



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO 4272 OF 1992

MATHEW MUTUA MUTIO.....PLAINTIFF

VERSUS

CAR & GENERAL (K) LTD.....DEFENDANT

RULING

This is an application brought under Order XLIV Rules 1 (1) and (2) of the Civil Procedure Rules, S. 3A of the Civil Procedure Act and all other enabling provisions of the Law for Orders:

- (1) That this court do review its judgement delivered on 28th September, 2000
- (2) That the said judgement do provide for interest
- (3) That the said judgement does specifically order that the Kshs.156,078 as awarded in the judgment do carry/attract interest from the date of filing suit.
- (4) That such other directions as are just be given
- (5) That the costs of this application be in the court's discretion.

The grounds in support of this application are that the said judgment does not provide for interest, that loss of past earnings/salary is in law a special loss or damage which ordinarily attracts interest from the date of filing suit, that the parties to the suit are unable to agree on the issue of interest, that the practice in our courts has been that loss of earnings is computed on the basis of the salary a litigant was earning at the date when the cause of action arose upto trial and that the courts compensate a successful litigant by an award of interest from the date of filing suit which interest takes into account the obvious possibility of the upward trend of salaries and avoids unnecessary evidence by such a party on the salaries that could have been earned at every stage from the date when the cause of action arose upto the date of trial.

A replying affidavit was sworn by Samwel Gakuru, the advocate for the defendant on 1/11/2000 and filed the same day. He challenges the rate of interest. The amount of Kshs.156,078 granted in the judgement is also challenged on the ground that it has not specifically pleaded and tabulated as required by law. The interest on loss of past earnings is similarly disputed on the grounds that it was not pleaded, requested for in evidence nor granted in the judgment. The court is also urged to determine whether the kshs.57,000/- paid under the Workman's Compensation Act should be deducted before or after the respective contribution. The issues for determination therefore are:

1. What rate of interest is applicable, if any

2. Whether the claim for loss of past earnings of

Kshs.156,078 was being specifically pleaded and was allowable.

3. Whether interest on loss of past earning should be awarded.

4. Whether Kshs.57,000/- paid under the Workman's Compensation Act should be deducted before or after contribution.

With regard to the first issue the answer is that the rate of interest applicable is 14%.

The next issue is whether the claim for loss of past earnings of Kshs.156,078 was specifically pleaded as required by law and was allowable. The court may make an award for loss of past

earning. See Berkley Steward Ltd. & others vs. Lewis Kimani Waiyaki (1982-88) 1 KAR 1118. Paragraph 8 of the plaint reads;

“Further by reason of the matters aforesaid the plaintiff's

lost his job due to medical grounds and underwent a long

period of hospitalization for which the plaintiff claims damages”

It is trite law that loss of past earning is special loss/damages. It is also trite law that special damages must be specifically pleaded. To specifically plead the plaintiff must quantify the special damages claimed or tabulate. In Charles Sande vs. Kenya Cooperative Creameries Civil Appeal No. 154 of 1993 (unreported), Shah JA of the Court of Appeal went to the extent of saying that in the absence of specific pleading of special damages such a claim cannot be allowed even if not objected to by the other side. Shah J.A. quoted the following decision in the case of Coast Bus Services Ltd. vs. Sisto & Murunga Danji & 3 others Civil Appeal No. 192 of 1992 unreported:

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection it is not enough to simply aver in the plaint as has done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at trial by amending the plaint to include the particulars which were previously missing. It is only where the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars”

Therefore its only subject to amendment proof of special damages may be allowed. Without pleading special damages the same cannot be proved.

In paragraph 8, the plaintiff pleaded loss of his job and claimed damages. Further prayer (b) the plaintiff prays for special damages. Although special damages were neither particularized nor requested for in the evidence, the plaintiff however gave Kshs.1,200 as the salary he was earning before the accident on being examined in chief by his advocate. The pleading is sufficient. He proved the salary he earned at the time of accident.

In Berkley-Steward Ltd. & others vs. Lewis Kimani Waiyaki (supra) Nyarangi J.A. stated that loss of past salary is a matter of arithmetic. Therefore the court could take the number of months the plaintiff was out of work and the salary he was earning to easily come up with the amount of loss of past salary. In my view the court must move away from the dependence on rules to the extent of denying parties what they came to seek in court.

The next issue is whether interest or loss of past income should be awarded. It is the plaintiff's case that since loss of earning is a special loss it ought to carry interest from the date of filing suit. In my view,

this means that if the plaintiff was entitled to a sum before trial, the court ought to allow interest on the same since this constitutes moneys which do not have to await the courts assessment unlike general damages. In Prem Lata vs. Peter Musa Mbiyo (1965) E.A. 592 the court was of the view that interest should normally be awarded on special damages if the amount has been actually expended or incurred at the date of filing suit. In this case special damages consist of the salary the plaintiff would have earned at the time of filing the suit. It had accrued to the plaintiff at the time of trial and therefore ought to attract interest.

The last issue is whether the amount paid under the Workman's compensation Act should be deducted before or after contribution. S. 25 (1) (ii) of the Act provides that:

“if damages are awarded after compensation has been
paid, the amount of damages awarded in such a
proceeding shall take into account the compensation paid in respect of the same injury under
Act”

The amount of damages awarded by the court ought to take account of the amount of paid under the Act such that the final fixed award made by the court ought to be exclusive of the amount so paid. The practice is to deduct the amount paid from the award then the court gives its final award. If in this case the amount had not been deducted then it shall be deducted from the final amount awarded.

I will therefore review my judgment to the extent of these
findings.

Dated and delivered this 16th day of November, 2000.

KASANGA MULWA

JUDGE