**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 22 OF 2017**

**AKBAR MOHAMED HAJI ALI.....APPELLANT**

**VERSUS**

**JACKTON OUMA OKELLO.....RESPONDENT**

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

1. In this appeal the Appellant challenges the judgment of the trial court, Hon. Mutunga, (RM), dated 10/01/2017 by which the Appellant was found to have been 100% liable for the accident and ordered to pay to the Respondent the sum of Kshs.800,000.00 as general damages for pains & suffering as well as special damages in the sum of Kshs.9,700/=

2. The six grounds of appeal set out essentially attack the assessment of general damages as being overly high and exorbitant and special damages for having not been proved to the requisite standards.

3. The appeal makes no challenge against the finding on liability and therefore the only issues for determination is whether the award of general damages was reasonable and secondly, if the special damages were proved to the requisite standards.

**Special damages**

4. The law is that special damages must not only be specifically pleaded but must also be strictly proved[1].

5. By his plaint before the trial court dated 9/8/2011 and filed in court on the same day, the Respondent pleaded special damages in the sum of Kshs.129,425/= and gave particular s thereof. That to this court was sufficient pleading as the law demands.

6. At trial, the Respondent as PW 1, identified and marked the documents including a medical report and payment receipts to Dr. Ajowi Adede of Kshs.7,000.00 and approximation of a surgery costs of Kshs 90,000/= to remove the metal implants. Those costs were confirmed by the doctor who gave evidence as PW 3. PW 1 also produced an agreement showing payment of Kshs.10,000/= to one Lilian Auma Atieno for nursing services.

7. In the Judgment, the trial court having considered and reviewed the evidence adduced found and held:

> **"The plaintiff produced two receipts being exhibits 3(a) and 3(b) which were Dr. Ajonis expenses totaling to Kshs.7,000/=. I find they were proved and hereby award the same. Further that the plaintiff needed his metal implant be removed thus future medication is as Kshs.90,000/= as per Dr. Ajoni Adede which forms part of special damages".**

8. However in summary and rendition of the decision the trial court said:-

> **"I hereby enter judgment for the plaintiff as against the defendant in the following terms.**
>
> 1. **General damages of Kshs.800,000/=**
>
> 2. **Special damages of Kshs.9,700/=**

9. A *fortiori*, it is evident that the court found that special damages had been proved in the sum of Kshs.90,000/= for removal of metal plates together with Dr. Adedes expenses in preparing a medical report and attending court to produce same in the aggregate sum of Kshs.7,000/=. That makes a total of Kshs 97,000 and not Kshs 9,700

10. It therefore follows that the sum given as special damages of Kshs.9,700/= was by an error in typing. Mathematical calculations ought to have been Kshs.97,000/=. I find that is the sum it plaintiff strictly proved by evidence of the doctor supported by documents and the trial court, cannot be faulted for that finding and award Ksh.107,000/=. Up to that extent the trial court could not be faulted in its award of special damaged. However there was evidence by the respondent and supported by a document marked Exhibit P7 that he sought and obtained nursing services at a sum of Kshs 10,000. That evidence seems to have been totally missed out by the trial court because no mention is made of it at all in the judgment. As a first appellate court, even though this was not raised as a challenge to the judgment, I do find it was the Respondent pleaded Kshs 9,000 and proved that as part of special damages which I award it to the respondent. I do find that special damages were proved in the sum of Kshs 106,000

**General damages**

11. Assessment of damages is in the realm of judicial discretion[2] and a difficult[3] task incapable of mathematical accuracy hence an appellate court ought not to easily and freely interfere with same unless it be shown that the same is obviously and manifestly erroneous on account of wrong application or appreciation of the principles applicable in assessment in award of damages in personal injury claim[4].

12. The evidence given by both PW 1 and PW 3 were to the effect that the Respondent suffered injuries in the nature of a fracture to the femur – thigh bone, bruises to the head and upper lip and blunt injuries to the upper abdomen, left leg and left thigh. According to the medical report produced an exhibit, those injuries had resulted into permanent disability in the nature of a shortened leg and weakened bones. There also was a metal implant which would require a surgery to remove and therefore further pains and suffering with a result loss of amenities of life during the hospitalization for surgery and the consequent recuperation period.

13. In coming to the award of Kshs.800,000/= the trial court said:-

> **"The plaintiff suggested an award of Kshs.1,146,425/= citing three authorities in submissions which this court has looked at when the defendant proposed Kshs.300,000/=. Looking at the quoted authorities in support or against the general damages the inflation rate and injuries suffered I find an award of Kshs.800,000/= would be most appropriate".**

14. In the submissions filed, the Appellant cited to court the decisions by Majaya J[5] dated 20/7/2015 and that by Okwengu J[6], as she that was, delivered on 18/11/2009 and urged the court to interfere with the award by the trial court to award to the Respondent a sum of between 300,000/= and 320,000/= for general damages. In both decisions the judges sitting on appeal reduced awards from 1,000,000/= to 450,000/= and for 750,000/= to 400,000/= respectively.

15. Both judges gave their respective reasons for interfering with the decisions appealed against. Such reasons have not been given here and my reading of the record has not revealed any. Being an appellate court here, before I venture to interfere with a court exercise of discretion, the threshold and guiding principle are well settled that it must be shown that the award present a wholly erroneous exercise of discretion.

16. In this appeal, I have found no error so sufficient to entitle me to interfere with the discretion exercised by the trial court and I therefore have no reason to interfere. Nothing was placed before me to justify my intervention. It is not enough that another judge would make a different award. It is enough that the award falls within acceptable limits incapable of hurting the economy of the country and that it suffices as compensation to the injured person.

17. I find no merit in the appeal, save to the extent I have adjusted the award of special damages, and therefore order it dismissed with costs to the Respondent.

**Dated** and delivered at **Mombasa** this **6th** day of **July 2018**

**P.J.O. OTIENO**

**JUDGE**

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[1] Provincial Insurance Co. EA Itd Vs Mordecai Mwanga Nandwa, CACA 179 0f 1995

[2] Peter M. Kariuki v Attorney General [2014] eKLR, *JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER, CA NO. 314 OF 2000,*

[3] *UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575*, at page *579:*

[4] *KEMFRO AFRICA LTD V LUBIA & ANOTHER, (No. 2) 1987 KLR 30,* Kneller JA identified the principles as follows:

***"The principles t****o 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 wholly erroneous estimate of the damage****."***

[5] Agroline Hanliers Ltd vs Joseph Opiyo Omolo [2015] eKLR

[6] Gibson Kariithi Kairu vs Joseph Mutio Peter [2009] eKLR