



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

CIVIL APPEAL 445 OF 2003

**ZACHARIA WAWERU THUMBI.....APPELLANT**

**VERSUS**

**SAMUEL NJOROGI THUKU.....RESPONDENT**

**J U D G M E N T**

This appeal, dated 18/7/03 and filed in court on 21/7/03, challenges the judgment of the Resident Magistrate, Kikuyu, delivered on 11/6/2003, in Civil Case No. 75 of 2002, on the following three grounds:

1. The Learned Magistrate erred in law and in fact in failing to award damages for further medical expenses against the weight of evidence adduced and/or inspite of the fact that the said amount had been pleaded for and proved.
2. The Learned Magistrate erred in both law and in fact in failing to award special damages proved and pleaded for, amounting to K.Shs.41,477/- against the weight of evidence adduced.
3. The Learned Magistrate erred in both law and in fact in awarding general and special damages that were manifestly low against the weight of the evidence adduced and authorities cited.

Wherefore, the appellant prays that: the appeal be allowed; an award for costs for future medical expenses be made amounting to K.Shs.100,000/-; special damages pleaded and proved be awarded, and general damages for pain suffering and loss of amenities be enhanced, or in the alternative, the matter be referred back to the trial court for assessment of special and general damages, having regard to the proper principles of law. Then finally, the appellant prays for costs of the appeal.

The facts from which this appeal arose are briefly as follows:

The Plaintiff sued the Defendant in negligence for damages for injuries sustained by the Plaintiff when he was hit by the defendant's motor vehicle. The Plaintiff alleged that on or about 31/7/01 he was lawfully and carefully cycling along Kikuyu-Dagoretti Road when the Defendant's vehicle, No. KAN 097E, was so negligently driven, managed, and/or controlled, by the Defendant and/or his agent that it knocked the Plaintiff, occasioning him actual bodily harm.

The case proceeded **exparte**, the Defendant having been served with summons to enter appearance, but having filed the defence outside the stipulated time. Accordingly, an interlocutory judgment was entered and during the formal proof, the Plaintiff said that as he cycled along the Kikuyu-Dagoretti Road, near Kabete Approved School, a vehicle suddenly emerged from a feeder road and went onto the main road without giving way and hit him. He fell down and sustained grievous injuries; dislocation of the right leg

near the ankle; he was admitted at Kikuyu Hospital for five days.

Ground of appeal No. 1, and the corresponding prayer, raise an interesting question as to whether costs for future medical expenses are awardable. The Subordinate Court did not award such costs and the Learned Magistrate gave no reasons for it. It can, however, be safely assumed that the Learned Magistrate considered the prayer but rejected the same. However, from the Grounds of appeal; the prayer connected thereto; and the submissions of Learned Counsel for the appellant – Ms Wambua, future/further medical expenses were pleaded and proved, yet the Learned Magistrate did not make such an award. Hence, this ground of appeal.

There was no doubt in Learned Counsel's mind, and submissions that, just like a claim for Special Damages, once the claim for future medical costs is pleaded, and proved, it is awardable. And in support of her submissions, learned counsel cited, and relied on, several decisions of this court – the High Court – where such claims have been awarded. The first of these decisions is **EDWARD NJOROGE GICHOMO VS. PATRICK SIMIYU WEKESA & MYTRADE LTD**, High Court at Eldoret, in Civil Case No. R. 32 of 1998 where Dulu J, relying on the decision of Nambuye, J, in **ZACHARIA NYABUTI ONDIRI VS. TASHRIF BUS SERVICES LTD**, awarded a claim for costs of future medical expenses. At page 6 of his judgment, Mr. Justice Dulu said, in part:

“ I assess special damages as 618,868/-. As for future medical expenses, I will award K.shs.400,000/- as the future medical expenses for removal of plates and plastic surgery and not of a continuous nature.”

Mr. Justice Dulu's decision and award of future medical treatment was based on the Medical Report which stated that the cost of future medical treatment will amount to K.Shs.1,400,000/-.

