IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Tunoi JJ A)

CIVIL APPEAL NO. 135 OF 1988

BETWEEN

1. KANTILAL KHIMJI PATEL

2. KHIMJI LADHA PATEL & CO. .....APPELLANTS

AND

JOSEPH MUTUNGA.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Mr Justice Apaloo) dated 7th July, 1986

in

HCCC No 3452 of 1984)

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JUDGMENT

On 29th or 30th March, 1983 between 1.00 and 2.00 pm the respondent was knocked down and seriously injured by a motor vehicle registration No KVD 761, Peugeot 404, pick-up driven by the first appellant along Ring Road, Westlands, Nairobi. That motor vehicle belonged to the second appellant and at the time of the accident, the first appellant was driving it in the ordinary course of the second appellant's business. The accident occurred about 7 paces away from a zebra crossing which was about 100 feet away from another zebra crossing on the same road which was in a built-up area. This was a double lane street whose whole width was 22 feet so that the dividing yellow line left 11 feet for each lane.

At the time of the accident, the weather was clear and sunny and visibility was good and with the evidence available before him, the learned trial judge, Apaloo J, as he then was, found that motor vehicle registration No KVD 761, Peugeot 404, pick-up was being driven at a speed and that it was that manner of driving by the first appellant that was the substantial cause of the accident. He also found that the respondent was in part to blame for the said accident in that he did not look to his right side of the road before he started crossing it from left to right for had he done so, he would have found it unsafe to do so in view of the speed at which the motor vehicle above mentioned was being driven. In this regard therefore, the learned trial judge arrived at the conclusion that the respondent ought not to have been unmindful of other road users especially motorists. It was on this account that he assessed the respondent's blameworthiness at 20% while the first appellant was to blame for the accident to the extent

of 80%.

Shortly after the accident, the respondent was rushed to Kenyatta National

Hospital where he was admitted and because of the severity of the accident injuries that he has sustained, he remained on admission until 6th July, 1983 when he was discharged. Those injuries comprised of a fractured upper one-third of the right humeral bone; segmented fractures of the right femoral bone between the middle and lower one-thirds; extensive lacerated wound on the right leg anteriorly; multiple soft tissue injuries on the right tempro-parietal areas, right side of the chest and the right side of his back; and multiple superficial wounds, bruises and abrasions all over the body. The respondent was successfully treated for these injuries with union of the fractures being obtained.

His medical examination on 2nd August, 1985 by Mr David Stuart, a consultant orthopaedic surgeon at Nairobi Hospital, revealed that the right humeral fracture had fully healed although there was a slight angulation which was of little practical significance. The right femoral fractures had consolidated and the bone had united. There was a slight bowing and shortening in this leg which, according to the surgeon, was clinically of little significance. Full movement of his right knee had not been regained which indicated that he had damaged the cruciating ligaments in the knee-joint.

The surgeon's prognosis was that it was still necessary for the respondent to have the steel plate removed from his thigh bone. That was to involve a further major operation during which latter it was possible by manipulation to obtain more movement for the knee-joint so that, in theory, the respondent could have become less disabled although in view of the osteoarthitic changes in the knee-joint and the likelihood of progressive changes in the course of time, there was likely to be no significant improvement over all. The respondent was still faced with possible complications from the subsequent operation and indeed re-fracture during the time the bone needed to regain its full strength after the removal of the plate. The surgeon's opinion was that: allowing for the residual weakness and some stiffness in the shoulder, the respondent's loss of total body function was 5% from the upper limb injury and 20% in regard to the lower limb injury.

Before the accident, the respondent was in cattle trade and earned his livelihood from that business. He travelled to various markets within his locality and bought cattle at an average price of between Kshs 2,400/- and Kshs 2,600/- per head. After purchasing up to 20 head of cattle, he would transport them to his village home at Masii location in Machakos district from where he would have them transported for sale to the Kenya Meat Commission, the Commission, at Athi River in a lorry. A head of

cattle bought at Kshs 2,600/- was sold to the Commission at a price of Kshs 2,780/-. Prior to the accident, the respondent had sold cattle to the Commission for a period of 6 years having received orders from the Commission to deliver cattle to it twice or thrice on each month of those years. A lorry load of each delivery contained up to 20 head of cattle for which he paid a transport charge of Kshs 600/-. He had employed a herdsman in connection with his cattle trade whom he paid Kshs 800/- per month.

