



**Makui v Kimathi & another (Civil Appeal E329 of 2023)
[2025] KEHC 10977 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E329 OF 2023
TW OUYA, J
JULY 24, 2025
(FORMERLY KIAMBU HCCA NO.362 OF 2023)**

BETWEEN

SOLOMON GACHANJA MAKUI APPELLANT

AND

EVANS KIMATHI 1ST RESPONDENT

IRENE MWIGARURI 2ND RESPONDENT

(An appeal from the decision of the Principal Magistrate in SPM Court Ruiru delivered on 14th September 2023 in Ruiru Civil Case No. E172 of 2022)

JUDGMENT

1. The appeal herein was initiated by the Appellant vide memorandum of appeal dated 25th September 2023, seeking for orders that the Appeal be allowed, the judgement in favor of the Respondent be set aside and that the appellant be awarded the costs of the appeal and suit in the subordinate court.
2. The initial suit at the trial court was brought by the appellant against the 1st and 2nd Respondents arising out of a vicious sudden attack upon the plaintiff (Appellant herein) on a public road by dogs owned by the Defendants (Respondents herein) on the 20th February 2021. It was alleged that as a result of the attack, the Appellant sustained multiple soft tissue injuries and a severed lip.
3. While relying on the doctrine of res ipsa loquitur, the Appellant pleaded the following particulars of negligence:
 - i. Failing to take adequate precaution for the plaintiff and/or public safety against his fierce dogs;
 - ii. Failing to keep fierce dogs under restraint;



- iii. Acting recklessly, negligently and/or carelessly and without due care and attention in managing or handling fierce dogs in relation to the plaintiff;
 - iv. Exposing the plaintiff to the risk of attack and injury by the aforesaid dogs;
 - v. Failing to take care of the road users and/or public in respect to the presence of his fierce dogs; and
 - vi. Failing to handle or manage the savage dogs carefully or adequately.
4. The matter proceeded to full trial and upon conclusion, the trial court dismissed the suit with no orders as to costs on the basis that the Appellant had failed to prove the respondents' negligence.
 5. Being dissatisfied with the outcome, the appellant proffered an appeal to this court wherein he faulted the learned trial magistrate for finding his case unmeritorious and dismissing the same; for finding that the appellant had failed to establish that the dogs belonged to the 1st respondent, whereas there was evidence that proved that the dogs belonged to the 1st respondent; and for failing to take into account the various issues raised in the pleadings, witness statements and evidence produced by the appellant.
 6. The appellant also faulted the learned trial magistrate for failing to take into account the evidence adduced on behalf of the appellant; and for failing to administer justice, as her findings are insupportable in law.
 7. The appeal was disposed of by way of written submissions. The appellant's submissions were filed on his behalf by his learned counsel Kiare Joshua & Company Advocates; while those by the respondents were filed on their behalf by their learned counsel Kinini CM Advocate.
 8. In his written submissions, the appellant argued that the trial court failed to take into account the probative value of the appellant's evidence thereby arriving at a wrong decision. He contended that the appellant's evidence was accurate, precise and unwavering even upon cross examination proving a case beyond a balance of probabilities.
 9. He also pointed out that the fact that the 1st respondent was charged with a criminal offence concerning the dogs and the incident went beyond proving the Appellants' ownership and negligence.
 10. The appellant's bone of contention is that the 1st Respondent failed to exercise his duty of care to his neighbors when he let his fierce dogs wander in the estate thereby mauling the appellant who was extensively injured.
 11. It is the appellant's submission that the trial court erred in finding that the appellant failed to prove its case beyond a balance of probabilities thus arriving at a wrong decision in dismissing the Appellant's case.
 12. The respondents on the other hand submitted that the appellant did not adduce evidence to show that the dogs belonged to the respondents or that the said dogs escaped from their property and caused him injuries. They further submitted that the appellant failed to establish proximity, a fundamental element in claims involving strict liability and negligence, considering that he did not adduce evidence to prove that respondents were his neighbors' or that the alleged incident occurred within the respondents' vicinity.
 13. The respondents contended that the appellant failed to prove that they owed him a duty of care, that they breached any such duty or that the breach resulted in the alleged injuries. They further contended that the appellant failed to provide any credible evidence proving the existence of the dogs in question, or that the respondents had control of the dogs; and that without such proof, the chain of causation



is broken, as such, the respondents cannot be held liable for the injuries allegedly suffered by the appellant.

