Kosgei v Mutisya (Civil Appeal 4 of 2023) [2024] KEHC 156 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL 4 OF 2023

JRA WANANDA, J

JANUARY 19, 2024

(FORMERLY ELDORET HIGH COURT CIVIL APPEAL NO. 143 OF 2019)

BETWEEN

SAMWEL KOSGEI ..... APPELLANT

AND

JOSEPHINE MUTINDA MUTISYA ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered on 4/10/2019 in Iten Principal Magistrate's Court Civil Case No. 6 of 2018 in which the Respondent, a 43 years old female, sought compensation for injuries allegedly suffered by her as a result of a road accident. In the suit, the Appellant was the Defendant while the Respondent was the Plaintiff. The Appeal is against the trial Court's findings on both liability and quantum.

2. The background of the matter is that by the Plaint filed on 20/04/2018 through Messrs Mogire Nyamwaya & Co. Advocates in the said suit, the Respondent sued the Appellant and pleaded that the Appellant was the owner of the motor vehicle registration number KBQ 195M Toyota Matatu, that on 12/11/2016 the Respondent was travelling as a lawful passenger aboard the said vehicle along Chesot - Chagor Road at the Mureto area when the same was so negligently, carelessly and/or recklessly driven at a high speed that it lost control and rolled. It was alleged that as a result of the accident, the Respondent suffered injuries for which she held the Appellant liable. The injuries suffered were stated to be multiple blunt injuries to the chest, back and right knee, fracture of both scapula and degloving injury to the right elbow/forearm. It was also pleaded that the Respondent incurred medical expenses of Kshs 6,000/-. The Respondent therefore prayed for general damages, special damages, costs of the suit and interest.

3. The Appellant filed his Statement of Defence on 11/05/2018 in person. In the defence, he denied ownership of the alleged motor vehicle. Occurrence of the accident was also denied as was liability

thereof. Without prejudice and in the alternative, it was averred that the accident was wholly caused or substantially contributed to by the negligence of the Respondent.

4. The Appellant acted in person throughout the suit and it is only at the stage of this Appeal that he was represented by an Advocate.

5. The suit then proceeded to full trial wherein each side called 2 witnesses.

Respondent's evidence before the trial Court

6. PW1 was the Respondent. She adopted her witness statement as her evidence-in-chief and added that she boarded the motor vehicle from Eldoret to Tot but that they were involved in an accident, that she was admitted in hospital for 8 days for which she paid Kshs 30,190/-, she was discharged but later went for further treatment and paid Kshs 4,100/-, that she reported the accident at Chesoi Police Station and was issued with a Police Abstract, she was also given a P3 Form which was filled, she was later examined by Dr. Sokobe who prepared a Medical Report for which she paid Kshs 6,000/-, and that a demand letter was sent to the Appellant.

7. PW2 was a traffic officer Police Corporal Rodgers Kimagang stationed at the Chesoi Patrol Base. He stated that he had an extract from the Occurrence Book (OB) confirming that the accident in respect to the motor vehicle KBQ 195M was reported, that the Respondent was one of the victims, that on 13/11/2016 the owner of the motor vehicle, one Sammy Kosgei also reported the accident that had occurred on 12/11/2016, the Police Abstract indicates the owner of the motor vehicle as Sammy Kosgei and the driver as Micah Kimalel. In cross-examination, he reiterated that the name given in the accident Report was Sammy Kosgei, he was reading from the OB, and that the Appellant was issued with a Police Abstract and that "Sammy" is short form of "Samwel".

Appellant's evidence before the trial Court

8. DW1 was the Appellant, Samuel Kiprop Kosgei. He stated that he has never owned the alleged motor vehicle, that he never went to Chesoi Police Base, that he used to own two public service motor vehicles plying the Eldoret-Endoo route from 2008-2014, the vehicles were KBE 113U Nissan Matatu and KAW 190W 29-seater Minibus, he stopped the business and sold off the vehicles due to his busy work schedule. In cross-examination, he reiterated that he has never owned the motor vehicle KBQ 195M, he does not know Micah Kimaling the alleged driver thereof, he has never gone to Chesoi Police Base. He pointed out that the telephone number indicated in the Police Abstract has some slight differences in the digits from his correct number but conceded that if the digits were re-arranged, they would amount to his correct number, he never had an insurance policy with Invesco Insurance and that he is not aware of the accident.

