



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 337 OF 2014**

**HWK.....PLAINTIFF**

**-VERSUS-**

**DR. RACHEL N. KANG'ETHE.....1<sup>ST</sup> DEFENDANT**

**KAREN HOSPITAL NAIROBI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff moved this court by way of the plaint dated the 17<sup>th</sup> day of October, 2014 and filed on the same date seeking special damages in the sum of Kshs. 682,168/= general damages for trespass by intrusion into her body and privacy, general damages for assault for illegal injection and oral drugs, general damages for illegal detention and/or confinement costs and interest against the defendants.

The first defendant was at all material times to this suit a medical practitioner practicing as such in the 2<sup>nd</sup> defendant's hospital while the 2<sup>nd</sup> defendant is a hospital situate in Karen, Nairobi County in the Republic of Kenya.

The Plaintiff avers that on or about the 12<sup>th</sup> day of October, 2011, she was at her place of work known as (Particulars Withheld) situated in Maendeleo House, in Nairobi, when she was abducted by a group of more than five (5) men and women who claimed to be acting under the instructions of the 1<sup>st</sup> defendant who forcefully injected her with unknown drugs.

She pleaded that the said injections incapacitated and immobilized her and she was later admitted by the 1<sup>st</sup> defendant at the 2<sup>nd</sup> defendant's hospital in Karen, at Naivasha ward where subsequent injections were administered on her which rendered her completely incapable of movement for the entire period when she remained admitted and even after she was discharged. She averred that during the confinement as aforesaid she was denied opportunity to be visited by her relatives and friends.

The plaintiff contended that the defendants' action and/or commissions were completely unwarranted, illegal and amounted to a trespass and assault on her body and the same were unconstitutional. The particulars of the defendants' illegality, trespass and unconstitutionality are set out in paragraph 9 of the plaint while those of special damages are set out in paragraph 10 thereof. She has prayed for judgment against the defendants jointly and severally as set out in the plaint.

The first defendant filed a defence on the 2<sup>nd</sup> December, 2014 and amended the same on the 3<sup>rd</sup> of December, 2014 in which she has denied all the allegations in the plaint save as therein admitted. She denied instructing a group of more than five people or at all to abduct the plaintiff or to forcefully inject her with drugs and puts her to strict proof. She averred that, in any event, the alleged tortuous wrongs of abduction or forced injection that the plaintiff complains about, occurred more than three years before the suit was filed and are therefore time barred.

In the alternative and without prejudice, she avers that she is a stranger to and denies the plaintiff's alleged incapacitation or immobilization. She avers that the plaintiff was admitted to the 2<sup>nd</sup> defendant as an involuntary patient upon application by her adult son, one WK as contemplated under Sections 14 and 16 of the Mental Health Act.

She denied all the particulars of illegality, trespass and unconstitutionality attributed to her. She contended that she exercised all professional skill in administering the treatment and exercised such duty of care to the plaintiff as would have reasonably been expected of her in the circumstances of the case. She denied that the plaintiff suffered any loss and damage or that she is liable for it and puts the plaintiff to strict proof. All the particulars of special damages are denied. She prayed that the plaintiff's suit be dismissed with cost.

The 2<sup>nd</sup> defendant filed its statement of defence on the 5<sup>th</sup> day of December, 2014 in which it has denied all the allegations made in the plaint

save what is expressly admitted. It denied that on or about the 12<sup>th</sup> day of October, 2011, the plaintiff was abducted and forcefully injected with unknown drugs which incapacitated and immobilized her causing her to be admitted at its hospital.

Without prejudice to the foregoing, it averred that the plaintiff was taken to its hospital on the 12<sup>th</sup> October 2011 accompanied by her relatives and a police officer for medical attention and was referred to 1<sup>st</sup> defendant's hospital for medical attention. It further averred that upon review and examination by the 1<sup>st</sup> defendant, the plaintiff was diagnosed as being psychotic which caused her to be admitted at the 2<sup>nd</sup> defendant's hospital for treatment and management of the condition to save her life and the public.

