



REPUBLIC OF KENYA



**Mramba & another v Gikunda (Civil Appeal E173 of 2023)
[2025] KEHC 12903 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E173 OF 2023
M THANDE, J
SEPTEMBER 19, 2025**

BETWEEN

GRACE MRAMBA 1ST APPELLANT

TOM KOMOLA DAWA 2ND APPELLANT

AND

CAROLYNE GIKUNDA RESPONDENT

JUDGMENT

1. The Appellants challenge the decision of the trial court in respect of a suit instituted by the Respondent against them, claiming general damages for loss of business and special damages /repair costs amounting to Kshs. 783,000/=, costs and interest.
2. In her plaint dated 5.11.21, the Respondent averred that on 19.6.21, the 1st Appellant negligently drove the 2nd Appellant's vehicle registration number KCH 567 along the Malindi/Mombasa Road at Mida area and hit her vehicle registration number KCR 190N which was transporting sand. As a result of the collision, the Respondent's vehicle was intensively damaged and she incurred irreparable loss and damage to repair the same.
3. Following a hearing, the trial Magistrate entered judgment in favour of the Respondent against the Appellants as follows:
 - a. Liability 100% jointly and severally
 - b. General damages Kshs. 330,000/=
 - c. Special damages Kshs. 783,000/=
 - Total Kshs. 1,113,000/=
 - d. Costs of the suit and interest.



4. The Appellants being aggrieved by the award on quantum of damages, preferred the Appeal herein and listed the following grounds of appeal:
 1. THAT the Learned Trial Magistrate erred in law and in fact in awarding the sum for loss of user/loss of business in the absence of the evidence that met the test of strict provenance.
 2. That the Learned Trial Magistrate erred in law and in fact in failing to critically analyse the documents filed by the Plaintiff as evidence of the outlay spent in motor vehicle repair.
 3. That the Learned Trial Magistrate erred in law and in fact in awarding a global sum of loss of user claimed under loss of business and general damages, which claim was not founded on any evidence, technical or otherwise.
 4. That the Learned Trial Magistrate erred in law and in fact in finding that the invoice filed by the claimant was sufficient proof of the sum of Kshs. 783,000.00/= as costs of motor vehicle repair.
 5. That the Learned Trial Magistrate erred in law and fact and abdicated her judicial functions and duty by failing to critically analyse and consider the documents filed by the claimant and the respondent and thus arrived at the factually and legally untenable finding on the loss of user/loss of business.
 6. That the Learned Trial Magistrate erred in law and in fact in failing to consider, analyse and apply the facets applicable a claim for loss of user and general awards thus arrived at the erroneous finding.
5. The Appellants prayed that the judgment of 24.11.23 be set aside, varied and/or reviewed. They also prayed for dismissal of the claim for loss of user/loss of business as awarded under general damages of want of proof and/or in the alternative re-assess the award for loss of user in consonance with the evidence at hand. Further that costs be borne by the Respondent.
6. This being a first appeal, the Court has reconsidered and re-evaluated the evidence with a view to drawing its own conclusion. The Court has however made due allowance with respect to the fact that it neither saw nor heard the witnesses, in line with the principle set out in *Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123* by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*).
7. The Appellants submitted that the Respondent did not prove the claim for loss of business which is a claim for special damages. Further that the trial court erred in awarding general damages for loss of user/ business. The Appellants further contended that the assessment report indicated that repairs would take 12 days and the Respondent did not adduce any evidence as to why repairs were not undertaken within the period. As such, it was argued that the claim was speculative. The Appellants urged that



since no receipts were produced to support the vehicle lease agreement, the claim ought to have been dismissed.

8. For the Respondent, it was submitted that from the assessment report, receipts and the assessor's testimony, repair and spare parts for the vehicle cost Kshs. 601,000/=. As such, the Respondent was entitled to the said sum. It was further submitted that the Respondent proved her case on a balance of probabilities and the awards in the judgment were just and proper.
9. From their submissions, it would appear that the only issue the Appellants are unhappy with, is the award of Kshs. 330,000/= in general damages for loss of user of the vehicle. The Court is called upon to determine whether the trial Magistrate erred in awarding the sum she did.
10. There is a long line of authorities that say that a claim for loss of user is a special damage claim that must be specifically pleaded and proved.
11. In *David Bagine V Martin Bundi* [1997] KECA 54 (KLR), the Court of Appeal faulted the superior court for assessing loss of user as general damages. The Court stated:

The learned judge proceeded to assess "loss of user" damages as general damages although the same were claimed as special damages "to be proved at the hearing of the suit". In doing so the learned judge erred.

We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved.

12. A similar view was expressed by the Court of Appeal in *Macharia Waiguru v Muranga Municipal Council & Another* [2014] eKLR as follows:

22. On the issue relating to the claim of Ksh. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended plaint indicates that this is a claim for Ksh.300,000/= and loss of user which is a claim for special damages. In the case of *Siree Limited v Lake Turkana El Molo Lodges* (2002) 2E.A. 521 the Court of Appeal stated: "This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages".

13. On her part, Ngugi, J. (as she then was) in *Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa* [2018] KEHC 5672 (KLR), considered a claim for loss of user and stated:

33. What emerges from these decisions is that the correct position in law in this jurisdiction is that a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were, from nowhere and uses it as a basis for calculating the claim.



14. Flowing from the cited decisions, the correct legal position is that a claim for loss of user is a special damage claim that must be specifically pleaded and proved.
15. In the plaint before the lower court, the Respondent pleaded general damages for loss of business. The trial Magistrate, stated in her judgment:

Further, loss of user is normally a specific claim which the defendant thus states that the same is not awardable as it was not specifically pleaded and proved. Indeed this ought to be the case, however the plaintiff did plead albeit as a general damage and then went ahead to prove by way of an agreement for hire that she would get Kshs. 18,000/= per day.
16. The trial Magistrate proceeded to award the sum of Kshs. 330,000/= for loss of user which she said she found to be reasonable.
17. To begin with, the trial Magistrate did not indicate how she arrived at the amount awarded. Further, the exhibited agreement for hire that she referred to was for the period from 16.11.2020 to 15.12.2020, yet the accident in question took place 6 months later on 19.6.21. It would appear that the trial Magistrate picked a figure as Ngugi, J. stated, as it were, from nowhere and used it as a basis for calculating the claim.
18. Additionally, and even more critical is that the claim was not specifically pleaded or proved. The law is that a claim for loss of user, is one that can be calculated. As such, it cannot be general damages but special damages which must be specifically pleaded and proved. As stated by the Court of Appeal, damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages. (See Siree Limited "v Lake Turkana El Molo Lodges (2002) 2E.A. 521).
19. By awarding general damages for loss user, the trial Magistrate clearly misdirected herself.
20. In the end and in view of the foregoing, I find that the Appeal partially succeeds. The award of Kshs. 330,000/= as general damages is hereby set aside. All other awards remain the same. Each party shall bear own costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025

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M. THANDE

JUDGE

