



REPUBLIC OF KENYA



**Akinyi v Ooko & another (Civil Appeal 107 of 2019)  
[2023] KEHC 18754 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18754 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 107 OF 2019**

**DO CHEPKWONY, J**

**MAY 25, 2023**

**BETWEEN**

**SALOME ALICE AKINYI ..... APPELLANT**

**AND**

**ARIDEMPTA VERONICA OOKO ..... 1<sup>ST</sup> RESPONDENT**

**EDDY OTIENO OKELLO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and decree dated 9th November,  
2017 in Milimani CMCC No.5760 of 2012 by Hon. E. Nyaloti-SRM)*

**JUDGMENT**

**Background**

1. By way of a Complaint dated September 26, 2012, Bon Aggrey Okello (the deceased) filed a suit against the Appellant seeking for the following prayers:-
  - a. General damages for pain and suffering
  - b. Special damages
  - c. Costs of this suit and interest.
2. Subsequently, the Complaint was amended to bring on board legal representatives of the initial Plaintiff. The Amended Complaint was dated November 24, 2016, and filed in court on December 6, 2016, wherein the Respondents sought for similar prayers.
3. In their amended Complaint, the Respondents pleaded that on or about September 29, 2009, the deceased was a lawful pedestrian along Kayole Spine Road, Nairobi when the Appellant's driver, servant or agent



so carelessly and negligently drove, managed or controlled the Motor Vehicle Registration No xxxx that it veered off the road and knocked deceased.

4. The Respondents pleaded negligence on the part of the Appellant, her driver, servant or agent as particularized at Paragraph 6 of the amended Complaint as follows:-
  - a. Driving the motor vehicle on the wrong side of the road.
  - b. Overtaking or attempting to overtake when it was not safe to do so.
  - c. Failing to warn the deceased of his approach.
  - d. Failing to take heed of the deceased's presence on the side of the road-verge.
  - e. Negligently allowing the motor vehicle to veer off the road and knock the deceased.
  - f. Driving too fast in the circumstances.
  - g. Failing to keep any or proper look out.
  - h. Driving without due care for other road users reasonably expected to be on the said road.
  - i. Failing to brake timeously or at all.
  - j. Failing to swerve, stop, or slow down or in such other manner, so as to manage or control the motor vehicle.
5. By reason of the said accident, the deceased suffered severe injuries, loss and damages for which he required continued medical care and the Respondents claim for provision of future medical care provided until his demise.
6. The deceased suffered compound fracture of left tibia/fibula, temporary incapacity for three months and residual pain and swelling on the right leg.
7. The Appellant filed a statement of defence dated September 23, 2013 and amended on May 15, 2017, in which she denied the contents of the amended Complaint and put the Respondents to strict proof of the allegations.
8. Further and without prejudice, the Appellant averred that the said accident occurred which is denied was caused or was substantially contributed to by negligence of the deceased.
9. The Appellant pleaded negligence on part of the deceased as follows
  - a. Walking alongside the said road.
  - b. Failing to heed to the hooting and warning by the driver of the motor vehicle registration xxxx.
  - c. Failing to walk along the designated foot path.
  - d. Getting in the way of motor vehicle registration number xxxx.
  - e. Causing the said accident.
10. The matter was heard and the trial court delivered its Judgment in favour of the Respondents on November 9, 2017.



## The Appeal

11. Being aggrieved and dissatisfied with the trial's Court Judgment delivered on November 9, 2017, the Appellant preferred an appeal before this court vide a Memorandum of Appeal dated February 26, 2019 setting out the following grounds:-
  - a. THAT the learned trial Magistrate erred in law and fact by awarding special damages of Kshs 187,378/= despite the said amount being paid by the Plaintiff's Insurance Company.
  - b. THAT the learned trial Magistrate erred in law and fact by finding that the Respondent's assessment of damages were correct even after the amounts in Paragraph was paid earlier by the Insurance Company.
  - c. THAT the learned trial Magistrate erred in law and fact in failing to appreciate the receipts of Kshs 187, 378/= paid by the Insurance Company.
  - d. THAT the learned trial Magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the Appellant as regards to special damages award of Kshs 187, 378/=.
12. The Appellant sought for the following reliefs: -
  - a. That the appeal be allowed with costs.
  - b. That the Judgment in the lower court be set aside.
  - c. That the Respondent to bear the Appellant's costs of this appeal.
13. This appeal was canvassed by way of written submissions. The Appellant's submissions are dated December 8, 2022 while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions are dated February 8, 2023. I have read through the grounds of appeal and the submissions for consideration in the final analysis and determination of this case.