The 2<sup>nd</sup> defendant denied that the plaintiff was confined to bed or that she was discharged without medical bills being demanded and/or settled by her and that she was denied an opportunity to be visited by her relatives. The 2<sup>nd</sup> defendant further stated that the plaintiff was admitted at the instance of her children and other relatives and at the material time of the said admission, they were accompanied by a police officer and according to the 1<sup>st</sup> defendant's assessment, the plaintiff lacked capacity to give or withhold consent on the course of treatment and thus the consent was given by her son WK who was in the company of the plaintiff's other children, sister and aunts.

The 2<sup>nd</sup> defendant denies that its actions and/or omissions were unwarranted, illegal and/or amounted to trespass and assault on the plaintiff's body and/or were unconstitutional. The particulars of illegality, trespass and unconstitutionality set out in the plaint were also denied and so are those of special damages. The 2<sup>nd</sup> defendant further avers that the 1<sup>st</sup> defendant undertook a proper assessment of the plaintiff's condition and at no time was the 2<sup>nd</sup> defendant negligent in the plaintiff's treatment and its staff exercised proper care and skill commensurate with a world class hospital/health facility and that it consulted and advised the plaintiff's relatives and friends prior to and in the course of the treatment. That the 2<sup>nd</sup> defendant's conduct during the course of treatment was legal and within the professionally accepted forms of professional medical practice and that the 2<sup>nd</sup> defendant took all the remedial measures in mitigating the gravity of the plaintiff's condition, prior, during and subsequent to the course of treatment administered to her.

The plaintiff filed replies to the 1<sup>st</sup> and the 2<sup>nd</sup> defendants amended defence and defence respectively, in which she joins issues with the defendants' defences save and except where the same consists of admissions.

At the hearing, the plaintiff testified as the only witness in support of her case. She adopted her witness statement dated the 17<sup>th</sup> day of October, 2014 and filed the same date. It was her evidence that on or about the 12<sup>th</sup> day of October, 2011, she was carrying on with her daily duties at her place of work, that is "*Meeting Point Café*" when five (5) men and woman walked in and abducted her. That she was injected with unknown drugs that made her incapacitated and also immobilized her and the same was done at the instruction of the 1<sup>st</sup> defendant. That when she enquired from the 2<sup>nd</sup> defendant why she was admitted at its hospital, there was no sufficient reason given.

It was her further evidence that she was wrongfully confined by the defendants at the 2<sup>nd</sup> defendant from the 12<sup>th</sup> October, 2011 to 18<sup>th</sup> October, 2011 when she was discharged with no medical bills and she took time to recover completely from the effects of the drugs injected and administered orally to her by the defendants. That as a result of the wrongful confinement and admission by the defendants she fell into arrears of rent in the sum of Kshs. 282,074/= following which her landlord instructed an auctioneer to levy distress of rent against her and in the process she lost goods worth kshs. 50,094/= plus kshs. 30,197/= as auctioneer's fees. She asked the court to compel the defendant to pay her costs of her grounded and closed business at kshs. 300,000/= plus Kshs. 362,365/= being rent arrears, auctioneers charges, costs of the proclaimed goods and general damages for trespass, assault and illegal detention and/or confinement. She produced several documents in support of her case.

The 1<sup>st</sup> defendant testified as the only witness in support of her case. She adopted her witness statement filed on the 2<sup>nd</sup> February, 2015 as her evidence in chief. She is a Consultant Psychiatrist at the 2<sup>nd</sup> defendant and holds bachelors in medicine and surgery from the University of Nairobi. She also holds a master of medicine in psychiatry from the same university.

