



**Ndishu & another v Muriungi (Civil Appeal 3 of 2020)
[2022] KEHC 2 (KLR) (21 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 2 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL 3 OF 2020
JM MATIVO, J
JANUARY 21, 2022**

BETWEEN

GEOFFREY KAMAU NDISHU 1ST APPELLANT

DENNIS WARUINGE KIMANI 2ND APPELLANT

AND

PETER MUCHIRI MURIUNGI RESPONDENT

*(Appeal from the Judgment and decree of Hon. Mr. Fredrick Nyakundi,
SRM, delivered on 6th February 2020 in PMCC No. 210 of 2018, Voi)*

JUDGMENT

1. This appeal challenges the judgment of the learned Senior Principal Magistrate in PMCC No. 210 of 2018, Voi. In the said judgment, the learned Magistrate entered judgment on liability in favour of the Respondent on 100% basis. He awarded Kshs. 1,400,000/= less salvage value of Kshs. 200,000/=; and Kshs. 304,000/= per month for loss of user of the Respondent's motor vehicle to be calculated from the date of the accident. He also awarded the Respondent costs of the suit and interests.
2. A reading of the grounds of appeal, the prayer(s) sought and the appellant's submissions leave no doubt that the appellants are only challenging the award for loss of user. There is no ground challenging the award of the pre-accident value of the vehicle for the sum of Kshs. 1,400,000/= less Kshs. 200,000/= salvage value. Also, the appellants are not challenging findings on liability.
3. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the



witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others*¹ and *Peters v Sunday Post Limited*²).

4. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.³
5. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*,⁵ a court of first appeal can appreciate the entire evidence and come to a different conclusion.
6. In his Complaint dated 26th July 2018, the Respondent pleaded that on the 28th September 2018, his motor vehicle Reg No. KBC 594 F was being driven at Ndara along the Mombasa- Nairobi Highway at 01:50 hours when the appellant's motor vehicle KBL 357S/ZD 0462 was allegedly negligently driven as a result of which it collided with his motor vehicle. As a consequence, the Respondent claimed he incurred repair costs of Kshs. 1,653,232/= and loss of monthly income at the rate of Kshs. 304,000/=.
7. In its written Statement of defence, the appellant denied the alleged negligence and pleaded that the accident was caused by the Respondent's negligence.
8. The Respondent's case in the lower court rested on his evidence and that of a Police Officer. He testified that investigations revealed that the accident was caused by the negligence of the appellant's motor vehicle. He told the court that he used to earn Kshs. 304,000/= per month from the vehicle. He produced invoices to support the income. He said that the vehicle was valued Kshs. 1.6 million and produced an assessment report. He said he paid the assessor Kshs. 10,000/= and Kshs. 35,000/= for breakdown services. He also stated that the driver of the lorry died at the accident. His witness, PW2 Cpl Stephen Mutuma from Voi Police Station produced the police abstract report and told the court that the appellant's vehicle left its proper lane and caused the accident, and that, the accident was blamed on the appellant's driver. The appellant did not call any witnesses.
9. After analysing the evidence, the learned Magistrate held that the Respondent had established liability as against the appellant on 100% basis. As for damages, he awarded the Respondent Kshs. 1,600,000/= being the pre-accident value of the vehicle less Kshs. 200,000/= salvage. He also awarded Kshs. 304,000/= being loss of income per month to be calculated from the date when the accident took place. Lastly, he awarded costs and interests to the Respondent.

¹ {1968} EA 123.

² {1958} E.A. page 424.

³ See *Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

⁴ See *Kurian Chacko v Varkey Ouseph* AIR 1969 Kerala 316.

⁵ Cap 21, Laws of Kenya.