9. DW2 was one Moses Mwangi. He stated that he has known the Appellant since the year 2008 and that DW2 used to be his employer, that he used to be the manager of the Appellant's matatu motor vehicles KAW and KBE plying the Eldoret-Marakwet Road, that KAW was sold in 2013 and KBE in 2014, he worked for the Appellant from 2008-2014 during which time the Appellant never owned the motor vehicle alleged herein nor did he own any other motor vehicle.

Trial Court's Judgment

10. After the hearing, as aforesaid the trial Court delivered its Judgment on 4/10/2019 in favour of the Respondent. Liability was found at 100% against the Appellant and damages were awarded in the following terms:

General damages	Kshs 900,000/-
Special damages	Kshs 45,715/-
Total	Kshs 945,715/-
iii)	Costs and interest

Appeal

11. Aggrieved by the trial Court's said decision, the Appellant filed this Appeal on 17/10/2019. In an unnecessarily lengthy and verbose Memorandum of Appeal which looked closely is replete with repetitions and needless duplicity, the following 11 grounds were cited:

    i. That the learned trial Magistrate erred in law and fact in awarding damages which were inordinately excessive in the circumstances

    ii. That the learned trial Magistrate erred in law and fact in failing to dismiss the Respondent's claim which had not been proved by the Respondent on a balance of probabilities as required by law and particularly in failing to take into account the submission by the Appellant's evidence and Submission in arriving at his decision.

    iii. That the Learned trial Magistrate erred in law and fact in apportioning liability at the ratio of 100% in favour of the Respondent against the weight of the evidence and in failing to into account the submissions by the Appellant on the issue of liability.

    iv. That the Learned trial Magistrate erred in applying the wrong principles of law in arriving at his judgment and failing to find that the defence case indeed raised satisfactory answer to the Respondent's claim.

    v. That the learned trial Magistrate erred in law and fact in considering issues that were neither raised, pleaded nor submitted upon by the Respondent while making the awards both on liability or quantum.

    vi. That the learned trial Magistrate erred in law and in fact in awarding to the Respondent as against the Appellant general damages in the sum of Kshs 945,715 which amount was manifestly high and excessive and constituted an erroneous estimate of the damages suffered and in misapprehending the nature and extent of the Respondent's injuries.

    vii. That the Learned trial Magistrate erred in law and fact in failing to find that the evidence of the Respondent was incredible, contradictory and inconsistent particularly inconsistencies of medical reports on the part of the body alleged to have been injured by the Respondent.

    viii. That the Learned trial Magistrate erred in law and fact in finding that medical chits had been produced by the Respondent while no medical chits had been produced in Court as evidence whatsoever.

    ix. That the Learned trial Magistrate erred in law and fact in failing to find that the Respondent had not proved negligence against the Appellant to warrant compensation by the Appellant.

    x. That the Learned trial Magistrate erred in law and fact in awarding the Respondent costs while the Respondent had substantially failed to prove her case.

xi. That the Learned trial Magistrate erred in law and fact in showing open biasness against the Appellant.

12. Pursuant to directions given, the Application was canvassed by way of written submissions. The Appellant filed his Submissions on 20/09/2023 through Messrs Mukabane & Kagunza Advocates while the Respondent filed on 26/09/2023 through the said Messrs Mogire Nyamwaya & Co. Advocates.

Appellant's Submissions

13. On the issue of liability, the Appellant's Counsel submitted that no motor vehicle search was produced in Court to prove that the alleged motor vehicle belonged to the Appellant. He submitted further that Section 8 of the *Traffic Act* provided that the person in whose name a motor vehicle is registered shall, unless the contrary is proved, be deemed to be the owner, that the Appellant denied ownership, the burden of proving that the vehicle belonged to the Appellant lay on the Respondent, the Appellant denied any knowledge of the driver and the phone number indicated in the Police Abstract, no evidence to the contrary was given by the Respondent, no evidence was given to prove that Sammy Kosgei and Samuel Kosgei are one and the same person, the Occurrence Book (OB) did not bear the name of the Appellant, it is therefore suspicious how the name of the Appellant ended up being entered in the Police Abstract, and that the Appellant denied ever taking any insurance with Invesco Insurance Co. According to Counsel, all this evidence was ignored by the trial Court.

