver lost control and hit the left edge of the road and overturned upon reaching the bottom of the slope. She further stated that she was

conscious but due to trauma, could not speak. She was then taken to Machakos Hospital for treatment and was later discharged.

6. The Appellant produced the following documents as exhibits;

- a) Police Abstract dated 12.6.2012*
- b) A P3 form dated 8.8.2011*
- c) Medical report dated 13.08.2012 by Dr Okere*
- d) Receipt dated 11.08/2011*
- e) Demand letter dated 6.08.2012*

7. The appellant closed her case.

8. The Respondents did not call any witness nor did they produce any documents to support or rebut the allegations in court.

9. Vide application dated 17th March 2015, the Appellant sought to re-open her case and produce further medical treatment notes that were inadvertently left out which application was not opposed. The documents that had been left out were;

- a) Receipts dated 22/06.14, 8.01.15*
- b) Report dated 17.03.2014 by Dr. Wokabi*
- c) Report dated 16.01.2015 by Dr Wanyoike*

10. Parties agreed that the evidence be assessed on quantum. The court awarded the Appellant Kenya Shillings Six Hundred and Fifty Thousand (Kshs. 650,000) as general damages for pain, suffering and loss of amenities and Kenya Shillings Two Hundred and Eighty four Thousand, One Hundred and Sixty Nine as Special damages (284,169/). The appellant was also granted the costs and interest of the suit.

11. The parties agreed to canvass the appeal by way of written submissions.

12. The Appellant submitted that it is not challenging the liability but only on quantum. The Appellant's counsel further submitted that the medical reports prepared by Dr. Okere, Wokabi and Wanyoike confirmed the injuries sustained by the Appellant as blunt head injury with bilateral subdural haematoma and loss of consciousness for some time and a deep cut on the right lower leg. The Appellant relies on Dr. Wanyoike's report on the basis that it is the latest report that indicates the presence of blood clots that could have been as a result of the accident.

13. The Appellant opines that an award of Kenya Shillings Four Million Six Hundred Thousand (Kshs 4,600,000/) would be sufficient as general damages in consideration of the injuries sustained. The Appellant relies on the following cases in its submission; **Ali Issa Vs. China Road & Bridge Corporation (2011) eKLR**, **A.A.M Vs Justus Gisairo Bdareba & Another (2010) eKLR** and **Malindi Civil Appeal 57 of 2017 Aum Transporters Limited Vs. David Karari Thuka (2019) eKLR**.

14. The Respondent's counsel submitted that the award was sufficient as it took into account the medical reports that were filed and also the fact that the alleged serious injury to the head had not been pleaded in the plaint. The Respondent relies on the cases it filed in the lower court being **Cecilia Mwangi & Another Vs Ruth W Mwangi (1997) eKLR** and **LIM PHO Choo vs Camdem and Isington Aarea Health Authority**.

15. I have perused the lower court record, the documents filed before this court and the submissions by the counsels. I find the following issues for determination;

- a) Whether the award for general damages was adequate.*
- b) Whether the Appellant is entitled to an extra special damages of Kenya Shillings Thirty-One Thousand Five Hundred (Kshs. 31,500).*
- c) Who should bear the costs of the appeal.*

Whether the award for general damages was adequate

16. The parameters upon which this court can interfere with the finding of the trial court are well settled, this being a first appeal. In the case of **Butt V Khan (1981)KLR, 349** the court held as follows:-

The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at erroneous estimates of the damages.

17. In the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge’s decision on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.

18. It is not in dispute that the accident occurred and that the victim of the accident, now deceased, suffered blunt head injury with bilateral subdural haematoma and loss of consciousness for some time and a deep cut on the right lower leg.

19. I have noted that the Respondent in this matter filed a defence and later filed submissions having produced no witness nor evidence to rebut that which was presented to the court. The chance to cross examine the Plaintiff was waived when the Respondent’s counsel raised no objection to having the witness statement and documents adopted without a chance to cross examine the said witness.

20. It is not clear from the record whether the court took extra steps to confirm whether the Appellant was actually in the parking bay on the day of the hearing so as to confirm that the appellant was available to the counsels and the court to see her. It would be very crucial to have the same verified before issuance of such awards to avoid injustices from being committed. Be that as it may, it seems the parties agreed to proceed without the need to cross examine the appellant and hence they are deemed to have been satisfied with the same. Indeed, the respondents are not challenging the judgement of the trial court.