Besides the orders the respondent received from the Commission, he also sold cattle at other cattle markets and, according to him, he made an average of Kshs 10,000/- per month in his trade. If in any one month he made three deliveries to the Commission and on each such deliveries sold 20 head of cattle at a price of Kshs 2,780/- per head after purchasing each such head at a price of Kshs 2,600/-, his gross income in such a month would have been Kshs 10,800/- which after defraying the transport charges together with the monthly salary of the herdsman would have left him with a net income of Kshs 8,200/- in that month. However, as he carried on his cattle trade at other markets besides the Commission, even if he made only two deliveries to the Commission every month, he probably still made an average monthly net income of Kshs 10,000/-.

The accident disabled the respondent from continuing with the cattle trade due to his state of health. Indeed, according to the medical examination referred to above, Mr Stuart's opinion and prognosis was that the extensive injuries to the respondent's right leg were associated with considerable disablement and he was in the circumstances to find it physically difficult to run and look after cattle again.

In a plaint dated 18th December, 1984 and filed in the superior court on the same day, the respondent claimed from the appellants jointly and severally general damages for the injuries he suffered as a direct result of the accident and for the loss of future earnings besides his claim for special damages in the sum of Kshs 7,400/- against them jointly and severally. These two claims appear to have been contained in paragraphs 6 and 7 of the plaint which paragraphs were in the following terms:

"6. The plaintiff has further suffered and incurred financial loss as a result of the said accident.

Particulars of special damages

(a) Medical expenses incurred Shs 500/=

(b) Transport Shs 1,700/=

(c) Damaged clothing and lost

wrist watch Shs 1,200/=

(d) As a result of hospitalisation

the plaintiff lost Shs 4,000/=

Total Shs 7,400/-

which sum the plaintiff claims from the defendants

7. The plaintiff is aged 45 years and was self-employed earning his living by buying cattle and selling them to the Kenya Meat Commission which type of profession involved walking long distances. The plaintiff is unable to continue with this business due to disabling injuries he sustained as a result of the accident."

In his judgment, the learned trial judge awarded the respondent a lump sum figure of Kshs 350,000/- for pain and suffering and loss of amenities. The judge then proceeded to say:

"Before dealing with special damages, I must now consider his loss of earnings or earning capacity. I am not sure that there is any difference between these two concepts, at least not in this case. The plaintiff has been severely injured and cannot now commute between Masii and Nairobi to carry on his trade as a cattle dealer. He has not been able to do so since the accident and lost his earnings. He must be compensated for this, the quantum of this, of course, depends on what he satisfied me that he was earning.

As compensation for this must not only be limited to what he has lost from the day of the accident to date, but also his future earnings, I must determine his age and his probable working life."

From the evidence available before him, the learned trial judge found the respondent to have been 52 years old at the time of the accident and that barring accidents and other unforeseen events, he could have continued in his trade as a cattle dealer until he attained the age of 62 years, that is to say, he had a working life of 10 years from the date of the accident. Satisfied that the respondent earned his livelihood from his business of cattle trade and accepting that his own claim of making Kshs 10,000/- per month in this trade was reasonable, the learned judge found that from the date of accident the respondent had lost his income of Kshs 10,000/- per month and would continue to do so for the rest of his working life of 10

years. Taking a multiplier of 10 years for computing his loss of earnings, the learned judge awarded the respondent a sum of Kshs 390,000/- being his loss of earnings for a period of 39 months from the date of accident to the date of judgment and for the remaining period of 81 months, he assessed the respondent's loss of earnings at Kshs 810,000/- which sum he reduced by one-third of it attributable to the respondent's living expenses. This left a balance of Kshs 540,000/- out of which he lopped off Kshs

40,000/- being what he considered to be reasonable in view of the former sum of money being received nearly 7 years in advance leaving a balance of Kshs 500,000/-. The learned trial judge then awarded the respondent special damages in the sum of Kshs 9,800/-. The total award of damages to the respondent amounted to Kshs 1,249,800/-. A reduction of this sum of money by 20% being his contribution to the accident left him with an award of damages amounting to Kshs 999,840/- against the appellants jointly and severally.

Aggrieved by the award of damages above mentioned, the appellants have appealed to this Court and have itemised their complaint into eight grounds of appeal with an exhortation to this Court to set aside the decision of the superior court and re-assess the damages payable to the respondent.