10. Aggrieved by the above verdict, in their amended Memorandum of Appeal, the appellants seek to upset the said award citing 3 grounds, namely: - (a) that the learned Magistrate erred in fact and in law in making an award on loss of use without the same having been specifically proved. (b) that the learned Magistrate erred in awarding damages for loss of use in excess of what was pleaded in the Plaint. (c) the learned Magistrate erred in making an award in excess of the court's pecuniary jurisdiction. They pray that the judgment and decree dated 6th February 2020 on loss of use be varied and or be set aside. They also pray for costs of the appeal.
11. In his submissions, the appellant's counsel cited *Capital Fish Kenya Limited v The Kenya Power & Lighting Co Ltd*⁶ in which the Court of Appeal held that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. He also cited *David Bagine v Martin Bundi*⁷ in which the court cited *Lord Goddard CJ in Bonban Carter v Hyde Park Hotel Limited*⁸ in support of the proposition that special damages must not only be pleaded but they must be proved. Additionally, counsel relied on *Abdi Ali Dere v Firoz Hussein Tundai & 2 others*⁹ in support of a similar proposition.
12. He submitted that the vehicle was assessed one month after the accident, that the delay has not been explained and that the Respondent cannot claim loss of use since the vehicle was already a write off. He cited *Abdi Ali Dire v Foroz (Supra)* in support of the proposition that where the goods are destroyed, the owner is only entitled to restitutio in intergrum and the normal measure of damages is the cost of replacement of the goods, that is the market value at the time and place of destruction. He also cited *Ryce Motors Ltd & another v Elias Muroki*¹⁰ in support of the proposition that a Plaintiff must take steps to mitigate his damages. He argued that the Respondent was only entitled to the pre-accident value of the vehicle.
13. Additionally, counsel submitted that parties are bound by their pleadings. He submitted that the Respondent claimed Kshs. 304,000/= without specifying the effective date. He cited *Antony Francis Wareham t/a Wareham & 2 others v Kenya Post Office Savings Bank*¹¹ in support of the proposition that cases are tried and determined on the basis of pleadings. Also, he argued that damages for loss of use (if any) could only have been awarded for 30 days. He submitted that the said sum was not proved and the document(s) provided did not show that the Respondent was trading under the name shown in the document. He relied on *Jamal Mohamed Bandira v Owners of Motor Vessel "Nasibu"*¹² in support of the proposition that a proforma invoice is not a satisfactory proof of loss.
14. The Respondent's advocate argued that the appellant is only appealing against the loss of user. He submitted that the appellant cannot question the court's jurisdiction since he did not raise it in the lower court. He argued that loss of user is clearly prayed in the Plaint and that the claim was proved by production of receipts.

⁶ {2016} e KLR.

⁷ {1997} e KLR.

⁸ {1948} 64 TLR 177.

⁹ {2013} e KLR.

¹⁰ {1996} e KLR.

¹¹ {2004} e KLR.

¹² {2020} e KLR.



15. As for the applicable standard of prove, he cited *Team for Kenya National Sports Complex & 2 others v Chabari M'ingaruni*,¹³ *Wambua v Patel & another*¹⁴ and *Jackson Mwabili v Peterson Mateli*¹⁵ all of which held that the standard of prove in such cases is on a balance of probabilities. He argued that courts have been lenient when it comes to claims for loss of user and cited *Team for Kenya National Sports Complex & 2 others v Chabari M'ingaruni* (supra) where the court allowed a claim for loss of user of a vehicle for 6 months without supporting documents. He also relied on *Peter Njuguna Joseph v Ann Moraa*¹⁶ in which the Court of Appeal assessed loss of user for an immobilized vehicle by estimating net income despite absence of supporting documents. As for the period of loss of user, he submitted that it has become a practice for courts to adopt a 6 months period while computing such claims.
16. Regarding the attack on jurisdiction, he argued that the amount awarded falls within the pecuniary jurisdiction of the court which is Kshs. 7,000,000/=.
17. I will address the argument that the Respondent in his Complaint in the lower court did not plead or particularize his claim for loss of user. In resolving this issue, it is inevitable that we must refer to the Respondent's Complaint in the lower court. A reading of the complaint shows that the Respondent at paragraph 7 of the Complaint under special damages, pleaded: -Costs and repairs...Kshs.1,653,232/= .The said sum of motor vehicle was used by the Plaintiff in a transport business which brought him income of Kshs. 304,000/= per month. He suffered loss of the said income.
18. From the above averments, it is clear that the Respondent only claimed costs of repairs which are the special damages claimed in the prayers in the sum of Kshs. 1,653,232/= . There is no averment to suggest that the vehicle was total loss, so it is not clear how the said claim specifically prayed as special damages mutated to a claim for total the pre-accident value of the vehicle. Equally perplexing is why the learned Magistrate allowed a claim for the pre-accident value of the vehicle less the salvage value yet the said claim was not expressly pleaded and prayed in the Complaint. Also, I note that in the instant appeal, the appellant is only challenging the award for loss of use and not the award for the pre-accident value of the vehicle.
19. Also disturbing is the fact that the Respondent in the lower court only claimed that he earned Kshs. 304,000/= per month and he specifically averred that he suffered loss of the said income. In the prayer, he prayed for the said sum. There is no prayer for the loss of user at the rate of Kshs. 304,000/= per month to be calculated from the date of the accident until date of judgment or payment. Again, despite such a clear averment, the court awarded Kshs. 304,000/= per month to be calculated from the date of the accident.
20. The above scenario brings into sharp focus the function and purpose of pleadings. In this regard, I recall the words of the Australian Court¹⁷ where Vickery J said: -

“In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with

¹³ Civil Appeal No. 293 of 1998.

¹⁴ {1986} KLR 336.

¹⁵ Civil Appeal No. 29 of 2019.

¹⁶ Civil Appeal No. 23 of 1001.

¹⁷ In *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6]



maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration, which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary, function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.¹⁸ (Emphasis supplied)

21. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness), and, further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.
22. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.
23. The Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited*¹⁹ rendered itself as follows: -

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's *Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present

¹⁸ See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [13] – [20].

