



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 134 OF 2009**

**COAST BUS MOMBASA LTD.....APPELLANT**

**-VERSUS-**

**ANNE AWITI ONEGE.....RESPONDENT**

**JUDGMENT**

The appellant **Coast Bus Mombasa Ltd** has preferred this appeal against **Anne Awiti Onege** arising from the judgment of the trial court delivered on 20<sup>th</sup> of August, 2009 in **CMCC NO. 133 OF 2007** where the respondent was the plaintiff and the appellant the defendant.

The respondent claim was for general and special damages arising from a road traffic accident. In her amended plaint dated 1<sup>st</sup> July, 2009 the respondent alleged negligence on the part of the defendant's driver and/or agent.

The parties entered consent on liability at the ratio of 80% to 20% in favour of the plaintiff. The trial court assessed Ksh 650,000/= for general damages and Kshs 138,578 for special damages. Being aggrieved by the judgment the appellant brought this appeal on the following grounds:-

**“1) That the learned trial magistrate erred in awarding the respondent general damages of Ksh 650,000/= which award is so inordinately high or too excessive, unfair, unmerited, totally unjustified and erroneous regard being had to the nature of injuries suffered by the plaintiff and comparable awards in decided cases.**

**2. The learned trial magistrate erred in awarding the respondent special damages of Kshs 138,518/= yet the said figure was neither specifically pleaded nor strictly proved or at all.**

**3. That the learned trial magistrate did not apply the correct principles in determining quantum and her awards represent totally erroneous estimates given the fact that the plaintiff had healed and required no further medication.**

**4. That the learned trial magistrate's decision was biased, unjust, against the weight of evidence and was based on wrong points of fact and wrong principles of law and has occasioned a miscarriage of justice.”**

In support of the appeal the appellant's counsel filed on the 20<sup>th</sup> of May, 2011 submissions as follows; the trial magistrate erred both in awarding an inordinately high and excessive award given the nature of the injuries, the sum of Kshs 250,000/= would have been adequate, the trial court erred in awarding specials of Kshs 138,578, as the same was neither pleaded nor proved. Counsel for the appellant relied on the following authorities **Rtd. Col. Johnson Kerira Wachira VS CMC Motor Group Ltd – Nyeri HCCA NO. 2007 & Moses Ochieng Owili VS Bernard Githata Kamau HCCC NO. 1099 OF 2000.**

On his part counsel for the respondent filed his submission dated 11<sup>th</sup> November, 2011 as follows; the award of the trial court was reasonable and fair taking into account the injuries sustained and this court would have no justifiable reason to interfere with the same. On special damages he argued that the respondent specifically pleaded for special damages in the amended plaint. She proved the claim and has an obligation to settle the same. In his submissions counsel relied on the following authorities. **Ratcliffe VS Evas (1892) 24B 524, stromp Brucks Akhe Bolaq VS John & Peter Hutchim (1905) AC 575, Kampala City Council VS Nakaye (1972) EA 446, Ouma VS Nairobi City Council (1976) KLR, Geoffrey Mburu Theuri VS Board of Trustee Arch Diocese of Nyeri HCC NO. 81 OF 2002, Eric Onyango Okumu VS SDV, Transami (K) Ltd MBS HCCC No. 1031 of 2004, James Nguchu Kibe VS Simon Muruchi Thiga & Anor. HCC NO. 5066 of 1991 Eunice Wanjiru Kamau VS Christopher Mwaura HCC NO. 1559 OF 1998.**

This is the first appellate court. It has to consider the evidence on record, examine and analyze the same in order to come to an independent opinion. The liability was agreed upon. For consideration is the issue of the injuries sustained and the sum to be paid for the said sustained injuries and whether the specials were pleaded and ought to be paid.

In a medical report produced by **Dr. D. O. Olima** having examined the respondent on the 12<sup>th</sup> of May, 2009 this is what he found:-

**Head & Neck:**

(i) Cut wound of the left frontal region.