It was her evidence that she met the plaintiff for the first time on the 12<sup>th</sup> day of October, 2011 when she was taken to the 2<sup>nd</sup> defendant by her two adult children namely GNK and WK who were in the company of a police officer. The plaintiff had been referred to her for medical attention. That Mr. K informed her that the family of the plaintiff had decided to intervene and seek psychiatric treatment for their mother owing to what he described as abnormal behavior such as hallucinations, abusive and violent behavior. He indicated to her that they had to take the plaintiff to hospital involuntarily because the plaintiff had been denying that she needed treatment despite evidence to the contrary. He then filled a standard form supplied by the 2<sup>nd</sup> defendant which he signed documenting the plaintiffs medical history and the family's decision to intervene and seek psychiatric treatment for her due to the severity of the situation and to avoid escalation of the plaintiff's problem. That she assessed the plaintiff's capacity to give or withhold consent to evaluation and treatment and from her assessment, she formed the opinion that the plaintiff was unable to understand and retain information relevant to the decision to seek treatment

It was her evidence that the plaintiff appeared not to be in a position to use and weigh such information in the decision making. She admitted her and during the course of the next five days, she diagnosed her with psychosis and post traumatic stress disorder and she combined multiple therapies to manage her. She denied that she arranged for the plaintiff to be abducted and be brought to hospital as alleged. She stated that she met the plaintiff for the first time on 12<sup>th</sup> October, 2011 and she was never involved in the process of bringing her to hospital. She also did not instruct anybody to sedate the plaintiff as alleged.

She stated that once she was satisfied that the plaintiff needed medical attention as intimated by her family, she managed her to the best of her professional responsibility within the strict bounds of the Mental Health Act and Medical Professional Ethics and discharged her as soon as she was satisfied that she had stabilized.

The 2<sup>nd</sup> defendant called two witnesses. In support of its case, Dr. Daniel Nduiga testified as DW1. He told the court that he was requested by the first defendant on the 15<sup>th</sup> day of October, 2011 to review the plaintiff who had been admitted on the 12<sup>th</sup> October, 2011 with a

diagnosis of florid Psychotic episode. On review, she found her oriented in time, place and person, elated and very talkative. Her vital signs that day were within normal limits. He requested for several tests and her physical examination revealed mild tenderness of the left knee.

Lipsa Cheruiyot testified as DW2 in support of the 2<sup>nd</sup> defendant's case. She is a registered nurse with Nursing Council of Kenya and is employed by the 2<sup>nd</sup> defendant. She stated that they received the plaintiff on the 13<sup>th</sup> day of October, 2011 but she had been admitted on the 12<sup>th</sup> day of October, 2011 having been diagnosed with psychosis and she was very violent. That on the 12<sup>th</sup> October, 2011, she was attended by one Florence Riage who has since left the hospital.

That when she reported on duty, she was given a report that the plaintiff was violent and on admission, she had ran away from the hospital but was brought back by security guards and her relatives. That the plaintiff had been given an injection prescribed by the first defendant and she calmed down and slept throughout the night. Throughout the day the plaintiff remained calm but she had an orderly on the bedside until 6pm when she was handled to the next staff.

At the conclusion of the case, parties filed written submissions which this court has considered together with the pleadings and the evidence on record. In their submissions, counsels for the plaintiff and the 2<sup>nd</sup> defendant set down issues for determination which I rephrase as hereunder;

- 1. Whether the plaintiff was abducted under the 1<sup>st</sup> defendant's instructions and taken to the 2<sup>nd</sup> defendant's hospital**
- 2. Whether the plaintiff was forcefully admitted at the 2<sup>nd</sup> defendant's hospital and treated without her consent**
- 3. Whether the plaintiff is entitled to both general and special damages as set out and prayed for in the plaint.**
- 4. Who should meet the costs of the suit.**

On the first issue, let me start by examining the definition of the word abduction. In the oxford dictionary the same is defined as;

***“The action of forcibly taking someone away against their will”***

The plaintiff herein alleges that she was abducted under the instruction of the 1<sup>st</sup> defendant and was taken to the 2<sup>nd</sup> defendant's hospital and the said abduction is alleged to have taken place on the 12<sup>th</sup> day of October, 2011.

She stated that she was abducted at her place of work during morning hours and that the same people injected her with unknown drugs that incapacitated and immobilized her and that the said injection was administered at the instruction of the 1<sup>st</sup> defendant.