In all these grounds of appeal, the appellants' grievance is the high award of general damages to the respondent by the superior court. Save for the submission by Mr Kagucia, who at the hearing of this appeal appeared for the appellants, that the award to the respondent for the loss of earnings between the date of the accident and the date of judgment should not have been quantified as part of the award of general damages since such earnings were referable to specific loss and were therefore special damages which required to be pleaded and strictly proved, the rest of the appellants' grounds of appeal are unmeritorious and we need not waste time on them. Mr Mbobu for the respondent did not seem to have an answer to Mr Kagucia's submission in this regard.

In *Pritchard v J H Cobden Ltd and another* [1987] 2 WLR 627 at page 636 letters B and C, O'Connor LJ said this:

"It seems to me that in the case of a live plaintiff future loss of earnings is a different head of damage to past loss of earnings. In my judgment there are good reasons for preserving this distinction. The great majority of injured wage-earners need their wages to defray their current expenses in the period between the accident and trial. In so far as the injury produces a shortfall in earnings that shortfall is made up by drawing on savings

or alternatively by borrowing the money. It is for this reason that interest is awarded on this part of the award. It is the assessment of money actually lost and the award replaces the loss. That is quite different from assessing a capital sum to compensate for future loss of earnings and it is only to the latter exercise that the machinery of multiplier and multiplicand has any relevance."

While considering how a plaintiff must deal with damages in his statement of claim, Lord Donovan in *Perstrello E Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570 at pages 579 letters C to H and 580 letters B and C, had this to say:

'There is plenty of authority for the proposition that a plaintiff need not plead general damage; but since the expressions "special damage" and "special damages" are used in such a wide variety of meanings it is safer to approach this question by considering what a plaintiff is required to plead rather than what he is not.

The Rules of the Supreme Court are of no direct assistance. Ord 18, r 7, requires that every pleading shall contain a summary of the material facts and by rule 12 "every pleading must contain the necessary particulars of any claim..... "By rule 15 "a statement of claim must state specifically the relief or remedy claimant." It follows that the necessity of pleading "damage" (meaning injury) or "damages" (meaning the amount claimed to be recoverable), if it arises at all, does so as an example of the general requirement of any statement of claim that it shall "put the defendants on their guard and tell them what they have to meet when the case comes on for trial" (per Cotton LJ in *Phillipps v Phillipps* [1878] 4 QBD 127, 139).

Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into Court.

The limits of this requirement are not dictated by any

preconceived notions of what is general or special damage but by the circumstances of the particular case "The question to be decided does not depend on words, but is one of substance" (per Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524, 529).

The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.

The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung upon the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed. As Lord Dunedin said in *The Susquehanna* [1926] AC 655 at p 661: "if the damage be general, then it must be averred that such damage has been suffered, but the quantifications of such damage is a jury question."

What amounts to sufficient averment for this purpose will depend on the facts of the particular case, but a mere statement that the plaintiff claims "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to fair earning'.

It follows therefore that in the instant appeal, the assessment of Kshs

390,000/- being the respondent's loss of earnings for a period of 39 months from the date of accident to the date of judgment was in respect of money actually lost by him during this period. This was a known fact and was substantially capable of exact calculation. It was a special damage which in fairness to the appellants the respondent had an undoubted obligation to plead and particularise. As is set out above, he did not do so. The same could not with justice therefore be sprung upon the appellants at the trial as was the case in this appeal. In the result, we cannot resist Mr Kagucia's implicit submission that the award of Kshs 390,000/- to the respondent on account of this damage without it having been pleaded and particularised was erroneous.

Consequent to what we have attempted to outline above, we allow the appellants' appeal to the extent that the award of Kshs 390,000/- on account of the respondent's loss of earnings for a period of 39 months from the date of accident to the date of judgment is set aside with the result that his net award of damages in the sum of Kshs 999,840/- by the superior court will be reduced by a sum of Kshs 312,000/- being 80% of the award of Kshs 390,000/- as is set out in the judgment of that Court leaving him with a net award of damages in the sum of Kshs 687,840/-. As the appellants have succeeded to the extent of one-third of their complaint against the award of general damages to the respondent by the superior court, they will have one-third of the costs of this appeal and will pay two thirds of the respondent's costs in the superior court.

Orders accordingly.

Dated and Delivered at Nairobi this 25th day of November 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

J.E.GICHERU

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JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR