



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CIVIL APPEAL NO. 27 OF 2018**

**RUKIA ABDI MANYA.....1<sup>ST</sup> APPELLANT**

**MARIAM ARES ABDI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**OFFICER COMMANDING POLICE STATION, HABASWEIN.....1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**(Being an appeal against part of the judgment delivered on 14<sup>th</sup> December 2018**

**by Hon. A. K. Makorros – SRM in Wajir Civil Suit No. 2 of 2017)**

**JUDGEMENT**

1. The appellants sued respondents for malicious prosecution and the respondents denied the claim.
2. After full hearing the trial court awarded appellants Kshs. 300,000/- each as general damages. The trial court dismissed the special damages claims.
3. Being aggrieved by the above decision the appellants lodged instant appeal setting out 10 grounds which in their submissions compressed 4 issues namely-
  - a. Principles of award of –
  - b. Special damages were not followed.
  - c. The general damages awarded as inordinately low.
  - d. The trial court misunderstood concept of Advocates Remuneration Order.
4. The parties were directed to canvass appeal via submissions which they filed and exchanged.

**APPELLANTS' SUBMISSIONS**

5. The appellants submitted that they specifically pleaded special damages and strictly proved the same before the learned trial magistrate. Thus the learned trial magistrate fundamentally and grossly erred in failing to apply the basic principles that guide the award of special damages. They relied on the case of *Coast Bus Service Ltd vs Murunga Danyi & 2 Others, Civil Appeal No. 192 of 1992 (UR); cited in National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR*.
6. They also cited the case of *Chripine Otieno Caleb vs Attorney General [2014] eKLR – Nairobi HCCC No. 782 of 2007*, where the court awarded the plaintiff Kshs.800,000/- he had spent on legal fees defending the criminal matter that was held to have been malicious.

7. They argue that the trial court erred in law for holding that the appellants had invited court to assess costs in their pleadings and in their submissions.

8. They contend that there are instances where special damages need to be proved only by way of receipts, invoices, audited accounts, waybills or bill of lading etc. special damages can also be proved by other forms of evidence as the court may find relevant, especially if such form of evidence is the only available way of proving a claim for special damages. They cited the case of *Mitchell Cotts (K) Ltd vs Musa Freighters [2011] eKLR*.

9. Thus the court in *Mitchell Cotts (K) Ltd vs Musa Freighters (Supra)* upheld the decision of the lower court in awarding special damages to the respondent who had tendered the only possible evidence in support of the claim for special damages.

10. It is contended that the only way the appellants could prove that they had incurred expenses in form of legal fees, accommodation and transport (flight) while defending themselves in the criminal court was by producing receipts to confirm they paid their advocates.

11. Further they contend that, their only duty in as far as the claim for special damages under this head was concerned was to prove it on a balance of probability that they deserved an award for special damages.

12. As to whether the learned magistrate erred in awarding inordinately low general damages, the appellants submit that the trial magistrate erred in awarding inordinately low general damages. That Kshs. 300,000/- as general damages was too low and incommensurate with the finding by the court that the appellants were maliciously prosecuted.

13. They relied on the case of *Kasio Matuku & Kenya Post Office Savings Bank vs James Kipkemboi Cheruiyot; Inspector General of Police & Attorney General (Interested Parties) [2019] eKLR*, where the High Court in determining an appeal before it on award of general damages found that the appellant had not demonstrated that the award of Kshs.1.5 million as general damages for malicious prosecution was inordinately high.

14. Thus the court refused to interfere with the award of Kshs.1.5 million as general damages because in its view, Kshs.1.5 million was a reasonable amount although the respondents had claimed Kshs.3 million.

15. Further they relied on the case of *Joseph Wamoto Karani vs Dorman Limited & Another [2018] eKLR – Nairobi HCCC No. 579 of 2012*, where the High Court awarded a security guard who had been maliciously charged with stealing Kshs.2,000,000/-.

16. They submit that, taking into consideration the ages of those cases and the fact that the appellants herein are old women in a predominately Muslim conservative region who had been charged with the assault of a man, the appellants submit that this court should substitute the award of Kshs.300,000/- with that of a minimum of Kshs. 2,000,000/- for each of them.

