



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Onyango & 2 others (Civil Appeal E1159 of 2023)
[2025] KEHC 8139 (KLR) (Civ) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8139 (KLR)

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

CIVIL

CIVIL APPEAL E1159 OF 2023

TW OUYA, J

JUNE 12, 2025

BETWEEN

ROSE WANJIRU NJOROGE APPELLANT

AND

DOUDGLAS AOL ONYANGO 1ST RESPONDENT

FAWZI MOHAMED SAID 2ND RESPONDENT

JOSEPH MWANGANGI 3RD RESPONDENT

(An appeal from and against the Ruling of Honorable chief Magistrate Wendy Micheni at Milimani Commercial Courts delivered on 19th October 2023 in MCC number E 4514 of 2020)

JUDGMENT

Background

1. This Appeal emanates from the Ruling of the Chief Magistrate Hon. Wendy Micheni in Milimani Civil Case No. E4514 of 2020 delivered on 19.10.2023. The suit was initiated by the Plaintiff (herein Appellant) arising from a road traffic accident along Dandora Phase 5 Ex Moroto Area in Nairobi, involving motor vehicle registration number KBQ 785A driven by the 1st Respondent and the Appellant (pedestrian) who suffered injuries. The matter proceeded to full trial and the trial court found in favor of the Appellant thereby awarding kshs. 700,000 for general damages and kshs. 400,000 for future medical expenses plus costs of the suit and interest thereof.
2. The appellant being dissatisfied with the outcome filed the instant appeal based on the following grounds:



- a. That the learned magistrate erred in law and fact in failing to appreciate the obligation bestowed upon her by the Provisions of Section 3 A and 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules when dealing with the plaintiff's Application for Review.
 - b. That the Learned Magistrate erred in law and fact by failing to appreciate that, where an error of a substantial point of Law stares one in the face, a clear case of error apparent on the face of the record would be made out.
 - c. That the Learned Magistrate erred in Law and fact by incorrectly construing the Consent Order of the parties recorded on 24.2.2022 in CMCC No E 4525 of 2020 which is a related matter.
 - d. That the Learned Magistrate erred in Law and fact in failing to appreciate the dictate of Section 61 of the *Evidence Act* that in Civil cases, that which is admitted by the parties thereto need not be proved.
3. The appellant prays for orders that:
 - a. That the whole ruling of the Learned Magistrate Wendy K. Michemi (Mrs)CM in Milimani CMCC 4514 of 2020 be set aside and be substituted with an Order allowing the Appellants application for review.
 - b. That the costs of the Appeal be awarded to the Appellants.
 - c. Any such further orders as maybe made by this Honourable Court.
 4. The matter was canvassed by way of written submissions by the rival parties through their counsel. Counsel for the Appellant focused on two issues; that the trial court erred by failing to take into account that the parties had recorded a consent and proceeded to disregard the contents thereto. Secondly, the trial court erred in dismissing the Appellant's notice of motion application for review of the judgement.
 5. Counsel in his submissions gives illustrations of the errors apparent on the face of the record of the judgement delivered on 2nd December 2022. The said errors formed the gist of the Notice of motion application dated 17th August 2023 which the trial court dismissed vide Ruling dated 19th October 2023.
 6. The appellant contends that the consent by the parties was not limited to the issue of liability only. Counsel points out that at page 5 paragraph 2 the court held that there was no proof of special damages; at page 4 paragraph 1 court held that parties recorded a consent on liability in the ratio of 90:10 in favor of the plaintiff against the 1st and 2nd defendants. That the court made an assumption that the consent was limited only to liability whereas it contained other terms which the court failed to take into account.
 7. Counsel also points out in particular, that paragraph c of the consent provided that DR. Bhanji was testify in both matters on the issue of quantum, the plaintiff's documents were to be admitted without calling the makers as they appeared in the plaintiff's list of documents and lastly that the second medical report by doctor P. M. Wambugu dated 28th June 2021 be produced without calling the maker and be included in the submissions.
 8. Based on the above he submits that by virtue of the consent order, the plaintiff's list of documents including medical reports, receipts, hospital cards and medical expenses were all admitted and that they formed the items of special damages claimed by the plaintiff. He submits that as a rule of evidence that which is admitted ought not to be proved.



9. Lastly, the appellant laments that in the application for review, the learned Magistrate as she then was although alluding in her judgement that the Doctor testified that he charged kshs. 30,000 for his court attendance, she did not award the same.
10. Counsel for the Respondents on the other hand argued that the trial magistrate correctly disallowed the application on the basis that the issues raised by the appellant were more to do with a difference in opinion on a point of law rather than an error apparent on the face of the record. He contends that the appellant's dissatisfaction with the trial court's failure to award certain special damages can only be raised as a ground of appeal. He also argues that the award of costs is a discretion of the court and that if a party is aggrieved that the said discretion was wrongly exercised, his recourse lies in an appeal and not review.