In her witness statement, the plaintiff stated that she was abducted by more than five (5) men and women. She did not name any of them.

On the other hand, in cross examination, it was her evidence that her two children were among the people who abducted her on the material day. She named her two children as KM and TW. It was her further evidence that the others were taxi drivers who were operating from Barclays Bank and at Lifestyle.

The evidence available to this court is that the alleged abduction took place at her place of work. She told the court that she had employed five (5) people in the said hotel. The court notes that the alleged abduction took place during the day and her business must have been open at the material time. She did not call any of her employees to support her evidence on the alleged abduction. The court noted that her evidence in cross examination was contradictory and it was not clear from her evidence how she found herself at the 2<sup>nd</sup> defendant's hospital.

On the other hand, it was her case that she did not know the 1<sup>st</sup> defendant before the 12<sup>th</sup> October, 2011 yet according to her, on her abduction, she was injected at the instruction of the 1<sup>st</sup> defendant. Even assuming that she was abducted as alleged, she did not connect the 1<sup>st</sup> defendant with the said abduction, or the 2<sup>nd</sup> defendant for that matter. The available evidence that is believable is that she found herself in the 2<sup>nd</sup> defendant's hospital and the defendants have given a credible account of how she ended there but whether she was forcefully admitted and treated without her consent is the subject of the next issue.

On the 2<sup>nd</sup> issue, the plaintiff averred that she was illegally admitted at the 2<sup>nd</sup> defendant's hospital without her consent and was confined therein from 12<sup>th</sup> October, 2011 to 18<sup>th</sup> October, 2011. From the onset, it is trite law that a doctor who operates without the consent of his patient is, save in cases of emergency or mental disability, is guilty of the civil wrong of trespass to the person and he is also guilty of the criminal offence of assault.

**----- a patient has the right to be informed of the risks inherent in the treatment which treatment is proposed. This was the holding in the case of Sidaway vs. Bethlem Royal Hospital Governors & others (1985) 1 AII ER 643 by Lord Scarmon at Page 649.**

In my view, the consent is not only required in cases of operation but also in normal treatments of patients, which in most cases is implied and especially in cases where a patient freely walks in a hospital for treatment.

The issue of consent was also discussed by the court in the case of ***PBS vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 others***

(2016) eKLR in which the court cited the medical journal thus;

**“Expectations of a patient are two fold. Doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness or recklessness or altitude of their staff. Though a doctor may not be in a position to save his patient’s life at all times, he is expected to use his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him. Therefore, it is expected that a doctor carryout a report from the patient. Furthermore, unless it is an emergency, he obtains informed consent of the parties before proceeding with any major treatment, surgical operation even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability.”**

According to Medical Malpractice Law by **John Healy (Barrister at law)** the common law has drawn a distinction between the failure to obtain a patients basic or real consent (attracting civil liability in trespass for battery) and failure to provide sufficient information to enable a patient to understand the broader implication of the proposed intervention (attracting liability in negligence as a breach of doctors duty of care in and around the giving of medical advice). The law on trespass has established that to obtain a patient’s consent to a medical intervention, it is both necessary and sufficient to explain the “nature and purpose” of the intervention.

It is important to note that the cause of action herein is that of trespass, assault and illegal confinement on account of lack of consent and not one of medical negligence.

In her evidence, the 1<sup>st</sup> defendant stated that during the course of treatment, she diagnosed the plaintiff with psychosis and post-traumatic stress disorder and she combined multiple therapies to manage her. On her part, the plaintiff contended that she was not sick and she did not need any treatment. The defendants have relied on the provisions of the Mental Health Act, Cap 248 Laws of Kenya. Under the said Act, there are two categories of patients namely voluntary and involuntary patients.

The treatment of voluntary patients is provided for from Section 10-13 while that of involuntary ones is provided for from Section 14 - 15 of the Act.

