Mwaura & another v Njoroge (Civil Appeal 226 of 2023)
[2025] KEHC 12684 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 226 OF 2023

FN MUCHEMI, J

SEPTEMBER 9, 2025

BETWEEN

JOHN MWANGI MWAURA ..... 1ST APPELLANT

DELMONTE KENYA LIMITED ..... 2ND APPELLANT

AND

LAWRENCE MWAURA NJOROGE ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M. W. Wanjala (PM) delivered on 18th May 2023 in Thika CMCC No. 477 of 2017)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 477 of 2017 in a claim that arose from a motor vehicle accident whereby the trial court entered judgment on liability in favour of the respondent on full liability against the appellants. The court awarded the respondent general damages for pain and suffering of Kshs. 1,000,000/- and special damages of Kshs. 886,196/- plus costs and interest.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 6 grounds of appeal summarized herein as follows:-

    a. The learned trial magistrate erred in law and in fact in awarding the respondent special damages in the sum of Kshs. 756,196.64 which had been borne by NHIF, a fact acknowledged by the respondent.

    b. The learned trial magistrate misdirected himself when he held that Section 43 of the NHIF Act does not exclude the respondent from recovering the sum paid by NHIF on its behalf in the absence of express and written authority from NHIF to recover on its behalf.

c. The learned trial magistrate erred in law and in fact by rewarding the respondent special damages in the sum of Kshs. 50,000/- as medical expenses incurred under pharmacy yet the only receipt produced to support the claim was for Kshs. 1,060/- from Megalife Medical Centre Pharmacy.

3. Directions were issued that parties put in written submissions and the record shows that the appellants complied by filing their submissions on 24th April 2025. The respondent on the other hand had not filed his submissions by the time of writing this judgment.

The Appellants' Submissions

4. The appellants submit that during cross examination, the respondent admitted that all his medical expenses save for one made to German Medical Centre was covered by NHIF. He further admitted that the National Health Insurance Fund had not sent him to collect the monies on its behalf. The appellants argue that Section 43 of the NHIF Act prohibits a contributor to the fund from obtaining any benefit in respect of any compensation given for treatment if the payment was made by NHIF. The NHIF Board is the only one capable of recovering such funds. The appellants argue that the respondent did not have express and written authority from the NHIF Board to recover the funds on its behalf. Furthermore, the respondent admitted that he was not acting for NHIF neither was he sent to collect the funds on their behalf. Thus, the learned magistrate misdirected himself by stating that Section 43 of the Act does not preclude the respondent from recovering funds on behalf of NHIF. Thus awarding Kshs. 756,196.64 to the respondent as special damages amounted to unjust enrichment. To support their contentions, the appellants refer to the cases of National Bank of Kenya vs Samuel Nguru Mutonya [2019] KECA 404 (KLR); Chase International Investment Corporation and Another vs Laxman Keshra & 3 Others [1978] KECA 7 (KLR) and Mwangi Munyiri & Another vs Paul Wachira Njuguna [2020] KEHC 4287 (KLR).

5. The appellants argue that the learned magistrate erred in awarding the respondent special damages amounting to Kshs. 50,000/- as medical expenses incurred under pharmacy yet the only receipt availed amounted to Kshs. 1,060/- from Megalife Medical Centre Pharmacy. The appellants further rely on the cases of Mariam Maghema Ali vs Nyambu t/a Sisera Store (Civil Appeal 5 of 1990) [1990] KECA 54 (KLR) (24 July 1990) (Judgment); John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] KECA 73 (KLR) and Telkom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] KECA 600 (KLR) and submit that special damages must not only be pleaded but also strictly proven. Further, the respondent did not prove the amount of Kshs. 48,940/- and neither did the respondent give an explanation why the same was not produced.

Issues for determination

6. The main issues for determination are:-

a. Whether the respondent ought to be awarded special damages of Kshs. 756,196.64 which was paid by NHIF.

b. Whether the special damages were specifically pleaded and proven.

The Law

7. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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 into account of particular circumstances or probabilities materially to estimate the evidence."

8. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> 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.

9. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

   a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

   b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

   c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the respondent ought to be awarded special damages of Kshs. 756,196.64 which was paid by NHIF.

10. The appellants argue that Section 43 of the NHIF Act does not entitle the respondent to seek compensation against hospital bills which were settled by NHIF.

11. Section 43 of the National Health Insurance Fund Act provides:-

> Where a contributor to the Fund is entitled, whether under the *Work Injury Benefits Act* (Cap 236) or otherwise, to recover compensation or damages in respect of any injury or illness, he shall not, to the extent to which such compensation or damages are recoverable, be entitled to any benefits in respect of any treatment undergone by him as a result of such injury or illness, and any benefits paid in respect of such treatment, shall to the extent to which such compensation or damages have been recovered, be repaid to the Board;
>
> Provided that the payment of any benefits as aforesaid shall not preclude the right of the contributor to recover any compensation or damages.