## Analysis and Determination

14. To consider the appeal, I have considered the Grounds of Appeal, the proceedings before the trial Court and the written submissions filed by both parties and find the following issues relevant for determination;
  - a. Whether the doctrine of subrogation is applicable in personal injuries claims.
  - b. Whether the award on special damages to the Respondents amounted to double compensation.
15. This Court is mindful of the duty of this court sitting as the first appellate court. I am also alive to the law that requires it to re-appraise, re-evaluate and re-consider the evidence adduced before the trial court afresh and come up with its own inferences on all issues of law and facts.
16. In the case of *Abok James Odera T/A AJ Odera & Associates –vs- John Patrick Machira T/A Machira & Co Advocates [2013]eKLR*, the Court of Appeal held as follows:-

' This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

17. It is trite that this Court will only interfere with Trial's court decision if it is proved to have been founded on wrong legal principles or wrong interpretation of the law. In the case of *Bashir Ahmed Butt -vs- Uwais Ahmed Khan [1982-88]KAR*, the Court held that:

' An Appellate Court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low'.

18. This court will therefore abide by the above principles in determination of this appeal.

**a. Whether the doctrine of subrogation is applicable in personal injuries claims.**

19. The principle of subrogation was defined in the case of *Egypt Air Corporation -vs- Suffolk International Food Processors (U) Ltd & Another (1999) 1 EA 69* as follows;

' The whole basis of subrogation is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity then there is no juristic scope for the operation of the principle of subrogation.'

20. The doctrine of subrogation applies where there is a Contract of Insurance. If the 'insured risk' occurs and the Insurer settles the insured's claim, then the Insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the Insurer is put in a position of the insured and is entitled to claim compensation from the third party Tortfeasor. Therefore, subrogation presupposes the existence of an Insurance Contract. The doctrine applies to Indemnity Insurance claims.

21. In this instant case, the Appellant's argument is that the deceased's hospital bill was settled by the Insurance and therefore the trial court made an error in making an order for payment of special damages to the Respondents.

22. In the book titled '*General Principles of Law*' 6<sup>th</sup> edition (ER Hardy Ivamy)' the author at Page 463 states as follows:-

' In the case of all policies of Insurance which are Contracts of Indemnity the Insurers, on payment of the loss, by virtue of the doctrine of 'subrogation' are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject matter of Insurance.

Thus, subrogation applies to Marine Insurance Policies and to many non-marine policies, eg a fire, motor, jewellery, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to Life Insurance nor to personal accident Insurance, for these are not contracts of indemnity.'



23. In '*Bird's Modern Insurance Law*' Book (7<sup>th</sup> edition)–*John Birds*, in Chapter 15 under 'Subrogation', the author states as follows:-

' This Chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer's right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The 'fundamental rule of insurance law' is 'that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified'. A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points:- subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance'.

24. In the Court's considered view and in line with the authorities cited above, that personal accident claims are not affected by the doctrine of subrogation. Therefore, the doctrine of subrogation applies to indemnity insurance claims. In cases of indemnity, the insured loss is premeditated and can be computed upto the last cent. In personal injury claims, one cannot compute the extent of the injuries suffered.

**b. Whether the award on special damages to the Respondents amounted to double compensation.**

25. As regards to the issue of whether the special damages awarded amounted to double compensation, the special damages awarded to the Respondents would not amount to double payment. The reason is that the Appellant is not a party to any arrangement with the Respondents' insurer regarding the bills paid. The Appellant was liable to satisfy the damages suffered by the Respondents and this does not amount to double compensation as claimed by the Appellant.
26. In the case of *Leli Chaka Ndoro –vs- Maree Ahmed & SM Lardhib [2017]eKLR*, the Court cited the case of *George White –vs- Jubitz Corporation, (2009)* Supreme Court of the State of Oregon, USA where it was stated thus:-

' The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor.'

'The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a 'double recovery.' The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits.'

27. Based on the above analysis, this Court does not find any fault in the trial's court decision in granting an award of special damages in the sum of Kshs 187,378/= which amount was pleaded for in the Plaint. The Appellant is therefore liable to pay that amount. The contention by the Appellant that the hospital bill had been settled by the Insurance Company is not reason enough to challenge the award of special damages. The doctrine of subrogation therefore does not apply to personal accident claims and thus is not applicable in this instant case.



28. In the upshot of the forgoing, this appeal is found devoid of merit and the court proceeds to dismiss it with costs to the Respondents.

29 It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25<sup>TH</sup> DAY OF MAY , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

No appearance for and by either party

Court Assistant – Martin.