The defendant’s contention was that the plaintiff was admitted as an involuntary patient under Section 14 which provides;

1. “Subject to this Section, a person who is suffering from mental disorder and is likely to benefit by treatment in a mental hospital but is for the time being incapable of expressing himself as willing or unwilling to receive treatment, may, on a written application, under this section, be received into a mental hospital as an involuntary patient for treatment”

2. An application under this Section shall be made in the prescribed form to the person in charge and shall be made

*(a) by the husband or wife or by a relative, of the person to whom it relates.*

3. The application shall be accompanied by a recommendation in duplicate in the prescribed form, signed by a medical practitioner, who shall where practicable, be the usual medical practitioner attending the person concerned and where this is not practicable a medical practitioner approved by the director for the purpose of making any such recommendation, shall make it.

4. The medical practitioner who makes a recommendation under this section shall, before signing the recommendation, examine the person to whom the recommendation relates and specify in the recommendation the date and dates on which he examined the person and the grounds on which the recommendation is based.

The evidence available to the court is that the plaintiff was admitted on 12<sup>th</sup> October, 2011 and the admission form was produced as defence exhibit 1. The information contained therein shows that WK and MK are listed as next of kin and therein, the bill was to be paid by WK. The two are sons to the plaintiff.

Upon admission, a comprehensive medical evaluation was done by the first defendant to establish the appropriate treatment to be given to the plaintiff. This is contained in defence exhibit 2. In the same document, the first defendant assessed the plaintiffs’ capacity to give or withhold consent to the course of treatment and the record shows that the first defendant stated that the patient is unable to use and weigh this information in the decision making process. The first defendant also noted that the plaintiff was unable to comprehend and retain information material to the decision.

In the same form, under further details, the plaintiff’s son stated that since 2008, he has consistently tried to have his mother seek treatment for abnormal behavior such as hallucinations, abusive and violent behavior but she has declined treatment claiming that she is mentally well. He has further stated that due to the severity of the situation and to avoid escalation of her problem, as a family, they had decided to intervene and seek treatment through psychiatrist.

According to 1<sup>st</sup> defendant, the treatment could not wait until the plaintiff recovers capacity because she had absolutely no insight, was psychotic and violent. In the plaintiff’s medical report prepared by the 1<sup>st</sup> defendant and dated 15<sup>th</sup> November, 2014 she states that the plaintiff was not only a danger to herself but to others as well, and that, she required psychiatric treatment including medication as well as hospitalization for safety containment and further investigations and management.

On taking the history of the plaintiff from her daughter G, the first defendant was able to establish that the plaintiff had been through many traumatic events, marital woes in 2006/07/10, her home and business were sold, physical beatings by her husband and fears of being auctioned among others. In the same report, the first defendant further states that she had a session with the plaintiff who confirmed the said

traumatic stress. Dr. Daniel Nduiga who is a Physician testified on behalf of the 2<sup>nd</sup> defendant. He also examined the plaintiff and ruled out organicity as the cause of the plaintiff's episode. This report was produced as defence exhibit 4. In his view the admission of the plaintiff was right and proper.

In their defence, the defendants have also relied on Section 16 of Mental Health Act which provides for emergency admission of a patient under the Act. The said Section states;

1. Any police officer of above the rank of Inspector, Officer in Charge of a police station, Administrative Officer or Assistant Chief may take or cause to be taken into his custody;
  - a. Any person whom he believes to be suffering from mental disorder and who is found within the limits of his jurisdiction; and
  - b. Any person within the limits of his jurisdiction who he believes is dangerous to himself or to others, or who, because of the mental disorder acts or is likely to act in a manner offensive to public decency;

The defendants testified that the plaintiff was taken to the first defendant's hospital in company of her two children and a police officer. As earlier stated, the first defendant took her history and upon examination found that she was suffering from severe psychiatric condition and was a danger to herself and others.