12. This position has been enunciated in John Mwangi Munyiri & Another vs Paul Wachira Njuguna [2020] eKLR, where the court held:-

> Whether the respondent was entitled to the special damages of Kshs. 111,255/-. In the plaint, the respondent claimed special damages of Kshs. 111,455/- and further medical expenses of Kshs. 12,215/-. I agree with counsels submission that the respondent having admitted that Kshs. 107,800/- which he incurred in medical expenses for treatment and admission, were paid by NHIF, just like any monies paid by any insurance, the respondent could not be compensated for it again. Section 43 of NHIF Act provides as follows.....
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> It follows that if any sums paid by the Fund to the hospital were again paid to the respondent as compensation, then it is recoverable by the Fund. The respondent was therefore not entitled to claim the Kshs. 107,800/- which had been paid to the hospital by NHIF. It would amount to unjust enrichment to claim it.

13. This position was countered differently in the case of Leli Chaka Ndoro vs Maree Ahmed & SM Lardhib [2017] eKLR the court cited the case of George White vs Jubitz Corporation (2009) Supreme Court of the State of Oregon USA where it was stated thus:-

> The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor.
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> The common law collateral source rule does not concern itself with whether a plaintiff actually obtains a double recovery. The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned or must repay those third party benefit.

14. It is not disputed that the respondent was a civil servant and that part of his medical expenses were paid by NHIF. Courts are not unanimous on the decision whether one can recover costs paid by NHIF. It is important to note that where an insurance company has already compensated their client, the said client can only go to court to claim the said compensation from the tortfeasor with the consent and authority of the insurance company. Any material damages awarded will be for the benefit of the insurance company but not for the plaintiff who has instituted the suit. The insurance company cannot use its name to claim from the tortfeasor or from a 3rd party. It must be clear in the plaint that the case has been filed by the party concerned under the doctrine of subrogation. Such a party cannot enjoy the damages awarded for the reason that he has already been compensated. Section 43 of the National Hospital Insurance Fund (NHIF) has provisions that place its Board as the beneficiary of such funds claimed from a tortfeasor and awarded by the court.

15. In this appeal, it is noted that the respondent claimed damages from the appellant in respect of hospital bills already paid for him by NHIF. In his plaint and in his evidence, there was no indication that the respondent had obtained consent or authority to file the case for damages from the NHIF. In awarding, the respondent the damages Ksh.756,196.64 the court did not indicate how the funds would reach the NHIF Board. As such, the respondent who got the benefit of having his hospital bills South B Hospital, Kenyatta National Hospital and Ruai Family Hospital should not be paid the said special

damages for his own consumption. This would result to unjust enrichment which is not allowed by Section 43 of the NHIF Act.

> Where a contributor to the Fund is entitled, whether under the *Work Injury Benefits Act* (Cap 236) or otherwise, to recover compensation or damages in respect of any injury or illness, he shall not, to the extent to which such compensation or damages are recoverable, be entitled to any benefits in respect of any treatment undergone by him as a result of such injury or illness, and any benefits paid in respect of such treatment, shall to the extent to which such compensation or damages have been recovered, be repaid to the Board;
>
> Provided that the payment of any benefits as aforesaid shall not preclude the right of the contributor to recover any compensation or damages.

16. I, therefore, find that the magistrate erred in awarding the special damages to the respondent in a case where the insurer had not granted its consent or authority. The insurer can still claim what they paid to the respondent and through him provided the law and procedure are complied with.

Whether the special damages were specifically pleaded and proven.

17. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

> Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not 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.

18. On perusal of the respondent's Amended Plaint dated 20th November 2019, the respondent pleaded as special damages Kshs. 50,000/- for pharmacy and the trial court awarded the same. On perusal of the record, there is a receipt from Megalife Medical Centre for Kshs.1060/-, receipt dated 28/9/2016 from Mater Hospital for Kshs. 1,020/- and receipt dated 25/7/2016 from Mater Hospital for Kshs.2,500/- all from pharmacy which amount to Kshs. 4,580/-. Thus, the total sum of Kshs.4,580/- for pharmacy expenses was proved.

19. The judgment of the magistrate for special damages of Ksh.756,196.64 and that of Ksh.50,000/- awarded by the court below are hereby set aside. This court enters judgment for the respondent for expenses of Ksh4,580/= pleaded and proven.

20. The award of Ksh.1,000,000/= for general damages remains undisturbed.

21. This appeal is partly successful and is hereby allowed in terms of the foregoing orders.

22. Each party shall meet their own costs of this appeal.

23. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9th DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE