



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 106 OF 2018**

**SAMWEL MARTIN NJOROGE KAMUNYU ..... APPELLANT**

**VERSUS**

**WYCLIFFE YABWETSA LIKHAYA ..... RESPONDENT**

*(Being an appeal from the judgment in Eldoret CMCC No. 98 of 2015 delivered by Resident Magistrate Honorable N. Moseti on 14<sup>th</sup>*

*August, 2018).*

**JUDGMENT**

The respondents' claim in the subordinate court was for damages as a result of injuries he sustained on a road traffic accident. In Eldoret CMCC No. 98 of 2015, on the 14<sup>th</sup> August 2018, the trial court found in favour of the respondent and awarded a sum of kshs. 420,000/- as general damages less the plaintiff's contributory negligence of 20% and special damages of kshs. 4,000/-. The appellant being dissatisfied with the decision of the court filed the present appeal.

**APPELLANT'S CASE**

The appellant filed submissions on 1<sup>st</sup> September 2020.

He submitted that special damages must be specifically pleaded and strictly proved. He relied on the case of *Wakim Sodas Limited v Sammy Aritos (2017) eKLR Kiambu – Civil Appeal No. 103 of 2016* in support of the submission. He submitted that the respondent testified that he was treated at MTRH and that he paid kshs. 1,726/- and 1,876/- as treatment expenses and produced a bundle of receipts as PExh 3(a) and 3(b) respectively. Further that Dr. Sokobe prepared a medical report and charged kshs. 4,000/- and produced the report and receipt as PExh 5a and 5b respectively. The plaintiff produced a receipt of kshs. 1,726/- as PExh 3(a) and the same was not pleaded in his plaint as per law required. He only produced the receipt at trial and did not amend his pleadings to reflect the correct position of damages which he was well aware. He further cited the case of *Francis Muchee Nthinga vs David N Waweru (2014) EKLR Murang'a HCCA No. 161 of 2010* in support of this submission.

The Appellant in his submissions in the lower court at page 40 of the record of appeal submitted that though the respondent pleaded and proved the amount of kshs. 4,000/- as special damages the receipts were not taken for stamp duty assessment and did not bear any duty stamp.

The appellant cited the case of *Agnes Wanjiku Ndegwa v Kenya Power & Lighting Company (2014) EKLR Embu Civil Case 119 of 2008* where the court emphasized the decision in the case of *Leonard Nyongesa v Derrick Rgha Gula (2013) eKLR* whereby the judge declined to award special damages for those receipts which had not been presented for stamp duty payment in compliance with Section 19 and 20 of the Stamp Duty Act. He also cited the case of *Easy Coach Ltd v Emily Nyangasi (2017) EKLR Kisumu HCCA No. 20 of 2015*.

The appellant invited the court to consider the evidence tendered during the hearing by the respondent herein which appears at pages 64-67 of the record of appeal. In his testimony he stated that he was involved in a road traffic accident at Ngeria area on 28<sup>th</sup> November 2011 while aboard motor vehicle KBU 314W. As a result of the accident he sustained a deep cut above the right eye, bruises on the right hand and back, injuries on the right leg below the knee, further, that some glass fragments were dislodged in his eyes. It was his testimony that he was treated at Moi Teaching and Referral Hospital and produced the discharge summary as PExh1.

He testified that he was later examined by Dr. Sokobe and produced a medical report as PExh 5(a). During cross examination he stated that he sustained injuries as captured on discharge summary which include a cut wound on the forehead and right leg. During cross-examination he stated that the injuries in his medical report were at variance with the injuries indicated in the discharge summary. A quick perusal of the

discharge summary indicates that the respondent only sustained cut wounds on the forehead and the right leg. The appellant's' submission is that the medical report is exaggerated with an intention of misleading the court. He relied on the case of **Richard Andanje Abwalaba v Farm Industries Limited (2006) ECLR** in support of this submission.

The injuries are basically soft tissue injuries which have healed at the moment with no permanent incapacity and would barely fetch an award in the excess of kshs. 150,000/-. He cited the case of **Mulo Holdings & 3 others vs Martin Ogachi Mutundura (2009) ECLR Kisii HCCA No. 88 of 2014** where the court awarded kshs. 150,000/- for injuries including cut wound on the forehead, cut wound on the occipital region, facial cut wounds, blunt injury to the chest, blunt injury to the back, blunt injury to both hands and cut wound on the right leg. He prayed the court make an appropriate award of kshs. 150,000/-.

