Diana & another v Peter (Civil Appeal E1045 of 2023)
[2025] KEHC 8671 (KLR) (Civ) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8671 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1045 OF 2023

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

WYATT JANE DIANA ..... 1ST APPELLANT

JEREMY NICHOLAS WYATT ..... 2ND APPELLANT

AND

BERNARD MUSAU PETER ..... RESPONDENT

(Appeal from the Judgment and decree of Hon. N. Ruguru (Mrs.) Senior Principal Magistrate dated 12.5.2023 arising from Milimani CMCC No. E6488 of 2020.)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. N. Ruguru (Mrs.) Senior Principal Magistrate dated 12.5.2023 arising from Milimani CMCC No. E6488 of 2020.
2. The Memorandum of Appeal dated 29.10.2022 raised the following grounds of appeal:
    i. The lower court erred in making an erroneous finding on liability not supported by evidence.
    ii. The lower court erred in awarding general damages that were inordinately high and excessive.
    iii. The lower court erred in awarding special damages that were not proved.
3. The Plaint dated 19.10.2020 claimed damages for an accident that occurred on 20.7.2019 when the Respondent was pedal cycling along Masai West Road – Koru Junction when he was knocked down by the Appellants' motor vehicle registration number KBE 379P.
4. The Respondent set forth particulars of negligence on the part of the Appellants and also pleaded injuries as follows:

i. Head injury and loss of consciousness

ii. Red eye ptosis

iii. Right sub trochanteric fracture

iv. Right radio ulna fracture

v. Fracture of the right femur

5. The Appellants never entered appearance despite service of summons and default judgment was entered against them on 13.5.2021. The matter thereafter proceeded for formal proof. However, the ex parte judgment was set aside and the Appellant filed their defence in which they denied liability and blamed the Respondent for the accident.

6. The lower court determined as follows:

a. Liability 100%

b. General damages Ksh. 2,000,000/-

c. Cost of future medical expenses Ksh. 305,000/-

d. Special damages Ksh. 5,550/-

7. Aggrieved by the finding of the lower court, the Appellants lodged the appeal herein.

Evidence

8. During the hearing, PW1 was PC Swaleh. He produced the police abstract and testified that KBE 379P was blamed for joining the road through the wrong side. It was his case that he had not healed and had a metal implant in his hand. That the keg also had a metal implant. On cross examination, it was his case that the matter was pending under investigation.

9. PW2 was the Respondent. He relied on his witness statement dated 19.10.2020 and testified that he was riding his bicycle when KBE 379P knocked him down. That the accident motor vehicle was driven entering a junction at the time of the accident. He also produced the documents per the list of documents dated 19.10.2020.

10. The Appellants closed their respective cases without calling witnesses. The medical reports were produced by consent without calling the authors.

11. The Appellant reiterated the grounds in the memorandum of appeal and submitted that the award of Ksh. 2,000,000/- was inordinately high. It was the view of the Appellant that Ksh. 600,000/- would be adequate compensation. I have considered the 5 authorities cited by the Appellant and they do not present similar factual scenario. The injuries therein involved either the fracture of the femur or fracture of the ulna and radius but not both as in the instant case.

12. The Appellant also submitted that the damages for future medical expenses ought to have been awarded per the proposal by Dr. Wambugu in his medical report dated 17.6.2022. That is Ksh. 110,000/-.

13. On the part of the Respondent, he appears to seek enhancement of the damages as awarded by the lower court albeit without a cross-appeal. In the absence of a cross appeal, the court is unable to rely on submissions only to enhance damages for submissions are not pleadings or evidence. As stated by

the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

14. A party is bound by their pleadings and the cross appeal which is equivalent to a Memorandum of Appeal was the appropriate pleading if the Respondent wanted to challenge the award by the lower court. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows:-

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

15. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another vs Senator Bola Ahmed Tinubu &INEC & 3 others consolidated with petitions No. 4 and 5 both of 2023, stated as doth: -

> " In Belgore Versus Ahmed(2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
>
> "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

Analysis

16. 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.

17. 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."

18. 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."

19. 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.

20. 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..."

21. 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..."

22. The Appellants urged the court to find that the lower court erred in finding 100% liability against the Appellants. That the award of Ksh. 2,000,000/= in general damages and Ksh. 305,000/= for future medical expenses was inordinately high. On the other hand, the Respondents' general case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

23. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellants were 100% liable for the accident. 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."

24. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendants, 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."

25. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. 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....."

27. 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."

