



REPUBLIC OF KENYA



KENYA LAW
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**British American Insurance Co (K) Ltd v Andieri (Civil Appeal
E247 of 2022) [2024] KEHC 7222 (KLR) (Civ) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E247 OF 2022

REA OUGO, J

JUNE 4, 2024

BETWEEN

BRITISH AMERICAN INSURANCE CO (K) LTD APPELLANT

AND

GAMALIEL FAUZA ANDIERI RESPONDENT

*(Being an appeal from the judgment of the Senior Resident Magistrate's
Court at Nairobi before Hon. S. Muchungi (SRM) delivered
on the 25th March 2022 in Nairobi CMCC No. 5704 of 2013)*

JUDGMENT

1. This appeal is solely on damages. The appellant in his Memorandum of Appeal dated 22nd April 2022 has raised the following grounds:
 1. The Learned Magistrate erred in law and fact in finding that the appellant is liable to the respondent in awarding a sum of Kshs 200,000/- general damages for an alleged conversion.
 2. The Learned Magistrate erred in law and in fact in awarding a sum of Kshs 100,000/- in special damages that was not pleaded nor proven.
2. A brief background of this case is as follows; the respondent claimed that in November 2010, he received his payslip and discovered a wrongful deduction from his salary being the payment for an insurance policy under British-American Insurance Co. (K) Ltd. The deductions were unlawful as he did not have any agreement with the appellant for an insurance policy.
3. The trial court found that there was conversion and that the respondent was entitled to general damages. The trial magistrate in making the award on damages noted that the parties did not make any



proposal as regards the general damages awardable and made an award of Kshs 200,000/- as general damages. The respondent was also awarded Kshs 100,000/- as special damages.

4. The appellant filed written submissions dated 14/3/2024. He submits that the respondent testified that he notified the appellant of the erroneous deductions in November 2010 and the appellant effected a stop order in December 2010. Once investigations were completed, the respondent received a full reimbursement. It was submitted that the respondent did not suffer any detrimental loss or damage. Only one deduction of Kshs 3,494 was made, which was later fully refunded to the respondent. Therefore, the trial court's award of Kshs 200,000/- was excessive. It referred the court to the decision in *Peter Ndungu Ngae v Ann Waitbera Ndungu & 2 Others* [2014] eKLR where the court held that an award of damages in conversion must operate neither by way of penalty to the defendant nor by way of windfall to the claimant. The appellant proposed that a sum of Kshs 20,000 would be sufficient compensation in this case.
5. On special damages, the appellant submits that special damages must not only be pleaded but strictly proved. In this case, the respondent did not produce any receipts to show that he had incurred expenses, that is, transport and telephone charges as alleged in the plaint. It was submitted that the respondent is not entitled to any awards for special damages.

Analysis And Determination

6. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

7. In *Halsbury's Laws of England*, 4th Edition at Pg 389 Para 616 on the measure of damages the authors state:

"615. Nominal measure of damages. ... In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss."

8. The respondent was awarded Kshs 200,000/- which in my view was excessive considering that the amount converted was Kshs 3,494/- and was held by the respondent for only one month. In the circumstances, I find that an award of Kshs 50,000/- would be sufficient as nominal damages on the award of conversion.



9. It is trite law that special damages must be specifically pleaded and proved. There was no evidence by actual receipts that the respondent spent Kshs 100,000/- while following up with the appellant to make payment. The trial magistrate awarded special damages without considering the pleadings and evidence.
10. In the end, I find that the appeal is meritorious and set aside the trial court's judgment. The respondent is awarded Kshs 60,000 being damages for conversion. Considering the nature of this case each party shall to bear its own costs. Orders accordingly.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 4TH DAY OF JUNE 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Njeri Ikubi -For the Appellant

Respondent - Absent

Wilkister/ Daina - C/A

