

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 247 OF 2017

WORLD VISION KENYA.....APPELLANT

VERSUS

BEBORA MWAONO BEMWINGO.....RESPONDENT

JUDGMENT

1. The instant dispute arose out of a road traffic accident in which the Appellant's driver negligently rode/managed and/or controlled motor cycle registration number **KAT 720G**, thereby allowing it to violently hit the Plaintiff motor cycle Registration number **KAZ 060D**. That as a result of the accident, the Respondent was severely injured and suffered loss and damages. He thus instituted **Mombasa CMCC 2231 of 2009** in which, after trial he was awarded general damages of **Kshs.1,000,000/=** and special damages of **Kshs.330,340/=** prompting the instant Appeal.

2. Liability had been agreed between the parties at **30%:70%** in favour of the Respondent herein/Original Plaintiff. The Appeal is solely on quantum and sets out the following grounds:-

1. That the Learned Senior Principal Magistrate erred in law in awarding to the Plaintiff kshs.1,000,000/= for general damages in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the Plaintiff.

2. That the Learned Senior Principal Magistrate erred in failing to consider or adequately consider the medical report of Dr. Ronald F. Kaale dated 15th July 2013 on the injuries sustained by the Plaintiff which was tendered in evidence and marked DEX 1.

3. The Learned Senior Principal Magistrate failed to give any or adequate reasons of how he arrived at the figure of kshs. 1,000,000/=on General damages which he awarded to the plaintiff on the basis of 100% liability.

4. That the Learned Senior Principal Magistrate erred in law in awarding to the plaintiff a sum of kshs.330340/=for special damages when no credible documentary evidence had been adduced before this honourable Court showing that the Plaintiff indeed incurred special damages of kshs.330,340/=.

5. That the Learned Senior Principal Magistrate erred in law and in fact in failing to hold that in the absence of any documentary evidence in support of the special damages he went ahead to award to the Plaintiff the special damages of Kshs.330,340/= without any or any adequate reasons of how he arrived at the said figure.

6. That the Learned Senior Principal Magistrate erred in failing:-

a) To appreciate that the significance of the various facts that emerged from Dr. Ronald F. Kaale medical report dated 15/7/2013 and from the evidence of the Plaintiff and Dr. S.J. Chidagaya's medical report dated 6/4/2009.

b) To consider or properly consider all the evidence before him and/or

c) To make any or any proper finding on the aspect of quantum of damages on the evidence before him.

7. That the Learned Senior Principal Magistrate erred in failing to adequately consider the written submissions filed by Counsel for the Appellant.

3. The parties agreed to canvass the Appeal by way of written submission, which they filed on **19.6.2018** and **20.7.2018** respectively and exchanged.

SUBMISSIONS.

4. On special damages, **Mr. Bwika**, Learned Counsel for the Appellant submitted that no receipts were produced by the Respondent to confirm how much was incurred for treatment and drugs and that no specific amount had been pleaded by the Respondent at paragraph 5 of the Plaintiff. Consequently, the Respondent was estopped from departing from his pleadings and any variation of what was pleaded and the evidence placed before Court ought to have warranted a dismissal of the prayer. For authority, reliance was placed on the decision in **Civil Appeal No.445 of 2003 - Zachary Waweru Thumbi...Vs... Samuel Njoroge Thuku**, where the Court held that special damages ought to be specifically pleaded and strictly proved.

5. On general damages, Counsel submitted that considering all the circumstances and the injuries suffered by the Respondent, the trial Court ought to have been guided by the figure of **Kshs.375,000/=**

suggested and **Kshs.435,000/=** on the basis of 100% liability.

6. **Mr. Oduor**, Learned Counsel for the Respondent on special damages submitted that the award was properly awarded from the available evidence.

7. On general damages, Counsel submitted that owing to the injuries sustained by the Respondent, the award by the trial Court was reasonable and the case of **Nairobi HCCC 381 of 2010- Elizabeth...Vs... John** was on all fours on the injuries sustained by the respondent and in that case the Plaintiff was awarded **Kshs. 1,500,000/=**.

DETERMINATION

8. The principles to be applied when considering whether to interfere with damages awarded by the trial Court were clearly laid down by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini...Vs... A.M.M. Lubia & Ano. (1982-88)1 KAR 777**, where the Court stated as follows:

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

9. This position was restated by the Court of Appeal in the case of **Arrow Car Limited...Vs...Bimomo & 2 Others (2004)2KLR 101** and so recently in the case of **Denshire Muteti Wambua..Vs.. Kenya Power & Lighting Co. Ltd (2013)eKLR**.

10. The Respondent/Original Plaintiff underwent two medical examinations by two different Doctors. The said Doctors prepared Medical reports, and the Medical Report by **Dr. Ronald F. Kaale** was produced as an exhibit by the consent of parties and submissions on quantum tendered.

11. The first Medical Report is by **Dr. S.J. Chidagaya** dated **6.4.2009**. The second one is by **Dr. Ronald F. Kaale** dated **15.7.2013**.

12. The **first Medical Report** revealed the following injuries:-

- 1) *He had soft tissue injuries mainly bruises on the left hand.*
- 2) *Comminuted fracture of femur(lower) left.*
- 3) *There is like ankylosis of the left knee joint ,there is approximately 30% incapacity.*

13. The **second Medical report** revealed the following injuries:-

- 1) *Fracture left lower femur bone.*
- 2) *Fracture left 2nd metacarpal bone .*
- 3) *Stiff left knee, which is as a result of poor physiotherapy and the metal implants need removal.*

14. I have gone through the two Medical Reports and note that the medical reports are similar save for the fact that the medical report by **Dr. Ronald F. Kaale** does not assess the degree of incapacity by the Respondent. That is the same conclusion/finding that was arrived at by the trial Court.