The second decision that the learned counsel for the appellant cited, and relied on, is **ERICK KIMUTAI MUGUN VS. AUGUSTINE MAGETO ONKOBA & TWO OTHERS**, Civil Suit No. 76 of 2001 (Kericho) where Mr. Justice L. Kimaru, relying on the decisions cited to, and relied upon by, Mr. Justice Dulu, and on the basis of the Doctor's report that “**the Plaintiff's broken teeth had to be removed and replaced with artificial teeth.**”, [but giving no estimate of the cost], awarded the sum of K.Shs.40,000/- **being costs of future medical expenses.**

The two decisions above, were delivered on 15<sup>th</sup> January, 2004 and on 11<sup>th</sup> June, 2004, respectively.

Despite the eloquent and persuasive presentation of the submissions by Learned counsel for the appellant, I have great difficulty in following my learned brothers' decisions on the issue of awarding future medical expenses, and claims, analogous to, but not quite the same as, special damages.

The law is quite clear on the head of damages called **special damages**. Special Damages must be both **pleaded and proved**, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in **HAHN V. SINGH**, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

**“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”**

If I were to explain, or define, **special damages** to a layman, I would say “**they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of**”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an

invoice would not suffice. Only a receipt, for the payment, will meet the test.

It is on the foregoing basis that in my humble view, awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of Torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages. [See WINFIELD & JOLOWICZ on Torts, 17<sup>th</sup> Edition 2002, at Page 760]

On the basis of the foregoing authorities and reasons, I hold that the Learned Magistrate was right in not awarding the claim for future medical costs. The claim was made – pleaded – as per the Amended Plaint filed in Court on 12/11/02. But the claim was not proved. What was mentioned – the figure of K.Shs.100,000/-; - was purely guesswork by the Medical Doctor which may or may not be the exact figure at the time, and point of expenditure, when that future time comes.

Accordingly, I reject this ground of appeal as lacking in substance and conducive to sheer speculation.

Turning to the second ground of appeal: that the lower court erred in failing to award special damages proved and pleaded for K.Shs.41,477/- against the weight of evidence, the records before me show that there is sufficient record and documentation – Receipts – to support the following items, under the head of Special Damages, which were pleaded and proved. These are: Medical Report (K.Shs.1,500/-); Police Abstract 100/- and medical expenses at P.C.E.A. Kikuyu Hospital totaling K. Shs.5,756/-. These I award the Appellant under the head of special damages. They total to K.Shs.7,356/- as per my additions.

There are receipts for taxi cabs which total K.Shs.8,000/-. BUT these were not pleaded, even in the Amended Plaint, and as the principles governing Special damages, these are not awardable. Similarly, I have painfully tried to understand where the figure of K.Shs.41,177/- comes from. My efforts show that this is the figure arrived at when one adds the invoices taken from P.C.E.A. Kikuyu Centre, running from 9/8/01 to 8/10/01. But there is no evidence that such invoices were ever paid. Accordingly, these figures cannot qualify for award under Special Damages, as herein earlier held.

All in all, the claim under Special Damages is allowed, but only to the extent that the figures claimed are those claimed and specifically proved. And that is K.Shs.7,356/-.

I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances.

I begin by emphatically stating that special damages can't be too high, nor too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved.

I have carefully read the Medical Report; and gone through the authorities cited as comparables by Learned Counsel for the Plaintiff/Respondent at the trial level. The two authorities were for the late 1980's and very early 1990's, and in both, a figure of K.Shs.160,000/- was awarded, under the head of general damages.

It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein *vis-à-vis* those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid 2001, I find no sufficient reason to interfere with the Learned Magistrate's award of K.Shs.180,000/- under the head of general damages. Accordingly, I uphold the lower court's award.

All in all therefore, the appeal fails on all the grounds of appeal and is dismissed with costs to the

Respondent and against the appellant. The only marginal correction made is with respect to the arithmetical error in the additions of pleaded and proved special damages, which change from K.Shs.12,000/- to K.Shs.7,356/-.

The said sums to be paid with interest at court rates from: (a) the date of filing of the suit with respect to the special damages and (b) the judgment date, at the Lower Court, with respect to the general damages, until payment in full.

DATED and delivered in Nairobi, this 30<sup>th</sup> Day of March, 2006.

**O.K. MUTUNGI**

**JUDGE**