14. It was the respondents' submissions that the appellant's case at the trial court was marred with contradictions, which undermines the credibility of his claims. The respondents in their submissions urged this court to dismiss the instant appeal, as the appellant has failed to establish the element of negligence or strict liability.
15. This being a first appeal to the High Court, it is an appeal on both facts and the law. As such, the duty of this court as a first appellate court is now well settled; it entails re-analyzing, re-considering and re-evaluating the evidence tendered before the trial court and arriving at my own independent conclusion on whether or not the findings of the trial court should stand, although I should bear in mind that unlike the trial court, I neither heard nor saw the witnesses and to make due allowance in that respect.
16. This duty was reiterated in the Court of Appeal the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to reevaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: “On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
17. Having stated that, I have dully considered the grounds of appeal, the parties rival written submissions, together with all the authorities cited, and I find that the issues arising for determination in this appeal are as follows;
 - i. Whether the dogs that attacked the appellant belonged to the respondents;
 - ii. Whether negligence on the part of the respondents was proved
 - iii. If the answer to (a) and (b) above is positive, the amount of special and general damages due to the appellant as compensation.
18. On whether the dogs that attacked the appellant belonged to the respondents, the evidence on record from the appellant is that on the 20th of February, 2021, at about 6:30 am, while on his way to work, he was attacked by the respondents' three dogs; and that he knew that the dogs belonged to the respondent because the people there said so. He also stated that the respondents were his neighbor in Kahawa Sukari.
19. To prove his case, the appellant called one witness, George Odhiambo Osodo, who testified as PW2. George who witnessed the appellant being attacked by dogs, stated that the appellant was his neighbor at Kahawa Sukari, Nyahuru road, 1st Avenue and that he has known him for a period of 10 years.
20. PW2 recalled that on 20th February, 2021, he was coming from work when he saw three dogs at his door step, and that on going closer, he saw the appellant lying on the ground, bleeding profusely on his face, hands and his clothes were torn. He stated that the appellant had been attacked from his gate by the dogs and dragged to his door step. That the dogs were mauling and tearing the appellant's flesh



21. It was his evidence that they managed to chase the dogs away and the appellant was taken to hospital. He stated that he remained at the scene and when police officers from Kahawa Sukari police station came to the scene, they went to the 1st respondent's house, knocked at his gate, and he and his sons came out, tied the dogs and took them back to their residence, before arresting the 1st respondent.
22. PW2 stated in his evidence before court that he knew the appellant and the respondents as they are his neighbors' in Kahawa Sukari. PW2 stated that the 1st respondent knows him and his family and that he recognized the dogs that attacked the appellant, as they belonged to the 1st respondent. He further stated that when the police went to the 1st respondent's house, the 1st respondent and his two children came out with ropes which they used to tie the dogs with.
23. On his part, the 1st respondent in his witness statement dated 28th October, 2022, which he adopted as his evidence in chief, denied the allegations that the appellant was attacked by dogs supposedly under his control, and that it was possible that he was attacked by stray dogs. While being cross examined by the appellant's advocate, the 1st respondent denied the fact that in 2021, he was living in Kahawa Sukari. The respondent has however admitted to the fact that following the attack on the respondent he was arrested by the police and that there is a pending criminal case against him as a result.
24. Looking at the evidence on record, it is apparent that the appellant made out a case that the three dogs that attacked him belonged to the 1st respondent. I say so because, whereas the 1st respondent denied the fact that he was living in Kahawa Sukari in 2021, he did not adduce evidence to prove the fact that he was not living in the said neighborhood at the time.
25. PW2 clearly stated that he knew the 1st respondent as he was his neighbor in Kahawa Sukari, Nyahururu Road, 1st Avenue. He also stated that the 1st respondent knew him and his family and also that he recognized the three dogs that attacked the appellant as they belonged to the 1st respondent who was his neighbor at the time. The 1st respondent on his part did not deny knowing PW2, who stated clearly that the 1st respondent was his neighbor, he also did not adduce evidence to prove that at the time that the appellant was attacked, he was not living in Kahawa Sukari.
26. Other than denying that he resided in Kahawa Sukari at the said time, the appellant did not adduce any evidence to prove this fact. Furthermore, the appellant has not explained why he would be arrested by the police and a criminal case preferred against him, if indeed he was not living at Kahawa Sukari at the said time.
27. The fact that he was arrested and criminal charges preferred against him, is an indication that he not only lived in Kahwa Sukari at the time that the appellant was attacked, but that the police had reasonable grounds to believe that the dogs that attacked the appellant belonged to him. Rarely would the police randomly arrest and prefer charges against a person, if they did not suspect the said person of committing a crime.
28. Aside from this, PW2, who was at the scene when the police officers from Kahawa Sukari police station visited the scene, was very clear and consistent in his evidence that after the police came, they went to the 1st respondent's house, and the 1st respondent and his two children came out with a rope which they used to tie the three dogs that attacked the appellant and they took the dogs back to his house.
29. I have noted that the 1st respondent did not deny or adduce evidence to rebut PW2's assertions that he and his two children tied the dogs with a rope and returned with the said dogs back in his home. The 1st respondent also did not deny the fact that he knew PW2. The fact that the 1st respondent tied the dogs and returned with them back to his compound, is a clear indication that the said dogs belonged to him.