15. On the weight to be attached to such evidence, **Warsame, J** (as he then was) in the case of **Theodore Otieno Kambogo...Vs... Norwegian People's Aid Nairobi (Milimani) HCCC No.774 of 2000** held:

“The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.”

16. It follows that without the Appellant calling a doctor who could be cross-examined on the report produced by the Defence, the failure rendered the medical report by **Dr. Ronald F. Kaale** to be of little probative value. Consequently, the trial Court was free to base its finding on the medical report, which its maker was subjected to cross-examination. It is therefore mischievous for the Appellant to turn around on Appeal and claim that the Trial Court did not rely on their medical report. Accordingly, there is really no dispute as to the nature of injuries sustained by the Respondent in my view.

Whether the general damages awarded were inordinately high.

17. I have read and considered the finding in **Elizabeth Wamuyu Wanjohi..Vs...John Muriithi Mbanya & 2 Others[2015] eKLR**, I note even though the injuries sustained are not the same, they are somehow similar. It has been indicated in the medical report by **Dr. Ronald F. Kaale** that the Respondent was hospitalized for 12 days, had a major surgery, and a result of poor physiotherapy he has a stiff knee and he is on walking crutches.

18. The Appellant relied on the following authorities where the Plaintiff suffered a fracture of the femur. In **HCCC No.180 of 1986 Jitendra Tarachand Shah...Vs...Kenya Ports Authority** general damages were assessed at **Kshs.300,000/=**, and in **James Ngichiri Kibe...Vs...Simon Muruchi Thiga & Ano.**, general damages for pain and suffering were assessed at **Kshs.200,000/=**.

19. Courts have a responsibility to keep themselves apprised of recent authorities. This is not to say that reliance on old authorities is acting on the wrong principle. However, courts are also required to take into consideration inflation, which has taken a toll on the value of the Kenya Shilling. Notably, the Appellant relied on very old authorities, which did not assist this Court in establishing what the recent awards of Courts in awarding general damages for pain and suffering and loss of amenities were, as they did not take into account the inflationary trends over the years. Bearing in mind the nature of injuries that were sustained by the Respondent herein, the sum of Kshs 1,000,000/= general damages for pain and suffering and loss of amenities was reasonable. Consequently, this Court upholds the finding on general damages by the trial Court.

20. On special damages, the law on award of special damage is well settled, as pleaded by the appellant. It must not only be pleaded; it must be specifically proved. I agree with the authorities that the appellant has cited to support his case. I could add more. In the case of **Capital Fish Kenya Limited...Vs...The Kenya Power & Lighting Company Limited [2016] eKLR**, the Court of Appeal said:

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as the circumstances permit. See National Social Security Fund Board of Trustees..Vs.. Sifa International Limited [2016] eKLR, Macharia & Waiguru vs. Murang’a Municipal Council & Another [2014] eKLR and Provincial Insurance Co. EA Ltd..Vs..Mordekai Mwanga Nandwa KSM CACA 179 of 1995 (ur).”

21. Similarly, In the case of **Caltex Oil (Kenya) Limited...Vs.... Rono Limited [2016]eKLR**, the same court said:

“... It is trite law that special damages must be pleaded and proved. See Mohamed Ali & Ano...Vs...Sagoo Radiators Limited [2013] eKLR (Civil Appeal No. 231 of 2005) wherein the Court adopted the holding of the Court in Hahn.. vs. Singh (1985) KLR 716 that:

“... 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.”

22. In the amended Plaintiff, the particulars of special damages were pleaded as follows:

Particulars	Kshs.	Court’s Finding
Medical Report	4000/=	1500/=
Completing P3 Form	500/=	500/=
Police Abstract	200/=	200/=
Towards treatment expenses & purchase of medicine	230,000/-	228,000/=
Travelling expenses to attend treatment	80,000/=	No Receipts
Towards purchase of walking crutches	49,000/=	No Receipts
Physiotherapy expenses	150,000/=	No Receipts
Future treatment expenses	70,000/=	No Receipts
Towards repair of Motor Cycle KAZ 060D produced	18,000/=	No Receipts
TOTAL	601,700/=	230,840/=

23. I find that the trial Court erred in awarding the Respondent a sum of Kshs.80, 000/= as traveling expenses to attend treatment. I note that

though the same was pleaded, and even the receipt filed, the said receipts were unfortunately never produced in evidence by the Respondent. Therefore, travel expenses were not awardable.

24. After re-assessing the amount that was proved as special damages, I find that the Respondent strictly proved a sum of **Kshs.230,840/=** which I hereby award him. Interest on special damages shall be assessed from the date of filing the suit while interest on general damages shall be payable from the date of this judgment.

Orders

25. Accordingly, for the reasons set out above, the Court makes the

following orders:

a) The Appeal is allowed to the extent that the special damages for at the sum of Ksh.330,340/- is set aside and substituted by the sum of Kshs. 230,840/=.

b) The awards of General Damages for pain and suffering and loss of amenities at Ksh.1,000,000/- is upheld.

26. As the Appeal is only partly successful, there shall be no order as to costs in the Appeal.

Order accordingly.

DATED and DELIVERED at Mombasa this 28th day of September, 2020.

O. CHEPKWONY

JUDGE

28/9/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE

28/9/2020