14. On quantum, The Respondents' Counsel submitted that the trial Court awarded the Respondent Kshs 900,000/-, that the Respondent sustained blunt injuries, fracture of both scapula and degloving injury to the right elbow/forearm, the Respondent admitted that she had fully healed, Dr. Sokobe's Medical Report did not assess any level of disability on the part of the Respondent, and that the award was inordinately too high and reflects an erroneous evaluation of facts and authorities applicable to similar injuries. Counsel further submitted that the award of Kshs 45,715/- as Special damages was also erroneous given that the Special damages that was pleaded was only Kshs 6,000/-.

Respondents' Submissions

15. Regarding ownership of the alleged motor vehicle, Counsel submitted that the Police Abstract shows the owner of the motor vehicle as Samwel Kosgei, and that the Appellant failed to prove his claim. On quantum, Counsel submitted that the award of Kshs 900,000/- was reasonable.

Analysis & determination

16. The duty of an appellate Court was set out in Abok James Odera t/a A.J Odera & Associates v 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 re-evaluate, re-assess and re-analyze 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."

17. It is clear that on liability, the Appellant challenges the alleged ownership of the subject motor vehicle. The trial Court's findings on the manner in which the accident occurred has not been challenged. On quantum, the Appellant challenges the award of special damages on the ground that the amount awarded was much less than what was pleaded and on general damages, the ground alleged is that the amount awarded is inordinately high and excessive.

18. As aforesaid, the 11-ground Memorandum is unnecessarily too lengthy and verbose since, in my view, all the 11 grounds can be easily condensed into only 3 issues for determination, as follows;

    i. Whether the Appellant was proved to be the owner of the motor vehicle registration number KBQ 195M as at the time of the accident.

    ii. Whether the trial Court's award of Kshs 900,000/- as general damages was inordinately high and thus excessive.

    iii. Whether the amount awarded as Special damages reflected the amount pleaded in the Plaint and proved.

19. I now proceed to analyse and determine the said issues.

i.Whether the Appellant was proved to be the owner of the motor vehicle registration number KBQ 195M as at the time of the accident.

20. Regarding establishment of the identity of the owner of a motor vehicle, Section 8 of the *Traffic Act*, Cap 403, provide as follows:

> " the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

21. Section 8 therefore sets out the general rule with regard to ownership of a motor vehicle but also recognizes that there may be circumstances where such ownership may not reflect the true position. Registration of a person is therefore only prima facie evidence of ownership since the "contrary" may be proved. As such, Section 8 contemplates that there may be actual, possessory or beneficial ownership of a motor vehicle which can exist independent of registration.

22. In regard to the above, in the case of Securicor Kenya Limited v. Kyumba Holdings Limited [2005] 1KLR 748, the Court of Appeal stated as follows:

> " It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle was the appellant."

23. The alleged accident the subject of this Appeal is stated to have occurred on 12/11/2016. As aforesaid, in his Statement of Defence, the Appellant expressly denied ownership of the said motor vehicle registration number KBQ 195M. In his Witness Statement which he later adopted as his evidence-in-chief, he reiterated this denial. A second Witness Statement made by one Moses Mwangi who later testified as DW2 was also filed. This second Statement too reiterated the denial of ownership of the motor vehicle by the Appellant. The Respondent was therefore put on early notice that the matter of ownership would be an issue to be canvassed at the trial.

24. Both in his oral testimony and in cross-examination, the Appellant maintained that he has never owned the said motor vehicle. He further denied any knowledge of one Micah Kimaling the alleged driver of the vehicle and also denied any knowledge of the accident. He also denied that he had ever gone to Chesoi Police Base in connection with the alleged accident. Further, he denied that he had ever taken any insurance policy with Invesco Insurance for the vehicle. According to the Appellant, he used to own two public service motor vehicles plying the Eldoret-Endoo route from 2008-2014, that the

vehicles were - KBE 113U Nissan Matatu and KAW 190W 29 seater Minibus - but that he subsequently stopped the matatu business due to his busy work schedule and sold off the vehicles.