30. Looking at the evidence on record, I am of the view that the appellant proved on a balance of probabilities that the three dogs that attacked him belonged to the 1st respondent. Other than the 1st respondent denying that the dogs that attacked the appellant belonged to him or that he lived in Kahwa Sukari at the time that the alleged attack occurred, the 1st respondent did not adduce any evidence to back up his claims. It is therefore clear that his claims that he did not own the dogs or that he was not living at Kahawa Sukari at the time of the attack were mere denials.
31. As regards the 2nd respondent, the appellant did not adduce any evidence linking the said dogs to her, as such his claims against her fails.
32. On whether the appellant proved negligence on the part of the 1st respondent; having found evidence linking the three dogs that attacked the appellant to the 1st respondent, it is clear that the 1st respondent, owed a duty of care to not only the appellant but also to all the members of his community to ensure that the said dogs are kept in a safe place where they would not attack and injure anyone.
33. From the evidence on record, it is clear that the three dogs that attacked the appellant belonged to the 1st respondent, it is also clear that at the time the appellant was being attacked, the said dogs had escaped from the 1st respondent's compound and they were roaming around in public, and it is also evident that the said dogs attacked the appellant causing him personal injuries. It is therefore clear that the appellant proved negligence on the part of 1st respondent.
34. Having found the 1st respondent liable for the injuries sustained by the appellant. The next issue for determination is the amount of damages the appellant is entitled to.
35. From the plaint dated 5th April, 2022, the appellant stated that as a result of the attack, he sustained multiple soft tissue injuries and a severed lower lip. These injuries were supported by the Medical report from Aga Khan Hospital dated 24th February, 2021. As per the said medical report, the appellant was admitted to the said hospital on 20th February 2021, and he sustained multiple lacerations and puncture wounds on his upper and lower limbs.
36. In this case the learned trial magistrate stated that had he found the 1st respondent liable, he would have awarded the appellant damages to the tune of Kshs. 200,000.
37. On my part, I find the following case relevant: G4s Security Services (K) Ltd versus Fred Wanyonyi Simiyu Mutinyo & another [2018] eKLR; In this case, which was decided seven (7) years ago, the high court on appeal upheld the award of Kshs. 150,000 by the trial court for the soft tissue injuries that the 1st respondent sustained after being bit by a dog.
38. Considering the fact that the appellant's sustained soft tissue injuries as well as a severed lower lip as a result of the attack, and considering also the indices of inflation and the purchasing power of the Kenyan shilling, I am of the view that an award of Kshs. 200,000 as general damages for pain and suffering would be sufficient compensation for the injuries sustained by the appellant.
39. As regards special damages, the appellant in his plaint pleaded for special damages of Kshs. 1, 538, 468. Being medical report of Kshs. 3,500 and Medical expenses of Kshs. 1, 538, 468.
40. It is trite that special damages must not only be specifically pleaded, but they must be strictly proved. This principle was reiterated by the Court of Appeal in Hahn versus Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, 717; as follows: "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."



41. In this case, whereas the appellant claimed special damages amounting to Kshs.1,538, 468, he only produced receipts for medical expenses amounting to Kshs. 15, 037. I will therefore award the appellant Kshs. 15, 037 for special damages, as this is the amount that has been strictly proved.
42. Flowing from the foregoing, I find that this appeal has merit and should be allowed. The same is allowed on the following terms:
- i. Liability- 100% against the 1st Respondent
 - ii. General damages.....Kshs. 200,000;
 - iii. Special damages.....Kshs. 15, 037
- Total- Kshs. 215, 037.
43. The appellant shall also have costs of this appeal plus the costs of the suit at the lower court.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 24TH JULY, 2025.

HON. T. W. OUYA

JUDGE