17. They cite the case of *Butt vs Khan (1981) KLR 349*, Law, (cited in *John Mwanzia vs Githinji Wahinyia [2019] eKLR*, J.A observed that:

**i. “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”**

18. This prayer for the variation of general damages for being inordinately low finds its fortress in the above case and also in the case of *KEMFRO AFRICA LTD v/a MERU EXPRESS SERVICES [1976] & ANOTHER VS LUBIA & ANOTHER (Supra)*. In these and numerous other judicial authorities, it is well settled that a court is bound to vary damages if in the particular circumstance; it finds them to be inordinately low. Such is the circumstances of the appellants.

19. The appellants’ claimed for special damages and they proved it by producing receipts. It was not an invitation to the court to assess costs and this was a gross mistake by the learned magistrate.

#### RESPONDENTS’ SUBMISSIONS

20. The respondents submitted that, the appellants did not supply the court with any precedence to guide the court towards assessing the general damages payable to the appellants. The court proceeded to award the damages on its own discretion.

21. They cite the case of *Shadrack Mwanzia Kivuku vs Attorney General & Another [2017] eKLR – Nairobi High Court Civil Case No. 13 of 2008*; where the court proceeded to award the plaintiff Kshs. 600,000/- as general damages for malicious prosecution.

22. The respondents submit that the damages awarded to the appellants in this matter were reasonable and within the precedents set by the courts in matters involving the same cause of action such as the one cited above.

23. They further submit that the appellants have not made a good case for this court to disturb the decision of the lower court.

24. On whether the learned magistrate fundamentally and grossly erred by declining, failing, refusing and/or neglecting to award special damages, the court in its finding relied on the case of *Daniel Mwanyasi & Another vs Paul Muchiru (2004) eKLR*; where the court stated:

**i. “An advocate is not permitted to disclose his fees in the plaint. He is not a litigant nor party to the suit. The advocate fees**

**are paid after taxation and by the plaintiff direct to be recovered from the defendant where costs are awarded.”**

25. The respondents submit that the learned magistrate was right in declining to award the special damages of Kshs.5,000,000/-. They are in agreement with the reasoning of the court on this issue.

26. On whether the learned magistrate fundamentally and grossly erred when he failed to fully comprehend, appreciate and properly apply the principles that guide the award of special damages, in *Bangue Indosuez vs DJ Lowe and Company Ltd [2006] 2KLR 208* this court held inter alia that:

**i. “It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.”**

27. The above are factors that the learned magistrate took into consideration in declining to award the special damages to the appellants. More importantly the special damages were not the direct natural or probable consequence of the act. The special damages are exaggerated.

28. On whether the learned magistrate grossly and fundamentally erred when he found that the appellants had invited him to assess costs in previous criminal proceedings yet no such invitation had been made either in the pleadings or submissions, the learned magistrate was right by finding that the appellants had invited him to assess costs in previous criminal proceedings. Though the appellants had not invited the court to assess the same, the same was inferred from the pleadings of the appellants.

29. On whether the learned magistrate grossly and fundamentally erred when he failed, refused and/or neglected to comprehend, appreciate and understand the concept and principles that guide the remuneration of advocates, the Court of Appeal in *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board CA 220 of 2004*; held that it would be an error of principle if a Taxing Master failed to apply the formula for assessing instruction fees or costs specified under the applicable remuneration order.

30. My duty as a first appellate court, is to re-evaluate as well as examine afresh the evidence and to arrive at my own conclusion having regard to the fact that i have not seen or heard the witnesses. This position was stated in the case of *Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 123* as follows: -

**“... This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should made due allowance in that respect ...” [See also *Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425*]**

#### ISSUES, ANALYSIS AND DETERMINATION

31. After going through the evidence on records and the parties’ submissions I find the issues are; And whether the appellants proved and justified award of the special damages pleaded? whether the award of general damages was inordinately low to warrant this court’s interference?

32. In her appellant said that she sued the government for being 75 years old that she was placed in cells after she had reported an assault case to the police. She was charged in criminal case no 80 of 016 in court in wajir and she won the case.

33. She said she was wrongly charged. She produced a bundle of documents. She claimed to have been oppressed.

34. Appellant 2’s evidence was also a replication of appellant 1 testimony. They stated that they hired advocate to represent them and also stated that they incurred expenses on transport as they were from far.

35. In special damages claim, the appellants claimed legal fees Ksh 2.5 million, for defence in criminal case no 80 of 016, private prosecution application for leave legal fees Ksh 1.5 million and transport ,accommodation and meals for various dates Ksh 1.2millions.Thus jointly claimed Ksh 5 million as special damages.

