



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1785 OF 1990**

**LEVI AGUNDABWENI.....PLAINTIFF**  
**versus**  
**APEX DISTRIBUTORS LIMITED.....1ST DEFENDANT**  
**WILSON WISIWA MUDOGO.....2ND DEFENDANT**

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

On 7th April 1989, whilst a passenger in the 1st defendant's motor vehicle, registration number KZL 819 the plaintiff sustained injuries as a result of a road accident involving the said vehicle and vehicle registration number KWM 841. At the time of the accident, KZL 819 was being driven by the 2nd defendant.

The plaintiff claims to have suffered serious injuries due to the negligence of the 2nd defendant who he avers, drove in a negligent and reckless manner. He thereafter filed this suit against both the defendants. He claims damages, both special and general, for injuries, pain and suffering, costs of the suit. He also claims interest thereon. The defendants issued 3rd party proceedings against both the driver, and owner of vehicle registration number KWM 841.

Prior to the hearing of this suit, the parties agreed on the claim for general damages. Liability was agreed at 100% for the plaintiff and apportioned at 70% against the defendants and 30% against the third party. The issue for my determination is the claim for special damages, 70% of which is disputed by the defendants.

I have in mind, and I am guided by the well defined legal principle, that special damages must be not only specifically pleaded, they must be specially proven.

Prior to the commencement of the hearing, counsel for the plaintiff made an oral application amend the plaint, to raise the amount of special damages to Shs.314,137.20. The defence counsel indicated that he had no objection to the intended amendment and leave was so granted.

Unfortunately, the plaintiff's counsel did not take time after leave had been granted to particularize, or plead the extra sums specifically. As counsel for the defendant rightfully submitted such sums not having been specifically pleaded, cannot form part of the claim for special damages. That was not the case in the particular instance. I shall therefore limit myself to what had been specifically pleaded, which amounts to Shs.137,946.20.

The plaintiff, adduced evidence to the effect that he was attended to by several doctors who were all specialized in specific areas in which he required treatment. Some of them who were employed by his employer, the University of Nairobi (U.O.N.) and did not request for payment for services rendered.

The plaintiff claims that U.O.N. paid most of the bills but later on, deducted the amount so paid from his salary, which would in effect mean that finally, he was the one who made the payment for the several services. He informed the court that although U.O.N., was then under no obligation to meet the charges, because at the time of the accident he was not traveling on it's duty, it had however agreed to make payment on his behalf purely on humanitarian grounds. This is the sum, which he claims as special damages as, in his evidence he claims that it had been recovered from his salary, and that the deductions which commenced in 1989, continued until 1998.

The plaintiff produced several invoices in an attempt to prove how much he had incurred for his evacuation, consultation and hospitalization. Unfortunately, all these were wrongly certified by the U.O.N. as copies of the originals although PW1 had clearly indicated that the originals were no longer

available. They can thus not be relied upon as the certification was improper. Therefore, these to my mind can not be proof of payment as there were only invoices for services rendered. He was only able to provide proof of payment of shs. 42,200.00, to both Dr. Joshi and Dr.A.S. Dhingra. This he did by way the production of receipts issued to him by both the doctors.

U.O.N's the letter of 10th March 1998, which the plaintiff produced in support of his contention that the said sums had been recovered for his salary, stated that:

“we confirm that following a traffic road accident and hospitalisation of Prof. Levi Akundabweni in 1989, various payments were made by the University of Nairobi and deductions made from his salary”.

No indication is given in that letter of the amount paid nor is the letter indicative of how much was finally recovered given his salary. It only refers to several payments. That letter cannot be of much assistance in a claim such as the one before me, which requires to be specially proven.

Needless to say, at no point was the plaintiff able to prove that U.O.N. did make any payment on his behalf. Mere stamps bearing the words “POSTED” and/or “PASSED’ can not be proof of payment. In the circumstances, I need not delve into the some recoveries whose details appear in his several pay slips under the heading “medical”. I find that those deductions which were made for four months in 1989, three months in 1990, two months in 1991 one month in 1995, two months in 1996, and whose sums varied from time to time could have been for any other medical treatment. In my humble opinion, it would be difficult to deduce whether deductions were for the treatment following the subject accident, especially in view of the fact that in October 1989, U.O.N. had indicated that, the last deduction would be made during the month of October that year.

It was the submission of counsel for the plaintiff that it was for the defendants to prove that the plaintiff had not incurred the expenses, which formed part of his claim. That line of submission can not lie. The plaintiff must specially prove his case.

I find that he has not been able to prove his case to the standards expected in a claim for special damages. Therefore, except for the award of shs.42,000.00 as indicated hereinabove, and on which interest shall accrue at court rates until payment in full, his claim must otherwise fail.

Each party shall bear its costs of this suit.

Dated and delivered this 17th day of February 2001

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mr. Maingi holding brief for Mr. Gitonga – plaintiff. Mr. Madara for defendant.