Further, it was the first defendant's evidence that, the plaintiff was suffering from paranoid delusions which are beliefs that people are against you and they want to kill you or harm you and she was extremely paranoid. In the situation that she was, there was a danger that she could have reacted and in trying to defend herself, she could harm herself or others. She stated that, in that situation, a person has no insight and they do not know that the way they are experiencing things is not true and therefore they can be taken advantage of and if the situation is left like that it can get worse. It was her evidence that, while in hospital, the plaintiff had attempted to escape claiming that she wanted to chase away demons at Don Bosco.

She told the court that she prescribed clopixol, zyprixa and haloperidal to stabilize the plaintiff for the four (4) days that she was in hospital which drugs are safe, and the same were prescribed after she had done all the pre-test on her.

On the allegations that the plaintiff was denied opportunity to be visited by relatives and friends at the hospital, the plaintiff in cross examination admitted that she was visited by her Pastor and his wife, on the 14<sup>th</sup> day of October, 2011. She stated that G and her son TW also went to see her on 17/10/2011 but she could not recall the other people who visited her. At some point, she had told the court that she could not tell whether she was in Karen Hospital between 12<sup>th</sup> October, 2011 to 18<sup>th</sup> October, 2011.

It is interesting to note that though she stated that her two children were among the people who allegedly abducted her and took her to Karen Hospital, on cross examination, she said that she has never asked them why they took her there. She did not enjoin her children as parties to the suit yet, according to her, they were part of the group that abducted her. It was also the plaintiff's evidence that she reported the matter to the police but none of the defendants were charged with the offence of abduction or any other criminal case for that matter, in regard to the plaintiff's complaint relating to the case herein, yet, abduction is a criminal offence. This court does not wish to speculate why the police did not charge the defendants but what is clear is that they were not charged.

The plaintiff contends that the provisions of the Mental Health Act were not adhered to and in particular Sections 3, 14 and 16 of the Act. Section 3 provides that;

**“Subject to the Criminal Procedure Code (Cap 75), no person shall be received or detained in a mental hospital unless he is received and detained under this act”.**

Counsel for the plaintiff submitted that the procedure set out in Section 14 of Mental Health Act was not followed in that, the admission form was filled by the plaintiff's son and in the plaintiff's counsel's view, it is not the application contemplated under that section.

The court has considered those submissions vis-à-vis the evidence availed by the defendants. The court notes that the procedure for emergency admission as provided for in the Mental Health Act and that of involuntary patients are well set out herein. While the court finds that the same may not have been complied with, to the letter, it is clear from the documents availed to the court that to a great extent, it was. The application to receive the plaintiff was done by his son TK. It may not have been in the prescribed form but all the same, it was done. The first defendant examined the plaintiff and made a recommendation that she be admitted for treatment after she found that she could not freely give her consent for treatment.

The plaintiff's children were in the company of a police officer when they took her to Karen Hospital for treatment.

Section 42 of the Act is helpful in the case herein. The same provides;

**1. Any person who does any act in pursuance or intended pursuance of this Act shall not be under any Civil or Criminal liability in respect thereof, if the court is satisfied that he has acted in good faith and with reasonable care.**

In view of that provision, and the evidence on record, this court is satisfied that the defendants acted in good faith and with reasonable care. They disclosed to the court the drugs that were prescribed to the plaintiff, the treatment that she was given and that it was in her interest that she be treated. There was no bad faith attributed to the defendants or any ill motive that would have driven them to treat the plaintiff. None

of the drugs prescribed by the defendants was proven to be harmful to the plaintiff's health as she alleged. Though she insisted that she was mentally sound, she did not produce any evidence before the court to support that contention. To the contrary, there is ample evidence to proof that she was suffering from severe psychiatric condition for which she needed treatment.

Before I conclude, I noted that counsel for the plaintiff relied on foreign law on the procedure of admission of an involuntary mental health patient for countries who are members of the World Health Organization as ratified by Kenya. The guiding principle on application of foreign law is that the same can only be applied if we do not have a local statute that prescribes the procedure to follow. In line with the **Dualist Theory** with regards to the Treaty Law and Article 94(5) of the Constitution as read with the **Treaty Making and Ratification Act**, the **Mental Health Act** provides for a procedure and we have to abide by it unless there is a Lacuna.

