



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
CIVIL APPEAL NO. 273 OF 1998**

**TAHIR SHEIKH
SAID**

**TRANSPORTE
RS (K)
LTD**
.....
APPELLANT

VERSUS

**CHARLES
MUGABO**
.....**R**
ESPONDENT

**(Appeal from the judgment & decree of the High Court of
Kenya at Eldoret (Nambuye J) dated 23rd May, 1995 in
H.C.C.C. NO. R. 147 OF 1987)**

JUDGMENT OF THE COURT

On 9th September, 1985, there was a traffic accident along the Bungoma-Busia road, involving motor vehicle registration numbers KWH 618 and KTD 689/ZA/1531 . Motor vehicle registration number KTD 689/ZA/1531 was owned by Tahir Sheikh Said Transporters (K) Ltd who is the appellant herein, while motor vehicle KWH 618 was owned by one Julia Muthoni Njoroge who was the second defendant in the superior court. The appellant was the first defendant in the superior court. Charles Mugabo, the respondent herein and a Ugandan school teacher was a fare-paying passenger in motor vehicle registration number KWH 618 when the accident occurred. He sustained various injuries as a result of the accident and by a plaint dated 29th September, 1987, but lodged in the High Court at Eldoret on 28th October, 1987, the respondent sued the appellant and Njoroge, alleging that the accident was due to the negligence of their respective drivers. The respondent claimed from them general damages for the injuries he sustained and also special damages in the sum of Shs.14,100/=. Both the appellant and Njoroge entered appearance and filed their respective defences, but when the matter first came up for hearing before Nambuye, J. on 28th September, 1994, a consent judgment on liability at 100% was entered for the respondent against the appellant and Njoroge. The suit was then set down for assessment of damages and the learned Judge heard the parties on that aspect of the matter on 3rd November, 1994.

By her judgment dated 22nd December, 1994, but which was apparently delivered on 23rd May, 1995, the learned trial Judge awarded to the respondent a total of Shs.1,115,000/= as general damages for pain, suffering and loss of amenities, Shs.94,440/= as lost earnings and Shs.23,400/= as special damages. It appears that only the appellant appealed against these awards while it is not clear to us if Njoroge ever appealed.

The principles on which this Court will interfere with a trial judge's assessment of damages are now well settled. Those principles are that the trial judge has applied a wrong principle by, for example, taking into account an irrelevant factor, or failing to take into account a relevant factor, or misapplying or not understanding the correct law or not correctly appreciating the evidence adduced or, short of these, that the damages awarded are so inordinately high or low, that some error of principle must be assumed - see for example, **KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS AM L UBIA & OLIVE LUBIA (1982 -88) 1 KAR 727** .

As to the general damages awarded by the learned trial Judge, Mr Mogaka for the appellant sought to persuade us that the learned Judge applied a wrong principle in her assessment of such damages. It was agreed on the evidence before the learned Judge that the respondent had sustained injuries which were listed as:-

- 1.fracture of the femur;
- 2.head/brain concussion;
- 3.fracture of the clavicle;
- 4.injury to the pelvis and right hip leading to fracture of the greater trochanter.

The error of principle pointed out to us by Mr Mogaka was that in arriving at the total sum of Shs.1,115,000/= awarded as general damages for pain suffering and loss of amenities, the learned trial Judge first awarded separate damages on each of the four heads of injury listed hereinabove. Thus, for fracture of the femur, the trial Judge awarded Shs.650,000/=:, for head/brain concussion Shs.20,000/=:, for fracture of the clavicle Shs.150,000/=: and for injury to the pelvis and right hip the Judge awarded Shs.295,000/=: . These respective sums came to the total of Shs.1,115,000/= awarded for these injuries. Mr Mogaka told us that what the learned Judge did is not permissible. In East Africa, the matter was settled way back in 1957 in the Kenyan case of **PAOLO C AVINATO VS VITO-ANTONIA DI FILIPO [1957] EA 535** , when the then Court of Appeal for Eastern Africa held that:-

"general damages must be assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of independent assessments for each injury; that while the judge had assessed damages on a wrong principle, the sum awarded was no more than should have been awarded had the matter been assessed on a correct basis."