(ii) Blunt injury to the right eye.

**Chest:**

Blunt chest injuries  
Musculoskeletal system

(i) Compound fracture of the middle 3<sup>rd</sup> of the right femur bone

(ii) Multiple lacerations of both knee joints.

Complaints at the time of examination were pain in the hip at the operation site, a sutured scar of the left frontal region measuring 10cm X 0.25cm, multiple scars of the right knee measuring approximately 5cm X 4cm, 3cm X 4cm, multiple scars medial aspect of the left knee measuring approximately 28cm X 0.5cm. The fracture had healed with minimal deformity.

Having considered the submissions and authorities cited I am of the view that the appellant cited authorities where injuries sustained were less serious and on the part of the respondent authorities involved injuries way above those sustained by the respondent. I also find the authority was inordinately high. In the case of **Mr. Geoffrey Mburu Theuri VS Board of Trustee Arch Diocese of Nyeri** (supra) an authority with much more severe injuries the court gave 500,000/=, similarly in **Erick Onyango Okumu VS SDV Transami (K) Ltd** (supra). With the above in mind, I agree with the appellant's counsel only to the extent that an award of Ksh 650,000 was on the higher side. I am of the considered opinion that taking into account the inflationary trend and all the factors involved the sum of Kshs 350,000 would have been adequate compensation. Having found the award inordinately I will set aside the same.

As relates to specials damages the same were pleaded in the amended plaint as follows:-

**“And the plaintiff suffered loss and damage both special and general for which she claims damages.**

Particulars of special damages:-

**a) medical report Kshs 1,500/=**

**b) filing P3 form Kshs 500/=**

**c) fees on official search Ksh 500/=**

**d) unpaid hospital bills Kshs 137,018/=**

**TOTAL = 139,518/=”**

The plaintiff produced a receipt exhibit P5 of Ksh 1500/= and invoices of Kshs 137,018. The plaintiff testified that the bill is still outstanding at the Aga Khan Hospital. In contention is whether the unpaid bill falls under the category of specials damages. The appellant's counsel opines that specials damages are for incurred and paid up bills. The respondent counsel on the other hand argues that the bill is incurred and although not paid remains to be paid.

In the **Ratcliffe case** (supra) **Bomel L – J** stated in part:-

**“special damages on the other hand, are such as the law will not refer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore, they must be claimed specifically and proved strictly.”**

In **Kampala City Council VS Makaye** (1972) E. A at 449 the court held inter alia:-

**“It is settled law that special damages must not only be pleaded but also proved. The judge was satisfied from the evidence, that the amount was incurred by reason of the defendant's wrong ---**

**It was however necessary to include a claim for this amount in the pleadings.”**

There was no dispute as to whether the amount was incurred indeed there is evidence in terms of the invoices and the evidence of **PW1 & PW3**. Special damages were also pleaded in the amended plaint. It will be a travesty of justice to allow this claim to flop since the bill remains unpaid and was indeed incurred. This aspect was not challenged in any event. Indeed I do concur with the findings of the learned trial magistrate in awarding the same. I will therefore award Ksh 1,500 payment of medical report and the invoice of Kshs 137,018. I decline to award Kshs 500 claimed twice as no receipt or proof of the same was produced.

The upshot of this judgment therefore is that:-

**(a) I find the award of Kshs 650,000/= inordinately high and reduce the same to Kshs 350,000/=.**

**(b) I award the claim for special damages as follows;**

**i) Medical report Kshs 1,500/=**

**ii) Medical expenses Kshs 137,018/=**

**(c) The above award be apportioned at the agreed ratio of 80 – 20% in favour of the respondent.**

**(d) Costs to the respondent in any event.**

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2012.**

**ALI-ARONI**

**JUDGE**

**In the presence of:**

..... present for Appellant

.....present for Respondent