Analysis

11. Having carefully considered the grounds of appeal and the parties rival written submissions together with all the authorities cited, I find that the issues arising for my determination revolve around Whether the trial court committed an error on the face of the record, whether the trial court erred in dismissing the Appellant's application for review and lastly whether this appeal is merited.
12. This court notes that the first limb of this appeal was hinged on the impugned ruling of the trial court dated 19th October 2022 dismissing the appellant's application for review of its judgement dated 2nd December 2022. The appellant's sole argument herein was that failure by the trial court to award special damages on items which were presumably adopted by consent was an error on the face of the record. The items in question were special damages claims in the tune of kshs. 20,000 and 30,000 for medical report and doctor's court attendance respectively. This was far from the truth as the issues which have eventually played out in this appeal are matters facts and discretion which could only be addressed through an appeal.
13. In my view, the trial court rightly held that the issues raised by the appellant did not fall under the purview of section 80 of the civil procedure code and order 45 rule 1 of the civil procedure rules but rather a point of appeal. This was stated in the case of *Eco Bank Ltd v David Njoroge Njogu and Another* (2016)eklr where court cited a passage from Commentaries on the Code of civil Procedure by Chitaley & Rao 4th edition volume 3 page 3227.
14. In considering this appeal, I have carefully considered the pleadings of the appellant regarding special damages as per his amended plaint dated 2nd August 2021 and note that they comprised of:
 - a. Medical reportkshs .8,000
 - b. Search fee at Kenya revenue Authority.....kshs. 550
 - c. Medical expenses.....kshs. 25,822”
15. I have also taken into account that the parties recorded a consent which was adopted by court and which stipulated inter alia that liability was apportioned at 90:10 in favor of the plaintiff as against the Defendant, that documents and medical report by DR N H Bhanji be adopted without calling the makers and that the medical report by DR. P M Wambugu be admitted without calling the maker and to be attached to the submissions.
16. In this regard, I have made reference to the record to ascertain the list of documents that were adopted by virtue of the above consent order. I have noted from the plaintiff's list of documents that the applicant attached a medical report by Dr. NH Bhanji and a receipt thereto for kshs. 20,000 dated 6th



August 2020, receipts from Kijabe Mission Hospital for diverse dates on ranging between June and July 2022 all totaling kshs.16,073 and a paid invoice from national transport and safety Authority for kshs. 550. However, there is no receipt relating to the alleged payment of kshs. 30, 000 to Dr. NH Bhanji for court attendance.

17. I have therefore resorted to the proceedings and noted that Dr. NH Bhanji testified on 23rd March 2022 and stated inter alia that:

“...I produced the medical report. I charged ksh. 20,000, for attendance kshs. 30,000. I produce the receipts...”

18. The legal standard for special damages claims was restated by the Court of Appeal in David Bagine v Martin Bundi (*supra*) when it stated that:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.’”

19. Based on the above and without much ado, I find that kshs 20,000 for medical report by Dr. NH Bhanji was pleaded and proved. I also find that out of the kshs. 25,822 pleaded as medical expenses, only kshs. 16,073 meets the required threshold for the award of special damages. However, the claim for kshs. 30,000 for court attendance by Dr. NH Bhanji was not supported by any receipt and it therefore failed to meet the required threshold. It therefore fails. Resultantly, the award for special damages should be a total of kshs.36,073.

20. Having made the above finding, I now proceed to consider the prayers made in this appeal. The appellant sort for orders that:

“..the whole ruling of the Learned Magistrate Wendy K. Michemi CM in Milimani CMCC 4514 of 2020 be set aside and be substituted with an Order allowing the Appellants application for review...

... costs of the Appeal be awarded to the Appellants.

.....Any such further orders as maybe made by this Honourable Court.”

21. This leaves the court to make a finding on the appeal for special damages which have already been analyzed above. This court finds that the appeal on special damages has merit to the extent of items that were pleaded and specifically proved amounting to kshs. 36,073. The appeal therefore partially succeeds.

22. The final orders will therefore read:

a. General damages..... kshs 700,000



- b. Future medical expenses..... kshs. 400,000
- c. Special damages.....kshs.36.073
- d. Cost and interest of the suit
- e. Each party to meet their cost of this appeal

DATED, SIGNED AND DELIVERED VIRTUALLY on 12TH JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Mwangi

For Respondents.....No Appearance

Court Assistant.....Jackline/Brian