Both Mr Mogaka for the appellant, and Mr Kuloba for the respondent, relied on this case in support of their respective contentions. While conceding that the learned trial Judge applied a wrong principle in assessing damages in respect of each injury and then adding up the various sums, Mr Kuloba nevertheless contended on behalf of the respondent that the sum of Shs.1,115,000/= awarded by the Judge was no more than what she would have awarded had she applied the correct principle.

We are unable to accept Mr Kuloba's contention on this aspect of the matter. Various authorities were cited to the Judge by each side and we assume the parties were citing them because they thought the injuries involved in those claims were roughly similar to those involved in the one under consideration. In none of those cases was an award of more than Shs.500,000/= made; in fact the awards ranged between Shs.300,000/- and Shs.490,000/=: . The case of **MATHEWS MULIRO VS JOHN MICHAEL O. NYAOGA & ANOTHER , NAIROBI HCCC NO. 4483 OF 1988 (unreported)** where Shs.1,000,000/= was awarded as general damages for pain, suffering and loss of amenities was really one of paraplegia which involved the total loss of lower limbs. The respondent's injuries were nowhere near those suffered

by Muliro. We are satisfied on the material before us that the application of a wrong principle by the learned trial Judge resulted in such a high award that we are entitled to and must interfere with her assessment. Accordingly we set aside the award of Shs.1,115,000/= and substitute it with one of Shs.500,000/=.

The appellant also appeared to complain against the award of Shs.23,400/= as special damages and the complaint was based on the fact that only Shs.14,100/= was claimed in the plaint as special damages. We think there is no merit in that complaint. We see from the record that when the hearing of the case was proceeding in the superior court, the respondent applied for leave to amend the plaint by deleting Shs.14,000/= and substituting it with Shs.23,400/=. That application was not opposed and the plaint was thus amended by consent. The learned Judge found the figure of Shs.23,400/= proved. There can be no basis for our interfering with her.

The other grounds of complaint before us are that the learned Judge awarded to the respondent the equivalent of K.Shs.97,400/= as lost earnings when there was no such claim in the plaint. Mr Kuloba conceded that there was no such claim in the plaint but he vigorously resisted the appellant's arguments that the sum ought not to have been awarded. It is now settled that lost earnings are in the nature of special damages and that being so, they must be specifically pleaded and strictly proved - see, for example this Court's decision in **THURANIRA KARARI VS AGNES NCHECHE**, *Civil Appeal No. 192 of 1996*, where the Court specifically stated as follows:-

"The claim for loss of earnings is a special damage. It must be pleaded and proved. That is the law. It was not pleaded. The plaintiff gave evidence in which she said she used to operate a kiosk of some sort at Kasarani near Nairobi, from which she made Shs.50,000/= per month. She produced no documentary evidence to support this claim, but even if she had, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside."

But even in the face of this very clear and emphatic assertion as to what the law on this point is, Mr Kuloba would not relent. He still sought to press upon us the arguments in the case of **DOMSALLA & ANOTHER VS BARR (TRADING AS A.B. CONSTRUCTIONS) & OTHERS [1969] ALL E.R 487 - 495**. All we wish to say on **DOMSALLA's** case is that the same arguments were more eloquently than Mr Kuloba could ever do it, pressed upon the court in the case of **CHARLES SANDE VS KENYA CO - OPERATIVE CREAMERIES LTD**, *Civil Appeal NO. 154 OF 1992 (unreported)*. The submissions based on the **DOMSALLA** case failed to find favour with the court and were in the end rejected. We see no reason to change that position to-day. Accordingly we set aside the award for Shs.97,440/= given as lost earnings. The final orders of the Court in this appeal shall be as follows:-

1. The award of Shs.1,115,000/= given as general damages for pain, suffering and loss of amenities is set aside and is substituted with an award of Shs.500,000/=. We award to the respondent interest at court rates on that amount from the 23rd May, 1995 when the judgment of the superior court was delivered.

2. The sum of Shs.23,400/= awarded as special damages remains undisturbed and we award to the respondent interest thereon at court rates with effect from the date when the suit was filed in the superior court.

3. The award of Shs.97,440/= is set aside.
4. The appellant has had the damages reduced by a very large margin. We, therefore, award to the appellant 2/3 of the costs of the appeal.

Those shall be our orders.

Dated and delivered at Nairobi this 8th day of October, 1999.

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify
true copy of the original.

that this is a

DEPUTY REGISTRAR