The law enjoins this court to assess damages that it could have awarded the plaintiff had she succeeded in her claim. In pursuant of that duty, this court now proceeds to address the quantum. It is trite law that an award of damages is a matter of discretion on the part of the court. The discretion is unfettered save that it has to be exercised judiciously.

The guiding principles on awarding general damages are that;

1. An award of damages should not be inordinately too low or too high.
2. An award of damages is not meant to enrich a party but to compensate him for the loss suffered and where possible to restore him in the position he was before the damage caused.

With regard to damages, the plaintiff sought general damages for assault, tress pass and for illegal detention and confinement. She has also prayed for special damages in the sum of Kshs. 682,168/=

The words assault, trespass and illegal detention are defined in the **Halsbury's law of England third Edition** as follows;

**“Assault is an intentional use of force or violence to the person of another”**

To constitute assault, there must be a menace of violence, with a present ability to commit it. The menace must either be accompanied by an intention to commit violence or must raise an actual fear of violence in the mind of the person threatened.

An action lies for assault, and criminal proceedings may also be taken against the offender and the injured party may pursue both remedies except where summary proceedings are taken. In an action of assault, the plaintiff is entitled to recover by way of general damages, compensation for the indignity or suffering which the assault has caused.

On the other hand, illegal detention consist of any total restraint of the liberty of the person, for however short a time , by the use or threat of force or by confinement.

The tort of trespass to a person is a wrong committed against the personal security or personal liberty of one man by another. There are three varieties of trespass to person namely assault, battery and wrong imprisonment.

From the above, it therefore follows that, even if the plaintiff had succeeded she could only have been awarded damages on the general head of trespass to the person. The plaintiff in her submissions has urged the court to award Kshs. 2,500,000/= and has relied on the case of **Wachira Wehire vs. Attorney General (2010) EKLK** where a similar sum was awarded.

On special damages she claimed a total of Kshs. 662,365 made-up as follows;

- i. Closing down of the plaintiff's business Kshs. 300,000/=
- ii. Distress for rent Kshs. 282,074/=
- iii. Auctioneers charges incurred kshs. 30,197/=
- iv. Loss of café items Kshs. 50,094/=

Both defendants did not address me on quantum of damages.

On general damages, the court notes that the plaintiff was in the 2<sup>nd</sup> defendants hospital for six (days) between 12<sup>th</sup> October, 2013 to 18<sup>th</sup> October, 2013. The sum of Kshs. 2,500,000/= claimed by the plaintiff is on the higher side.

Being guided by the case of **Arcade stationers Limited vs. John Wanyonyi Wafula Civil Appeal Number 197 of 2004 and that of Geoffrey Githiri Kamau vs. The Attorney General (Civil case Number 387/2014** where Kshs. 180,000/= and Kshs. 400,000/= were awarded for trespass. In view of the age of those cases, an enhanced sum of Kshs. 500,000/= would have been reasonable in the circumstances of this case had the plaintiff succeeded in proving her case.

On special damages, it is trite law that for them to be awarded, they must be specifically pleaded and also strictly proved.

The sum of Kshs. 662,565/= claimed was not proven and therefore no award is made under that head.

See the case of **Hassan Osman Ali & Another (suing as Administrators of the Estate of the late Hussein Asman Ali vs. Multiple Hauliers (EA) Limited Civil suit number 2/2016**. Wherein the court quoted the case of **Maritim & Another vs. Anjere (1990 – 1994) EA 312** in which the court stated:

**“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”**

Also see the decision of the court of Appeal in the case of **Hann vs. Singh (1985) KLR 716** where the court held;

**“Special damages must not only be specifically claimed but also strictly proved, the degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.”**

In the end, the plaintiff case is hereby dismissed but with no orders as to costs.

Delivered at **NAIROBI** this 28<sup>TH</sup> Day of **NOVEMBER, 2019**.

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Plaintiff

..... For the Defendants