



**No. 341**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**CIVIL APPEAL NO. 129 OF 2003**

**IDDI OMOLLO SAT.....1<sup>st</sup> APPELLANT**  
**OMAR AWINO SAT .....2<sup>nd</sup> APPELLANT**

**-VERSUS-**

**GEORGE OTIENO ODIRA .....RESPONDENT**

**JUDGMENT**

**Being an appeal from the Judgment and decree of Hon. Bildad Ochieng Senior Resident Magistrate – Homabay.**

**dated and delivered on the 27<sup>th</sup> June, 2003 in the Original Homabay SRMCC No. 70 of 2001.**

This is an appeal by the then defendants in the trial court against the judgment and decree of the Senior Resident Magistrate’s court at Homa-Bay given on the 27<sup>th</sup> June, 2003 in which the learned magistrate awarded the plaintiff in the same trial court a total sum of Kshs. 119,445/= in respect of damages made up as follows:

- Kshs. 100,000/= general damages for pain, suffering and loss of amenities.
  
- Kshs. 19,445/= special damages.

The plaintiff now the respondent was on 25<sup>th</sup> September, 200 travelling in the motor vehicle owned by the 1<sup>st</sup> defendant now the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> defendant now the 2<sup>nd</sup> appellant along Sori-Rodi Kopany road. On reaching Kobama area, the 2<sup>nd</sup> appellant lost control of the same after hitting a pot hole and the motor vehicle overturned. As a consequence the respondent was injured. He sustained a fracture of the left hip bone. He was rushed to Homabay District Hospital where he was admitted for treatment for over 2 months.

The respondent later filed in the Senior Resident Magistrate's court at Homa-bay an action against the appellants for damages arising out of the accident. In the plaint dated 22<sup>nd</sup> March, 2001, the respondent averred that the accident was solely caused by the negligence of the 2<sup>nd</sup> appellant who was at the material time the driver of the subject motor vehicle owned by the 1<sup>st</sup> appellant. The appellants by their defence denied negligence attributed to them and pleaded that no accident occurred on the material day involving the respondent and their motor vehicle registration number KAH 938G. Alternatively they attributed the accident if at all to an act of God. The alleged loss and damages were similarly denied.

The suit was eventually heard. The respondent testified and called one witnesses who produced the police abstract. However, the respondent's case was closed without production of the medical report, which had earlier been marked for identification. The appellants however offered no evidence in rebuttal to the respondent's claim.

In a reserved judgment delivered on 27<sup>th</sup> June, 2003, the learned magistrate found in favour of the respondent on both liability and quantum. He found the appellants to have been wholly responsible for the accident and awarded the respondents the damages as aforesaid. The appellants were dissatisfied with the judgment and decree aforesaid, hence this appeal. The appellants faulted the learned magistrate's judgment and decree on 7 grounds to wit:

- “1. The learned trial magistrate erred in law when he made an award of kshs. 19,445/= as special damages when no special damage had been specifically pleaded for in the plaint contrary to established principles of law.***
  
- 2. The learned trial magistrate erred in law and fact in making a finding that the respondent herein had sustained injuries as a result of a road traffic accident, the subject matter of the original suit, when no medical report and/or evidence at all was produced before the court.***
  
- 3. The learned trial magistrate grossly misdirected himself when he proceeded to set down the original suit for judgment in the absence of an order closing the defence case.***
  
- 4. The learned trial magistrate erred in law and fact in proceeding to set down the original suit for judgment without affording the defence an opportunity to be heard, thus contravening the doctrine of natural justice.***
  
- 5. The learned trial magistrate erred in law and fact in proceeding to enter judgment in favour of the respondent, when the respondent had failed to discharge the burden of proof on a balance of probabilities.***

**6. The learned trial magistrate fell in grave error in granting judgment in favour of the respondent without fully appraising and analyzing the evidence on record, which if same had been properly appraised, the learned trial magistrate could have found that there were material discrepancies.**

**7. That the award by the learned trial magistrate was manifestly and/or inordinately excessive in the light of the alleged injuries sustained and of the obtaining circumstances”.**

When the appeal came up for directions, **Mr. Oguttu**, learned counsel for the appellants pleaded that the appeal be canvassed by way of written submissions. Neither the respondent nor his counsel appeared though he had been served with the hearing notice. The respondent too failed to file his written submissions though again he had been served with mention notice by way of registered post for that purpose. Therefore only the appellants filed their written submissions which I have carefully read and considered.

The respondent was awarded special damages of Kshs. 19,445/=. However, the respondent had not pleaded such special damages in the plaint. It is trite law that special damages must not only be particularly pleaded, but must be specifically proved. Consequently, the respondent not having complied with the strict and mandatory requirements of the law, no special damages should have been awarded. Thus the award of Kshs. 19,445/= as special damages was wholly erroneous and legally untenable. In the case of **Savannah Development Company Limited –vs- Posts and Telecommunication employees, Housing Co-operative Society Limited, Civil Appeal Number 160 of 1991 (UR)** the court of appeal observed thus: “...*Having considered judicial pronouncements on the subject of special damages including the decisions of this court, we can confidently state that the requirements that special damages must be explicitly pleaded and proved is not merely a procedural necessity but is a mandatory legal requirement going to jurisdiction on the specific issue and an objection by a defendant that a plaintiff has violated this rule may be taken at any time and even on appeal...*”. The position therefore boils down to this; the award of special damages should not have been made because the respondent had not pleaded the same. The learned magistrate would, in those circumstances lacked jurisdiction to assess and award the same. This ground of appeal therefore succeeds.

During the hearing of the respondent’s suit, the respondent testified and his medical report was marked for identification, pending the production by the author thereof. This was however not to be as the respondent ended up closing his case without the medical report being produced as an exhibit. However, the respondent had produced in evidence treatment cards and P3 form. To the appellants, failure to produce the medical report was fatal to the respondent’s case. To the extent that medical report was never produced in evidence, there was no proof that he respondent ever sustained any injury arising from the road traffic accident on 25<sup>th</sup> September, 2000. I do not agree with these submissions. Though and as a matter of prudence, a medical report ought to be produced in evidence to show the nature and extent of injuries sustained if at all, failure to do so cannot render a claim invalid. An injury can be proved by other evidence, say, the treatment notes, P3 form, observation by court and by the direct evidence of the victim. Though doctors are experts in their own right, their evidence is really of advisory character given on the facts submitted to them. In this case though the medical report was not tendered in evidence, there was however other evidence upon which the court acted and came to the conclusion that the respondent was indeed injured in the accident. There were the initial treatment records from Homa-bay district hospital as well as P3 form duly filled. In any event, the respondent never led any evidence in rebuttal to the respondent’s claim. They never made an issue of the same before the trial court. They cannot now raise it in this appeal.

From the grounds of appeal and the written submissions of the appellants, the issue of liability is not in dispute. What is in dispute is the damages awarded. Having found that the learned magistrate was in error in awarding special damages which had neither been pleaded nor specifically proved, this appeal succeeds to the limited extent that the award for special damages is set aside.

The appellants therefore succeed to that limited extent. That is to say, the award of special damages of Kshs. 19,445/= is set aside. However, the award of general damages shall remain undisturbed. I make no orders as to costs of this appeal.

**Judgment dated, signed and delivered** at Kisii this 17<sup>th</sup> day of January, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**