



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 3 OF 2012

JOSEPHINE NDINDA MOSES APPELLANT

VERSUS

MARTIN MUTISYA KIIO

MAXMILLAN M. MBITHI RESPONDENTS

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Machakos of Hon S.M. Mungai (S.P.M) Civil Case No. 751 of 2006 dated 25th January 2011)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Josephine Ndinda Moses** was involved in a road traffic accident on 22/12/2004. The Plaintiff thereafter filed a suit against the Respondents, **Martin Mutisya Kiio** and **Maxmillan M. Mbithi** claiming Special Damages, General Damages for pain and suffering, loss of earnings and costs and interests. The Respondents filed a statement of defence and denied the claim.
2. On 2/3/2010, the parties by consent entered judgment on liability at 90% against the Defendants and 10% against the Plaintiff. The General Damages were agreed at 80,000/= and the attendance of the doctor and the police officer as witnesses dispensed with. The special damages were not agreed upon and the issue subsequently proceeded to trial.
3. The Appellant was the only witness who testified. The trial court in its judgment awarded the Appellant Kshs.2,926/= as what was pleaded and proved. The trial court found the claim on the loss of earnings was not proved and dismissed the same.
4. The Appellant was aggrieved by the said judgment and appealed to this court. The grounds of appeal can be condensed broadly as follows:-
 - **Whether the trial magistrate erred in finding that the claim for special damages as pleaded in the plaint and the claim for loss of earnings had not been proved.**
 - **Whether the trial magistrate erred in the assessment of the special damages and loss of earnings.**
 - **Whether the Respondents by conceding to 90% liability and the dispensing with the evidence of the doctor conceded to the injuries as set out in the plaint.**
 - **Whether the trial magistrate failed to consider the Plaintiff's submissions.**

5. The appeal was canvassed by way of written submissions which I have duly considered.
6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*
7. There is no dispute that the consent referred to above was entered into by the parties. Although the trial magistrate in his judgment made an error in assessing the amount of General Damages as Kshs.50,000/=, this was later reviewed to reflect the consent on General Damages at Kshs.80,000/=. The appeal is essentially on Special Damages. Loss of earnings is a special damage claim that also required strict proof. (*See for example David Bagine –vs- Martin Bundi - Nairobi Court of Appeal No. 283/1996.*)
8. The particulars of Special Damages were pleaded as follows:-

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|---------------------------------|-----------|
| i. Hospital expenses | – 4,470/= |
| ii. Police Abstract | – 100/= |
| iii. Medical examination | |

Report (P3)	– 1,500/=
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iv. **Travel expenses in Machakos**

for treatment	– 750/=
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9. The Appellant in her evidence produced a bundle of receipts which she stated were twenty five (25) in total to support her claim for the special damages inclusive of the claim for loss of earnings. No evidence was tendered to show which receipts were for what expenses. From what can be gleaned from the said bundle of receipts, the same are twenty three (23) in total and not twenty five (25), ten (10) of the receipts are for medical expenses and one (1) is for the payment of Kshs.200/= for obtaining the police abstract but what was claimed for the police abstract is Kshs.100/=. The total for the eleven stated receipts for the above particularized Special Damages claim less the Kshs.100/= is Kshs. 2,726/= as correctly stated in the judgment of the trial magistrate. I have not seen any receipts for the medical examination report (P3 form) or for the travel expenses. There was therefore no proof that the said expenses were incurred.
10. Turning to the claim of Kshs.120,000/= per month for 6½ months for loss of earnings, the Appellant testified that she was unable to carry out her business of selling chicken. She produced a total of twelve (12) receipts totaling to Kshs.503,670/= for purchase of chicken on various dates during the month of August and September 2004. There was no evidence adduced on the gross income or the net income. The receipts produced were for only two months and the same are insufficient to give a true picture of the Appellant’s monthly average income.
11. The Appellant testified that she was injured on the chest and the whole body. No medical evidence was produced. The consent on liability only dispensed with the attendance of the doctor and the police officer. General Damages were agreed at Kshs.80,000/=. The ground of appeal that the dispensing with the evidence of the doctor conceded to the injuries suffered by the Plaintiff as set out in the plaint cannot be true.
12. The plaint is a pleading and not evidence. If the parties wished to adopt the said contents of the plaint as evidence, then they should have clearly stated so in their consent. In any event, the plaint lists the Plaintiff’s injuries as “chest pains, abdominal pains and tender shoulder”. There is no evidence to establish whether the said injuries would have prevented the Appellant from carrying out her business for six months or at all. There is no evidence to link the Appellant’s injuries and the loss of earning claimed.
13. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **30th** day of **September** 2014.

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B. THURANIRA JADEN

JUDGE