Nafas World Auto (K) Limited & another v Atambo (Civil Appeal E121 of 2023) [2025] KEHC 3326 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3326 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E121 OF 2023

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

NAFAS WORLD AUTO (K) LIMITED ..... 1ST APPELLANT

CHARLES OMBUI ..... 2ND APPELLANT

AND

JELDA KWAMBOKA ATAMBO ..... RESPONDENT

(Appeal arises from the Judgment and decree of subordinate court delivered by Hon. P.K. Mutai (PM) on 20.9.2023 in Kisii CMCC No. 337 of 2021.)

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. P.K. Mutai (PM) on 20.9.2023 in Kisii CMCC No. 337 of 2021. The Appellants lodged the Memorandum of Appeal dated 2.10.2023 raising the following grounds of appeal:
    a. The learned magistrate erred in law and fact in finding liability of 100% against the 2nd Appellant.
    b. The learned magistrate erred in law and fact in finding against the 2nd Appellant without evidence.
    c. The learned magistrate erred in law and fact in awarding excessive general damages of Ksh. 357,550/-.
    d. The learned magistrate erred in law and fact in failing to consider the 2nd Appellant's submissions.
2. The Appellant named the respondent as Kebu Vincent Mirieri. I presume this was in error for I find such a party nowhere in the record. The Respondent is as correctly titled above. The grounds of appeal

are, however, duplicated and circumvallated into 10 grounds contrary to Order 42 Rule 1 that requires that the Memorandum of Appeal be concise. The same provides as doth: -

> " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

3. The Court of Appeal had this to say in regard to rule 86 (which is pari materia with Order 42 Rule 1). In the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR it was stated: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> > " We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

Pleadings

4. In the Plaint dated 26.2.2021 and amended on 18.3.2021, the Respondent claimed damages for an accident pleaded to have occurred on 6.1.2021 along Kisii-Migori road at Denmark area between the Respondent as pedestrian and motor vehicle Registration Number KCN 904A that hit the Respondent. The Respondent set forth particulars of negligence and injuries and pleaded special damages. The injuries were pleaded as follows:

   i. Head injury

   ii. Bruises to the right leg

   iii. Bruises to the left leg

   iv. Chest contusion

   v. Blunt trauma to the right knee

   vi. Bruises to the right upper limb

vii. Blunt trauma to the left knee

viii. Blunt trauma to the back

ix. Bruises to the left upper limb

5. The special damages were also pleaded as follows:

Medical report Ksh. 6,500/=

Motor vehicle search Ksh. 550/=

Medical expenses Ksh. 12,550/=

6. The 2nd Respondent filed his defence dated 29.5.2021. He denied the particulars of negligence as pleaded by the Respondent and blamed the Respondent for the accident.

7. The lower court considered the matter and awarded reliefs as follows:

a. Liability agreed at 100% for the Respondent

b. Special damages Ksh 7,550/=

c. General damages Ksh. 350,000/=

Evidence

8. PW1 was the Respondent Jelda Kwamboka Atambo. She testified that the accident was on 26.2.2020 when she was from hospital to see a patient. The motor vehicle came from behind, hit her and landed in a ditch. She suffered injuries to the shoulder and face and was admitted to hospital for one day. She produced her bundle of documents.

9. PW2 was Dr. Morebu Peter Momanyi. He relied on his medical report to testify that the Respondent suffered head injury and multiple soft tissue injuries. The percentage of permanent disability was 20%. On cross examination, he saw the Respondent when the injuries were 3 weeks old. He did not treat. The Respondent, according to him had head injuries and would suffer from post-traumatic epilepsy.

10. PW3 was No. 82476, Corporal Acquinata Shiloti of Nyanchwa Police Station. The case was investigated by PC Kitawa who was away on transfer. According to her, the accident involved motor vehicle Registration No. KCN 904 a matatu, KCC 072Q Probox and the Respondent. The motor vehicles were heading the same direction. The matatu developed brake failure and hit the Probox ahead of it before hitting several pedestrians walking along the road including the Respondent. Both vehicles were towed to the police station and the driver of the matatu was not found at the scene. He stated on cross examination that he had no police file and no one had been charged.

11. The 2nd Appellant called DW1 as Dr. Steve Ochieng. He produced the medical report dated 17.1.2022. According to him, the Respondent had no dislocation or fracture. The injuries were soft tissue injuries. It was a mild head injury.

Submissions

12. The 2nd Appellant submitted that he should not be held 100% liable for the accident. Reliance was placed on Section 107 of the *Evidence Act* to submit that the Respondent had not proved liability at 100% against the 2nd Respondent.

13. On damages, it was submitted that an award of Ksh. 90,000/= would be adequate compensation. The court notes that the cases the 2nd Appellant relied on included Donald Gumba & Another v Ziporrah Kwamboka Michieka (2021) eKLR, James Kwanya Rege v Loice Mbone Chweya (2021) eKLR and Edward Mutevu Maithya & Another v Edwin Nyamweya (2022) eKLR. In all these cases that the 2nd Appellant cited, the Plaintiffs therein did not suffer head injuries like in this case.

14. On the other hand, the Respondent's submitted that the lower court was correct on both quantum and liability.

Analysis

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

16. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

19. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

21. The 2nd Appellant urged the court to find that the lower court erred in finding 100% liability for the Respondent. The court is asked to establish whether the lower court erred in its finding, on a balance of probabilities. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

22. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

23. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

24. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In

Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

25. The Respondent was a pedestrian and reliable evidence was that she was walking along the road with other pedestrians. PW3's evidence was that the accident involved motor vehicle Registration No. KCN 904A matatu and KCC 072Q Probox and the Respondent. The motor vehicles were heading to the same direction. The matatu developed break failure and hit the Probox ahead of it before several pedestrians walking along the road including the Respondent. This testimony was not shaken in cross examination and this court has no reason not believing it. The Respondent's case that the two motor vehicles were towed to the police station is correct.

26. The Appellant did not blame the driver of KCC 072Q Probox in this case and that case is not before this court. This court finds that the Respondent proved her case to the required standard against the 2nd Appellant. It was the duty of the 2nd Appellant to prove contributory negligence which in my view he failed. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that:

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

27. The motor vehicle Registration No. KCN 904A matatu could not have just caused the accident if well controlled and managed. As was held in Kenya Bus Services Ltd V Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

> " Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."

28. The above decision was also cited with approval by the Court of Appeal in Nairobi Civil Appeal No. 179 of 2003 - in Re Estate of Esther Wakiini Murage V Attorney General & 2 others [2015] eKLR where the Court of Appeal reiterated as doth: "Well driven motor vehicles do not just get involved in accidents....."

29. Therefore, I find no basis to disturb the finding of the learned magistrate on liability and hold that the Respondent proved want of care on the part of the driver of KCN 904A matatu. I am in consonance with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi

[2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> "In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
>
> > "……When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

30. The court finds no basis for interfering with the liability at 100% against the Appellant. I dismiss the appeal on this head.

31. On quantum, the lower court awarded Kshs. 350,000/= in general damages based on the case of Francis Ochieng & Another v Alice Kajimba (2015) eKLR. This authority was proper and applicable as the Plaintiff also sustained head injuries and multiple soft tissue injuries. In this case, the two medical reports produced by PW2 and DW1 were divergent, but their common confluence was that the Respondent sustained head injuries and multiple soft tissue injuries.

32. The court has to assess the effect of the injuries on the Respondent. The evidence of the medical doctor obtained in the medical reports referenced above was proper. The point of dissent was on degree of injury and this court doubts the level of permanent disability stipulated as 20% by the PW2 following the undisputed soft tissue injuries.

33. This court has to establish similar fact scenarios, though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985]eKLR. However, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

34. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

35. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

36. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

37. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'

We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:

> " I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

38. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest

application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

39. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

40. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> " ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

41. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

42. I proceed to determine similar fact cases in relation to damages as applicable to this appeal. In Francis Ochieng & Another v Alice Kajimba (2015) eKLR, the Plaintiff also sustained head injuries and multiple soft tissue injuries and was awarded Ksh. 350,000/= in 2015.

43. Similarly, in the case of H. Young Construction Company Ltd vs Richard Kyule Ndolo [2014] eKLR the court awarded a sum of Kshs. 250,000/= for degloving injury to the left leg with loss of skin over the calf muscles and blunt injury to the left ankle joint in 2014.

44. In the case of Francis Ndung'u Wambui & 2 others v Purity Wangui Gichobo (2019) eKRL the court of appeal reduced an award of Kshs. 450,000/= to Kshs. 250,000/= for injuries involving deep laceration on the medial side of the left leg and degloving injury on the left thumb.

45. In the case of Duncan Mwendwa & 2 Others v Silas Kinyua Kithela (2018), eKLR, the Plaintiff suffered injuries of blunt head injury with intracerebral hematoma, damage to the tendon of left finger and soft tissues and was awarded Kshs. 350,000/= in general damages.

46. In my view, the injuries suffered by the Respondent in the appeal herein are largely similar to the above cases involving multiple soft tissue injuries besides a head injury. Therefore, I am guided that the award of Kshs. 350,000/= granted by the lower court was not inordinately high, and I uphold it.

47. The Appellant lamented that the award of special damages of Ksh. 7,550/= was not pleaded and proved. With special damages, the rule is strict and somewhat mathematical. The court has to discern the pleaded damages and proceed to find proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

48. Special damages are thus very specific and constitute a liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise.

49. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 7,550/= which the lower court granted. I uphold it.

50. The net effect of the foregoing is that the appeal on quantum and liability fails in toto.

Determination

51. In the upshot, I make the following orders:

    a. The appeal is dismissed.

    b. The Respondent shall have costs of the appeal assessed at Kshs. 97,500/-.

    c. 30 days stay of execution.

d. 14 days right of appeal.

e. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Munji for the Appellant

No appearance for Mr. Migiro for the Respondent

Court Assistant – Michael