21. The trial court in arriving at the award it gave took into consideration the different medical reports filed. I however note that the P3 form is incomplete and as such it is not possible to evaluate the condition of the Appellant before the accident. I also note that Dr. Wokabi in his report brings out the possibility of there being other factors that could have led to the condition of the Appellant rather than the accident.

22. As at the time of the last examination, the Appellant was aware of her conditions and had improved on her speech and had generally recovered from the injuries sustained.

23. While relying on the decision in **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, nothing has been placed before the court to convince me that the trial court acted on the wrong principle of law or that there was an error in the amount awarded. I therefore find that the award given by the lower court is sufficient in the circumstances. In any event there was evidence that the appellant had a previous condition prior to the accident which fact was considered by the trial court based on the medical reports filed. I am satisfied that the amount of general damages awarded was sufficient for the injuries. The appellant seems to suggest that more sums should be paid due to the fact that the appellant has since passed on. It will not be proper to do so in view of the fact that the appellant had previous medical conditions prior to the accident which could be the cause of her death. I find the trial court did not consider an erroneous factor in coming up with the award of general damages since the appellant’s injuries were not that serious as the doctors opined that they were blunt in nature.

Whether the Appellant is entitled to special damages of Kenya Shillings Thirty One Thousand Five Hundred (Kshs. 31,500).

24. It is trite law that special damages must not only be pleaded but must also be strictly proved. The **Court of Appeal in Capital Fish Limited Vs The Kenya Power and Lighting company Limited (2016) eKLR** opined while relying on the case of **Provincial Insurance Company East Africa Limited vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur)** that;

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

25. Furthermore, In the case of **David Bagine v Martin Bundi (283 of 1996) [1997] eKLR**, the Court of Appeal, referred to the judgment by Lord Goddard CJ in **Bonhan Carter v Hyde Park Hotel Limited [1948] 64 TLR 177**, and again observed that:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

26. The Appellant was awarded Kshs. 284,169 in special damages on the basis that receipts worth the said amount were produced. I have perused the record and at page 106 of the record of appeal, reference is made to Plaintiff Exhibit 3 being medical receipts a-o as Plaintiff Exhibit 4 a-o. I have looked at the bundle of documents and the only receipt at page 17 of the record of appeal is one of Kshs 50 and another one of Kshs. 550. It is not clear how the award of Kshs. 284,169 was proven as there is no evidence on record to that effect.

27. The Appellant vide her counsel’s submissions indicated that there was an application dated 17th of March 2015 that allowed the additional Kenya Shillings Thirty One Thousand Five Hundred (Kshs. 31,500) as part of special damages. A perusal of the pleadings and the proceedings of the lower court indicates that the application was indeed allowed and a hearing date set. It is noted that on 1.4.2015 the appellant’s application dated 17.3.2015 seeking to introduce more treatment receipts amounting to Kshs 31,500/ was allowed by consent of the parties. I have also noted that the said amount of Kenya Shillings Thirty One Thousand Five Hundred (Kshs. 31,500) was not specifically pleaded in the Plaint. The Plaint only asks for Kenya Shillings Two Hundred and Eighty four Thousand One Hundred and Ninety Nine (Kshs. 282,169) which was awarded. The courts can only award what is specifically pleaded especially with regards to special damages. The documents were allowed but a perusal of the record does not indicate any amendment that was done to the pleadings or any testimony presented to the court to that effect. As such I find that the additional special damages were not pleaded and proven and thus will not disturb

the decision of the trial court. It was prudent for the appellant to have filed an amended plaint or orally seek to amend the same and the same captured by the court in the proceedings. Merely seeking to introduce new receipts without interfering with the substratum of the plaint regarding special damages claim was not sufficient. The appellant should have gone further to amend the plaint. Hence, I am unable to fault the trial magistrate for ignoring the extra claim. The pleaded sum of Kshs 284,169/ was duly awarded by the trial court and the same is upheld. As noted above, the amount of general damages is reasonable in the circumstances. The appellant's appeal therefore is devoid of merit.

Who should shoulder the costs and interest of this suit?

28. With regard to the costs of the suit, I note that the same is given at the discretion of the court. As the appeal has not been successful, the respondent ought to be paid the costs thereof.

29. The upshot of the foregoing is that the appeal lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **22nd** day of **February, 2021**.

D. K. Kemei

Judge