28. The Appellants filed a defence but did not call any witnesses at the hearing. The evidence of the Respondent as to the occurrence of the accident was uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* stated that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
>
> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

29. Therefore, the Appellants' defense in the lower court thus contained mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove his case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

30. As the Respondent proved his case to the required standard, it was the duty of the Appellants to prove contributory negligence which in my view they 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".

31. The motor vehicle Registration No. KBE 379P 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."

32. 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....."

33. 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 KBE 379P. 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."

34. On quantum, the lower court awarded Kshs. 2,000,000/- in general damages and Ksh. 305,000/- for future medical expenses.

35. The Respondent suffered the following injuries:

    i. Head injury and loss of consciousness

    ii. Red eye ptosis

    iii. Right sub trochanteric fracture

    iv. Right radio ulna fracture

    v. Fracture of the right femur

36. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report by Dr. Cyprianus Okoth Okere dated 9.10.2020, medical report by Dr. S. Njiru of Kenyatta National Hospital and the treatment notes produced in the lower court for the Respondent as well as the report by Dr. Wambugu dated 17.6.2022 for the Appellants. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and therefore uphold the injuries suffered as the injuries pleaded and proved in evidence. I only place a rider that as the medical doctors were not called to testify on the contents of the respective reports. The probative value of the reports will not be given the full weight

as when the doctors had been called and testified. The Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

37. Therefore, 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"

38. 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.

39. 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."

40. 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.

41. 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."

42. 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."

43. 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."

44. 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....."

45. 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.

46. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal.

47. In Marles Vivian & another v AMW [2020] eKLR Machakos HCCA No. 62 of 2016 the Plaintiff sustained mild head injury, deep cut wound left eyebrow, soft tissue injuries to the chest, fracture of left femur and bilateral fractures of tibia/fibula, open and deep cut wound left leg. The High Court awarded him general damages of Kshs 800,000/= in February 2020.

48. In the case of MAW (Suing as The Mother and Next Friend to) IM (Minor) v Solomon Kabiriri Mwangi [2021] eKLR Kakamega HCCA No.76 of 2019, the Plaintiff sustained severe head injuries, a segmented fracture of the left femur, a segmented fracture of the right femur and a fracture right radius and ulna. He was unable to walk or run, and could not use his arm well due to the accident. The High Court awarded him general damages of Kshs 700,000/= in August 2021.

49. With the above guide, this court appreciates that the Respondent suffered fractures both to the femur and the ulna and radius. These are fractures on both upper and lower limb and which makes the injuries more severe than the injuries in the above cited cases. The court has not clogged its eyes on the fact also that the Respondent had eye related injuries and as suggested by Dr. Wambugu in his report of 17.6.2022, the Respondent had residual slurred speech and photophobia which is supported by the injuries pleaded. In the circumstances, I find that the award in general damages of Ksh. 2,000,000/- was inordinately high. The lower court did not indicate the basis for the award of the said amount as no authority was cited. An award of Ksh. 1,500,000/= would in my view be adequate compensation for the Respondent.

50. The court awarded special damages of Ksh. 5,500/=. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their 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."

51. Special damages are thus very specific and constitute 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. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."

52. Regarding proof of loss, while it is true that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances. That is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali

Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

53. On special damages, the pleadings and evidence show that the Respondent pleaded and proved Ksh. 5,550/- which the lower court granted. I uphold it.

54. On future medical expenses, the Respondent submitted for Ksh. 500,000/= as per the medical report of Dr. Cyprianus Okere but the court awarded Ksh. 305,000/=. I understand the court granted Ksh. 305,000/= as average figure for the two proposals in the respective medical reports. In the case of, Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

55. Based on these authorities, I do not think the lower court improperly exercised its discretion in awarding Ksh. 305,000/-. The award is reasonable and supported by the medical reports. In any event, it was not in dispute that the Respondent would require to remove metal implants both on the fractures to his hand and leg. The costs vary also according to the health facilities and I uphold Ksh. 305,000/- as reasonable award under this head of future medical expenses.

Determination

56. In the upshot, I make the following orders: -

    a. The Judgment of the lower court on general damages is set aside and substituted with Ksh. 1,500,000/= as general damages.

    b. The appeal on liability is dismissed.

    c. The appeal on special damages is dismissed.

    d. The appeal on future medical expenses is dismissed.

    e. As the appeal partly succeeds, each party shall bear their own costs in the appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Karanja for the Appellants

Mr. Kulecho for the Respondent

Court Assistant – Jedidah