25. DW2, the said Moses Mwangi, testified that he has known the Appellant since the year 2008 when the Appellant employed him as the manager of the Appellant's matatu business comprising of two vehicles - KAW and KBE - plying the Eldoret-Marakwet Road. He added that KAW was sold in 2013 and KBE in 2014. He further testified that he worked for the Appellant from the year 2008 to 2014 and that during all this time, the Appellant never owned the motor vehicle KBQ 195M the subject of this matter nor did the Appellant own any other motor vehicle.

26. A look at the record reveals that despite being put on early notice that ownership would be an issue for determination, the Respondent's legal team made no effort to address this issue. I would have expected the Respondent to quickly carry out a search on ownership of the motor vehicle and present the search Report from the National Transport & Safety Authority (NTSA). If the Report did not bear the name of the Appellant as the registered owner, still under Section 8 of the *Traffic Act*, the Respondent's legal team could have carried out some inquiries to ascertain whether the Appellant was nevertheless the beneficial owner so as to prove "the contrary". In the alternative, the Respondent could have joined the registered owner as a co-Defendant. In not addressing this issue before the trial Court, my verdict is that the Respondent's legal team inexplicably chose to handle the matter too casually.

27. The *Evidence Act*, Cap 80 is clear on the aspect of burden of proof. In this case, it lay squarely on the Respondent. Sections 107 and 108 of the *Evidence Act* provide as follows:

> Section 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> Section 108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

28. Being the Plaintiff, the onus of proving her case was primarily on the Respondent. It is her who alleged that the Appellant was the owner of the subject vehicle. Applying the provisions of Section 108 of the *Evidence Act* above, it is therefore her who would fail if no evidence was presented to prove the issue of ownership. Regrettably, despite being given sufficient notice by the contents of the Statement of Defence and ample opportunity to rebut the Appellant's denial of ownership, the Respondent's legal team inexplicably seems to have ignored or overlooked this basic principle of law.

29. I am aware that PW2, the traffic officer from Chesoi Patrol Base testified that on 13/11/2016 the alleged owner of the motor vehicle, one "Sammy Kosgei" reported the accident that occurred on 12/11/2016 and that the Police Abstract also indicates the owner as "Sammy Kosgei". The material omission in PW2's testimony is the failure on his part to confirm to the trial Court whether the said "Sammy Kosgei" who reported the accident on 13/11/2016 at the Police Patrol Base and the Appellant herein "Samwel Kosgei" is one and the same person. PW2 did not disclose whether he personally met the alleged "Sammy Kosgei" when the latter went to report the accident and therefore whether he could positively identify him. Since PW2 did not also disclose whether it is him who personally recorded the report made by the said "Sammy Kosgei" or whether he was present at the time when the report was made or whether he witnessed the report being made, PW2's assertion that the name "Sammy" is the short form of "Samwel" is mere speculation which cannot form the foundation for linking the Appellant to the motor vehicle.

30. Further, when, in cross-examination, PW2 was asked how the name of the alleged "Sammy Kosgei" found its way into the Police Abstract, he responded that the name was the one entered in the Police Occurrence Book (OB) which he was reading. However, a look at the copy of the OB extract which PW2 produced in evidence reveals that he may not have been candid in giving this answer. This is because the OB does not anywhere indicate the name "Sammy Kosgei" nor does it at all mention the name of the owner of the motor vehicle.

31. I am also aware that the Appellant conceded that the phone number entered in the Police Abstract as the one belonging to the owner of the motor vehicle, although different in arrangement of some of the digits, bore striking similarity to the one belonging to the Appellant. However, in the absence of certainty on the identity of the person who supplied the number to the police, again the same cannot be used as a nexus between the Appellant and the motor vehicle.

32. From the foregoing, and although the standard of proof in civil matters is on a balance of probabilities, and not proof beyond reasonable doubt, it is clear that PW2's testimony was not at all sufficient to link the Appellant to ownership of the motor vehicle.

33. Of course, it is not in all motor vehicle accident cases that proof of ownership of a subject motor vehicle ought to necessarily be made by producing a search Report from the NTSA. There may be no need to produce Search Records or Certificate of ownership where there is other sufficient evidence through any other means indicating that a person is the owner of a motor vehicle or where such ownership is not denied or is expressly admitted. However, where as herein, the allegation of ownership has been strenuously contested and serious doubts raised, it is incumbent upon the person alleging ownership to produce a Search Report at least as a starting point.

34. It is important to note that at paragraph 12-14 of his Judgment, the trial Magistrate appreciated that there was an omission by both parties to produce a Search Report from the Registrar of Motor Vehicles. What I however find unjustified is that although the burden of proof in law is first primarily on a Plaintiff (the Respondent in this case), the Magistrate opted to solely blame the Appellant for the omission and proceeded to use the same against the Appellant. Considering the circumstances in this case, I do not believe this was the proper manner of handling the issue of burden of proof and shifting it to the Appellant (Defendant). For burden of proof on an issue to shift to a Defendant, the Plaintiff must have first laid down a strong foundation for establishing the correctness of the facts that he alleges as answering that issue. In this case, in view of all the contradictions and doubts apparent in the Respondent's allegations that the Appellant was the owner of the subject motor vehicle, my view is that no sufficient foundation had been laid by the Respondent (as the Plaintiff) to justify shifting the burden of proof to the Defendant (Appellant in this case).

35. In the end, I find that the Respondent failed to sufficiently prove, on a balance of probabilities, that the Appellant was at the material time the owner of the motor vehicle registration number KBQ 195M.

36. This conclusion therefore overturns the trial Court's findings imposing liability on the Appellant. By extension, the conclusion is therefore sufficient to dispose of this entire Appeal in favour of the Appellant. I therefore do not need to consider the two remaining issues. However, for completeness of record, I will still determine the two.

ii Whether the trial Court's award of Kshs 900,000/- as general damages was inordinately high and thus excessive

37. It is now a settled as a principle of law that for an appellate Court to interfere with or disturb the assessment or award of damages by a trial Court, it must be shown that the trial Court proceeded on

wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low as to represent an entirely erroneous estimate.

38. In connection thereto, in the case of Kemfro Africa Limited t/a 'Meru Express Services [1976]"& Another V. Lubia & Another (No. 2) [1987] KLR, the Court of Appeal held as follows:

> " .... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held 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."

39. This principle was reiterated in Dilip Asal v Herma Muge & another [2001] eKLR [2001] KLR as follows:

> " ..... Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

40. Similarly, in the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal further pronounced itself as follows:

> " ... it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:

41. On the manner of assessing damages, Kneller, JA in the Court of Appeal decision in Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR laid out the following guidelines:

> " The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.
>
> 1. Each case depends on its own facts;
> 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
> 3. comparable injuries should attract comparable awards.
> 4. inflation should be taken into account; and
> 5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone."

42. From the above, it is clear that in awarding damages, some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries.

Indeed, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards". Similarly, in Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed as follows:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

43. My task is therefore to determine whether the trial Magistrate committed any error of principle when assessing and awarding the damages.

44. Applying the above principles to the facts and circumstances of this case, I note that from the Medical Report of Dr. Joseph C. Sokobe dated 10/04/2017 and treatment notes produced in evidence, the Respondent suffered blunt injuries to the chest, back and right knee, fracture of the both scapula and degloving injury to the right below/forearm which left multiple healed ugly scars thereon. The most severe injuries are therefore the fractures of the both scapula bones (shoulder bone, also known in layman's language as the "shoulder blade")

45. I have perused various previous cases involving similar or comparable injuries and analyzed the awards therein. I find that majority of awards relating to fracture of scapula is in the region of Kshs 300,000/- and Kshs 400,000/-, depending on the severity of the injuries.

46. For instance, in the case of Waithaka & another v Kanyi (Civil Appeal 56 of 2016) [2022] KEHC 127 (KLR) (18 February 2022) (Judgment), Mshila J on appeal, upheld an award of Kshs 300,000/. The decision was delivered on 18/02/2022.

47. In the case of Easy Coach Bus Limited v Mary Adhiambo Ohuru [2017] eKLR, Majanja J reduced an award of Kshs 1,200,000/- to Kshs 300,000/-. The decision was delivered on 13/02/2017.

48. In the case of Jane Warugurumiano v Jotham Nguri Magondu & another [2018] eKLR, on appeal, L.W. Gitari J upheld an award of Kshs 250,000/- made by the trial Court. The decision was delivered on 19/04/2018.