The appellant prayed the court re-evaluate the record and be pleased to set aside the trial court's judgment and substitute the same with a proper finding.

## **RESPONDENT'S CASE**

The respondent filed submissions on 8<sup>th</sup> October 2020. He submitted that the award of the trial court was proper and should not be disturbed. A reading of the judgment shows that the learned magistrate considered the nature of the injuries sustained by looking at the medical documents. He also considered the decisions cited by both advocates for the parties and the passage of time. With regard to special damages, the sum awarded was pleaded and proved by way of production of relevant receipts.

The respondent relied on the cases of **Meru HCCA No. 17 of 1983 Lucy Ntibuka vs Bernard Mutwiri & others** where the respondent suffered similar injuries and was awarded kshs. 500,000/- in the year 2007 and Kisumu CA No. 4 'B' of 2009 – **Robert Ghonzi Kimani vs David Dwire Khisa & Another** where the plaintiff suffered comparable injuries and was awarded kshs. 400,000/- in the year 2013.

## **ISSUES FOR DETERMINATION**

1. Whether the special damages awarded were pleaded and proved.
2. Whether the general damages were excessive

## **WHETHER THE SPECIAL DAMAGES WERE PLEADED AND PROVED**

In **Maritim & Another –v- Anjere (1990-1994) EA 312 at 316**, the courts held:

***“In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”***

A perusal of the plaint shows that the plaintiff pleaded for kshs. 4,000 for the medical report expenses and kshs. 1,876 for the treatment expenses bringing the total to kshs. 5,876/-.

In **Leonard Nyongesa v Derrick Righa Gula (2013) eCLR** the court declined to award special damages for those receipts which had not been presented for stamp duty payment in compliance with *Section 19 and 20 of the Stamp Duty Act*.

*Section 19 of the Stamp Duty Act* provides;

**Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—**

**(a) in criminal proceedings; and**

**(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.**

A perusal of the record of appeal, specifically page 33 indicates that the receipt for the medical report was duly stamped and therefore the plaintiff was entitled to special damages of kshs. 4,000/-. However, the receipt from MTRH was not duly stamped and therefore the trial court rightly did not include it in the award for special damages.

In the premises, I find that the award for special damages, of 4,000/= was rightfully awarded.

## **WHETHER THE GENERAL DAMAGES WERE EXCESSIVE**

The plaintiff sustained the following injuries;

- a) Deep cut wound on the forehead; supra orbital

- b) Foreign bodies (pieces of glass) into both eyes
- c) Blunt trauma to the right shoulder and arm
- d) Lacerations and bruises on the right arm
- e) Lacerations and bruises on the upper back
- f) Cut wound on the anterior aspect of the right foot.

It is trite law that comparable injuries ought to be compensated by an award of comparable damages. The discharge summary indicates that he had cut wounds on the forehead and the leg contrary to the appellants' submission. Therefore the medical report by the doctor was not exaggerated in any way to mislead the court. While there may exist a slight variance, it does not negate the fact that the nature of the injuries sustained were severe soft tissue injuries.

In **Mulo Holdings & 3 others v Martin Ogachi Mutundura [2019] eKLR** the respondent sustained the following injuries;

- Blunt trauma to the head
- Facial laceration
- Multi cut wounds on the right leg
- Bruises on the fore head
- Bilateral lower limb bruises on both lower limbs

The court upheld the magistrates court award of kshs. 150,000/- for the injuries.

The principles upon which a trial court can interfere with the award of damages by a trial court are where;

- a) The award is inordinately too high or low.
- b) The trial court took into account irrelevant factors or failed to consider relevant factors so as to arrive at an erroneous estimate of damages.

The appellant provided a comparable case where similar injuries were sustained and the court made awards which were lower than those awarded by the trial court.

In consideration of the said case I do find that General damages of 300,000/- would be fair and adequate compensation to the respondent for the injuries he sustained. The appeal therefore succeeds to the extent that awarded general damages of 470,000/- by the lower court is reduced to 300,000/-, less 20% contributory negligence to arrive at a figure of 240,000/-.

Parties to bear own costs.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 11<sup>th</sup> day of November, 2020.**

In the presence of:-

Ms Nyakundi for the appellant

Mr. Keter Nyolei for the respondent (absent)

Ms Gladys - Court assistant

**Ms Nyakundi:-**

I pray for 30 days stay of execution.

**COURT:-**

30 days stay of execution is granted. Respondent be notified.

**SIGNED**

**S.M GITHINJI**

**JUDGE**

**11/11/2020**