36. Only appellant 2 attempted to prove special damages when she testified that she paid legal fees for defence vide receipts for Ksh 1 million, Ksh 300,000/- and Ksh 700,000/-

37. She also mentioned receipts of private prosecution of Ksh 1.25 million. On transport she mentioned a receipt of Ksh 540,000/- dated 13/4/016 issued by East African safari air express. Finally she mentioned of receipts for food and accommodation. In appellants record of appeal, only advocates legal fees payment copies of receipts are available.

38. Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (UR)*. In the latter case this Court was emphatic that ;

**“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.**

39. The 1<sup>st</sup> appellant apart from producing bundle of receipts and listing the alleged loss and damage, she did not, lead any evidence at all in

support of the alleged loss and damage. As it were, she merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.

40. The second appellant replicated the same exercise though as for defence legal fees for Ksh 2 million appeared credible for joint fees paid to the advocate on balance of probabilities. I did not see on record evidence of flight ticket of Ksh 540,000 but even if same was on record the same is super exaggerated.

41. The court takes judicial notice that the return fare between Nairobi and Wajir is Ksh 17,000/-. This what judiciary pays for this court and other officers in flights to Wajir from Nairobi thus Ksh. 540,000/- ticket was a fraud.

42. For private prosecution, no proceedings were produced to prove its existence and even if same was produced, the claim herein arises from malicious prosecution in criminal case no 80 of 016 Wajir not any other proceedings. It is also incredible that any specified dates the appellants spent Ksh 100,000/- under the same heading for themselves and the advocate and /or 3 advocates.

43. No proceedings were produced even to show the attendances in mentioned dates by appellants and the 3 advocates or any of them as alleged.

44. As for food and accommodation, same were neither itemized in further amended plaint nor proved strictly during trial.

45. In the case of *Mitchell Cotts (K) Ltd vs Musa Freighters (2011) eKLR* in which this Court expressed itself thus:

**“..... the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court...”.**

46. In *KTD corporation vs Sundowner Lodge Ltd 2018 eKLR* the court held ;

**“...A claim as big as this cannot be based on guess work or on inconclusive or conflicting reports. Such a claim must be based on an authentic report whose makers must be called to confirm or justify the claim if the sum is not agreed on. The report must be clear on issues it is addressing. In the instance case, the report is based on the rate of a four star hotel while the hotel under construction was a two star hotel. This is not a matter of guesswork. I am therefore unable to know the exact amount of loss in terms of special damages, for the plaintiff has failed to prove it. This limb of the claim must fail.”**

47. On the 2<sup>nd</sup> issue the appellants contend that the award of ksh 300,000 each for general damages for malicious prosecution was inordinately high.

48. In the case of *Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR*, the Court of Appeal held that –

**“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie [1941] 1 All ER 297*. It was echoed with approval by this Court in *Butt v. Khan [1981] KLR 349* when it held as per Law, J.A that:**

**‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’”**

49. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia (1982 –88) 1 KAR 727* at p. 730 Kneller J.A. said: -

**“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 that 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. See *Ilango V. Manyoka [1961] EA 705, 709, 713; Lukenya Ranching and Farming Co-Operatives Society Ltd V. Kavoloto [1970] EA 414, 418, 419*. This Court follows the same principles.”**

50. And in *Gicheru vs Morton and Another (2005) 2 KLR 333* this Court stated:

**‘In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.’”**

51. In the case of *Stephen Gachau Githaiga & Another vs Attorney General [2015] eKLR* being guided by the findings in the Uganda case of *Dr. Willy Kaberuka –vs- Attorney General Kampala* in which it was held that;

*“The plaintiff suffered injury to his reputation. .... He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence.....There are no hard and fast rules to prove that the plaintiff’s feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant’s conduct. The plaintiff’s status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages.....A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible made good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible.”*

52. And the court found no reason to interfere with the award of Kshs. 300,000/- made by the lower court stating that;

*“The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence.”*

53. The respondent herein did not clearly manifest the loss and damage suffered as a result of the actions of the respondents and never adduced evidence to that effect thus their entitlement to enhancement of General Damages awarded beyond Ksh 300,000/- is unjustified. Again and as earlier stated the issue of awarding general damages is a discretionary matter.

54. In conclusion, the only acceptable special damages is the legal fees for defence in CRC No. 80 of 016 in Wajir Ksh 2million otherwise the appeal is unmeritorious; thus the court makes the following orders;

- i) **General damages for each appellant Ksh 300,000/=.**
- ii) **Special damages for both appellants Ksh 2million.**
- iii) **Parties to bear their costs.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2020.**

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**C. KARIUKI**

**JUDGE**