¹⁹ {2015} e KLR.



their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

24. The other important point is that issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. The moment it became clear that the vehicle was a total loss or that the claim for loss of use was for several months, then an appropriate amendment ought to have been preferred. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un-pleaded issues as having been fully investigated. In *M N M v D N M K & 13 Others*²⁰ it was held that: -

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example, in *Chalicha FCS Ltd v. Odhiambo & 9 Others* [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in *Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

25. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.²¹ Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted.

From the above authorities, it is clear that a court has no power to make an order, unless by consent, which is outside the pleadings.

26. The other ground is that the claim for loss of user was only pleaded for one month and a specific sum prayed. There id no averment or prayer asking for loss of user from the date of the accident up to date of judgment or even date of payment. The learned Magistrate plucked this award from the air. It is not backed by the pleadings. It is trite law that special damages must not only be specifically pleaded, but

²⁰ {2017} e KLR.

²¹ See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003* [2004] 2 KLR 183.



must also be strictly proved with as much particularity as circumstances permit. The court of Appeal in *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd*²² observed that: -

“...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

... the degree of certainty and particularity depends on the nature of the acts complained of...

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council vs Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon* Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in *Ratcliffe v Evans* [1892] QB 524, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

27. Similarly, the Court of Appeal in *Hahn v Singh*²³ held that:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

28. Our decisional law is in agreement that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury or prove of income in case of business loss. (See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited*;²⁴ *Zacharia Waweru Thumbi v Samuel Njoroge Thuku*²⁵).

²² {2013} eKLR

²³ Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721, Kneller, Nyarangi JJA, and Chesoni Ag. J.A.

²⁴ {2015} eKLR

²⁵ {2006} eKLR



29. In the instant case the Respondent produced some invoices bearing a business name. He did not demonstrate his relationship with the said business. In any event, as demonstrated by the authorities cited by the appellants counsel, invoices are not proof of income. There was no tangible evidence to prove the monthly income from the vehicle. Case law is clear that a party must produce actual receipts in case of expenditure or reliable documents in case of business loss such as audited accounts or bank statements in order to meet the test of specifically proving special damages.
30. As stated above, the claim for the pre-accident value of the vehicle was not pleaded or claimed at all. Also, the claim for loss of income at the rate of Kshs. 304,000/= per month from the date of the accident till date of judgment or payment was not pleaded and prayed at all. As was held in *Zacharia Waweru Thumbi v Samuel Njoroge Thuku*,²⁶ special damages must be pleaded and strictly proved by documentary evidence.²⁷ The claim before the court did not pass the elementary test. The authorities cited by the Respondent are of no help. Before the court was not just a question of the applicable standard prove, but failure to plead the claims. Before applying the standard of prove the claim must be pleaded. In any event, the claim on loss of user falls on both grounds, that is failure to plead and absence of prove.
31. I had earlier noted that the appellants are only challenging the award on loss of user. However, as discussed above, the Respondent in his Complaint clearly pleaded costs and repairs and prayed for special damages in the sum of Kshs. 1,653,232/=. The claim mutated to a claim for pre-accident value of the vehicle less salvage value. This claim was not pleaded. The moment it became clear that the Plaintiff would claim the pre-accident value of the vehicle as opposed to the costs and repairs pleaded, he ought to have amended the Complaint. For now, it is sufficient for me to state that the Magistrate misdirected himself by awarding amounts which were not specifically pleaded and prayed. The other important issue is whether this court can disturb the award on the pre-accident value which is not under challenge in this appeal.
32. To my mind, the fact that the appellant did not challenge the award on the pre-accident value of the vehicle is not a bar to this court to address the issue nor can this court properly directing its mind to the law overlook or condone such a manifest illegality. I find backing in Section 78 (2) of the [Civil Procedure Act](#) provides that: -
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
33. The purpose of the above provision is to enable an appellate court to intervene where there is manifest misdirection by the trial court either on point of law or fact which if allowed to stand it can lead to grave injustice.
34. Flowing from the foregoing discussion, it is my finding that the judgment passed by the learned Magistrate on 6th February 2020 in SPMCC No. 210 of 2018 is not supported by the pleadings. It cannot be allowed to stand. Accordingly, I set aside the said judgment and substitute it with an order dismissing the Respondent's case in the lower court with no orders as to costs. Each party shall bear its costs of this appeal.

Orders accordingly

²⁶ {2006} eKLR

²⁷ Counsel also cited *Central Bank of Kenya v Martin Kingori* {2009} eKLR and *Bonham Carter v Hyde Park Hotel* {1948} 64TLR 177 where the same position was restated.



SIGNED, DATED AT VIRTUALLY AT VOI THIS 21ST DAY OF JANUARY 2022

JOHN M. MATIVO

JUDGE