49. In the case of Morris Miriti v Nahashon Muriuki & another [2018] eKLR, on appeal, Majanja J upheld an award of Kshs 300,000/- made by the trial Court. The decision was delivered on 31/05/2018.

50. In David Gakinya v Mary Nyambura [2017] eKLR, on appeal, Waweru J upheld an award of Kshs 300,000/- made by the trial Court. The decision was delivered on 31/05/2017.

51. Counsel for the Respondent urged me to rely on the case of P.N. Mashru Ltd vs Omar Mwakoro, Voi HCCA No. 9 of 2017, [2018] eKLR in which J Kamau J, on appeal, upheld an award of Kshs 1,200,000/-. I have however perused that authority and noted that the injuries therein included loss of consciousness, fracture of the femur, fracture of the temporal bone with haematoma, head injury with brain oedema and subdural haematoma.

52. Counsel also cited the case of Bonface Mugendi Njiru v Ochieng t/a Tohel Agencies & Another [2011] eKLR in which Rawal J awarded a sum of Kshs 1,000,000/-. I have similarly perused that authority and noted that the injuries therein included blunt head injury with loss of consciousness for over 24 hours, loss of four upper incisor teeth, fracture of the shaft of right femur, and compound fracture of the right tibia with loss of soft tissues including tendons. The injuries were also described as life threatening.

53. From the foregoing, it is evident that the severity of the injuries suffered in the said cases cited by Counsel for the Respondent are not and cannot by any stretch of imagination be compared or equated with those suffered by the Respondent in this instant case.

54. I have also perused the case relied upon by the trial Magistrate, namely, the decision of A. Mshila J made in the case of Janet Opiyo & Another v Stephen Tuwei [2012] eKLR in which an award of Kshs 1,000,000/- was made. I note that in that case, the injuries were, inter alia, a compound fracture of the tibia and multiple bruises. I also note that in that case, there was no fracture of scapula as in the instant matter. It is not therefore a sufficiently comparable case. In any event, the injuries were clearly slightly more severe than those under consideration in this instant case.

55. While the prevailing status of our currency and economy have to be taken into account in awarding damages, astronomical awards must be avoided. The Court must therefore ensure that awards result in fair compensation. I however note that in the cases that I have cited, the Plaintiffs suffered fracture of one scapula bone while in this instant case, the fractures were for both scapula.

56. In light of the said comparable awards and the principles referred to, I find the sum of Kshs 900,000/- for general damages as awarded by the trial Magistrate to be considerably high and substantially excessive to amount to an error in principle. The same justifies interference by this Court. Accordingly, I set aside the award of Kshs 900,000/- awarded in general damages and substitute it with an award of Kshs 450,000/-.

57. However, since I have already overturned the trial Magistrate's decision on liability, this finding on general damages turns on nothing as it will have no effect on the final orders.

iii.Whether the amount awarded as Special damages reflected the amount pleaded in the Plaint and proved

58. On this point, it is trite law that special damages must be both pleaded and proved before they can be awarded. In the case of Hahn v. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Court of Appeal held 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."

59. Similarly, in the case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR the Court of Appeal again held as follows;

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.
>
> In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:
>
> > " It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another

v Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

> "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.
>
> The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

60. In this case, the Magistrate awarded a sum of Kshs 45,715/- as Special damages yet the figure pleaded in the Plaint was only Kshs 6,000/-. The Plaint was never amended to change the figure pleaded. In the circumstances, I would have no hesitation in reducing the award of Kshs 45,715/- to Kshs 6,000/-, the amount pleaded as special damages.

61. Again, however, since I have already overturned the trial Magistrate's decision on liability, this finding, too, turns on nothing.

Final Order

62. In the premises, since I have found that there was no sufficient material before the trial Court to sustain the finding that the Appellant was the owner of the subject motor vehicle KBQ 195M, this Appeal must inevitably succeed. Accordingly, I order as follows:

    i. The Judgment delivered on 4/10/2019 in Iten Principal Magistrate's Court Civil Case No. 6 of 2018 entering Judgment in favour of the Respondent herein is hereby set aside and substituted with an order dismissing the suit in its entirety.

    ii. Since costs primarily follow the event, the Appellant is awarded costs of both the suit before the Magistrate's Court and also costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY 2024.

WANANDA J.R. ANURO

JUDGE