



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 329 of 2003

DESMOND LEMPOKO. .... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. .... RESPONDENT

*(From the judgment and orders of G L Nzioka (Mrs.) Senior Resident Magistrate in Nairobi Milimani  
CMCC NO. 3979 of 2002)*

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

In a judgment dated 16<sup>th</sup> February, 2003 the honourable Senior Resident Magistrate Mrs. G N Nzioka awarded the Appellant herein general damages of Ksh.450,000/- which she clearly stated, included Ksh.200,000/- as future/further medical treatment in relation to the serious injuries suffered by him in a car accident belonging to the Respondent.

The two Medical Reports produced by the plaintiff and Defendant before the trial magistrate, showed that the Appellant had suffered a segmented fracture of the right femur which the medical reports showed would require future treatment to correct it at a probable cost of Ksh.200,000/-. In his plaint the Appellant had not specifically sought the said further medical expenses but had sought general and special damages.

The main complaint raised in this appeal by the Appellant is that the honourable trial magistrate should have awarded the future medical expenses of Ksh.200,000/- independently from the rest of the general damages. That in failing to do so, the honourable magistrate erred in law and in any case, awarded the rest of the general damages which were inordinately low and not reflective of the seriousness of the injuries sustained by the Appellant.

I have carefully perused the pleadings, the evidence before the lower court, the submissions made before the trial court and the trial court judgment. I observe the following: -

- i) That the Appellant/Plaintiff had not pleaded for future medical expenses whether under special or general damages heading, notwithstanding that the item already existed in the two medical reports upon which the suit was based.**
- ii) That the Appellant neither raised the future medical expenses in his written submissions filed in the lower court.**
- iii) That despite the above omissions the trial magistrate identified, recognized and specifically awarded Ksh.200,000/- to that end.**

iv) That accordingly, the general damages she awarded to the Appellant/Plaintiff were (Ksh.450,000 – Ksh.200,000/- abovementioned) Kshs.250,000/-

To the above end, honourable trial magistrate’s conclusion was as follows: -

**“... he requires future and further treatment at the cost of Kshs.200,000/-. I ward the Plaintiff Ksh.450,000/- as general damages inclusive of Ksh.200,000/- for future/further treatment, reduced by 20% to Kshs.350,000/-, plus Kshs.2,100/- as special damages , plus costs and interest.”**

In my view, therefore, the trial magistrate clearly awarded the sum of Ksh.200,000/- for further medical treatment and the balance out of Ksh.450,000/- as general damages. This leaves the main issue before this court in this appeal to be whether or not the general damages awarded, which were Ksh.250,000/- were inordinately low in the circumstances, to deserve interference by this appellate court.

The Appellant/Plaintiff had cited several cases to assist the trial court to assess general damages: -

In **Samson Monongo Emonde Vs George Odhiambo Kopar, NBI HCCC No. 1809 of 1989**, Mbogholi, J had awarded Ksh.450,000/- as general damages of which Ksh.45,000/- was for further medical treatment that left Ksh.400,000/- as the real general damages .

In **Susan Evans Vs Corporal Ndungu & another, Nbi HCCC No. 258 of 1986**, Mbogholi J, had also awarded general damages of Ksh.400,000/- without any element of future medical treatment.

And finally, in **Nelima Aaron Vs Wanjiku Joshua & Another, Nbi HCCC No. 484 of 1987**, Ksh.400,000/- were awarded as general damages. The injuries in all the three cases above, cited before the lower court, were almost similar and related to the fracture of the femur, and the cases were all decided in or about 1991, ten years before this case was decided by the trial court herein.

Taking into account the reduced value of the shilling between the year 1991 and 2003 when the lower court decided this suit, there is no doubt in my mind that the sum of between Ksh.600,000/- to Ksh.800,000/- would have been proper and appropriate to award for general damages without the element of future medical expenses.

The relevant question herein accordingly, is whether Ksh.250,000/- as general damages, was not inordinately low to require interference by this court. I have carefully considered this issue and have come to the conclusion that the answer is in the affirmative. The sum awarded herein of Ksh.250,000/- is one quarter to one third of the proper award which should have been awarded. That is inordinately low. This court accordingly sets aside the award of Kshs.450,000/- (actually Kshs.250,000/- after removing future treatment expensed) and hereby awards Ksh.800,000/- as general damages. Costs and interest remain as awarded. The above sum will be reduced by 20% to leave a balance of Ksh.640,000/- as general damages.

Finally, I must clarify that I considered the issue of failure by the Plaintiff to plead a claim of **“future medical expenses”**. The two doctors identified the need and indeed assessed the cost at Ksh.200,000/-. There was, therefore, no excuse for the failure by the Plaintiff/Appellant to plead and prove the item notwithstanding the fact that there was adequate evidence on record and the trial court decided to grant a separate award for the same. This court cannot award an item which was not specifically pleaded. The court, therefore, sees no ground for complaint over the issue by the Appellant/Plaintiff who, in any case, was the one who had failed to plead the same.

Dated and delivered at Nairobi this 7<sup>th</sup> day of March 2013.

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**D A ONYANCHA**

**JUDGE**