



**Magaiwa & another v NRO (A minor suing through the father and next friend DAO)
(Civil Appeal E098 of 2021) [2024] KEHC 8303 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 8303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E098 OF 2021
RPV WENDOH, J
JANUARY 19, 2024**

BETWEEN

SAMSON RIOBA MAGAIWA 1ST APPELLANT

BEAUTY KEMUNTO NYANETI 2ND APPELLANT

AND

**NRO (A MINOR SUING THROUGH THE FATHER AND NEXT FRIEND
DAO RESPONDENT**

*(An Appeal from the Judgement and Decree of Hon. A. N. Karimi (RM) dated
and delivered on 3/6/2021 in the original Kehancha PMCC No. 16 of 2018)*

JUDGMENT

1. Samson Rioba Magaiwa and Beauty Kemunto Nyaneti (the appellants) preferred the instant appeal dated 1/11/2021 against the judgement and decree of Hon. A.N. Karimi (RM) dated and delivered on 3/6/2021. The firm of O.M. Otieno & Co. Advocates is on record for the appellants while the firm of Joe Ngigi & Kibet is on record for the respondent.
2. The respondent instituted a suit by a plaint dated 5/10/20218 seeking special damages, general damages, costs, interest and any other relief the court deemed to grant. This is a result of injuries sustained by the respondent, from an alleged accident which occurred on the 8/10/2015 involving motor vehicles registration number KCA XXXX and KBD XXXX along the Migori - Isebania Road. The respondent pleaded that the 1st appellant was the registered owner of the motor vehicle registration number KCA XXXX while the 2nd appellant was the beneficial owner/insured of the said motor vehicle which was being driven by herself/her driver/agent/employee. It was further pleaded that the respondent was a lawful passenger in motor vehicle registration number KBD XXXX when the alleged road traffic accident occurred.



3. The appellants filed a statement of defence dated 23/7/2019. The appellants averred that the accident occurred as a result of the contributory negligence of the respondent and denied liability, the particulars of injuries, loss and damages stated by the respondent.
4. On 25/3/2021, parties recorded a consent on liability in the ratio of 70:30 in favour of the respondent. Parties further agreed that the documents dated 5/10/2018 and the supplementary list dated 15/9/2020 in the order they appear, be produced as PEX No. 1 - 4 and PEX 5-7 respectively. It was also agreed that the medical report dated 10/9/2020 be produced as DEX No. 1.
5. The trial Magistrate in a judgement dated 3/6/2021, apportioned liability in the ratio of 70:30 against the appellants, awarded general damages of Kshs. 250,000/=, special damages of Kshs. 16,000/=, costs and interests of the suit from the date of judgement until payment in full. The learned Magistrate however, declined to award special damages amounting to Kshs. 7,050/=.
6. The appellants being dissatisfied with the judgement preferred the instant appeal on the following eight (8) grounds:-
 - a. The court erred in law when it entered judgement in favour of the respondent whereas he failed to prove his claim to the required standard;
 - b. The learned Magistrate misdirected herself in law by making an award for both general and special damages which were not proved to the required standards;
 - c. The court misapprehended the principles applicable in computation of damages thus occasioning miscarriage of justice;
 - d. The trial court failed to consider the appellants' submissions and authorities in support thereof;
 - e. The appellants have since discovered that the claim was not a genuine one and the application to adduce additional evidence shall be done at the opportune time;
 - f. The trial court failed to subject the award to the agreed contribution;
 - g. The trial court failed to properly evaluate the evidence on record thus reaching an erroneous decision;
 - h. The trial court failed to subject the costs of the suit to contribution.The appellants prayed:-
 - i. The appeal be allowed and the judgement and decree of the trial Magistrate dated 3/6/2021 be set aside and/or varied.
 - ii. That the court be pleased to revisit, re-assess and/or review the issue of liability and quantum of damages which is reasonable in the circumstance.
 - iii. The costs of this appeal and costs incurred in the subordinate court be borne by the respondent.
 - iv. Such other relief as the court may deem necessary.
7. Directions were taken that the appeal be canvassed by way of written submissions. The appellants filed their submissions dated 8/8/2022 on 24/8/2022. The appellant submitted that the only issue for determination is that of quantum of damages awarded in respect of the injuries suffered by the



respondent. The respondent filed his submissions dated 13/10/2022 on 24/10/2022 and submitted on the issue of quantum on the general damages and the issue of special damages.

8. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.
9. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

10. Guided by the above principles, I have considered the appeal, the proceedings in the trial court and the submissions by both parties. The main issues for consideration are:-
 - i. Whether the trial court applied the correct principles in assessment of damages.
 - ii. Whether the trial court arrived at the right conclusion in not awarding special damages.
11. On the issue of quantum, the appellants submitted that the award on general damages was inordinately high compared to damages awarded in comparable cases; that during the hearing, PW1 admitted that the minor aged 7 years had only sustained soft tissue injuries and the same had completely healed. The appellants asked this court to find that an award of Kshs. 100,000/= would be sufficient. Further, it was submitted that both the general and special damages should be subjected to the agreed contribution of 70:30 liability. On the other hand, the respondent submitted that the Magistrate did consider the correct principles and subjected the general damages to the agreed 30% contribution arriving at a figure of Kshs. 266,000/= and urged the court to uphold the decision. The respondent also asked this court to consider the special damages amounting to Kshs. 7,050/= that were omitted.
12. The medical report by Dr. Morebu Peter Momanyi dated 10/9/2019, indicated that the respondent had suffered blunt trauma to the mouth, chest contusion, blunt trauma to the frontal region, bleeding from the gums and mobile canines. It was the doctor's further opinion that the respondent required some analgesics on and off while in pain. On the other hand, the second medical examination report by Dr. J.A.S. Kumenda dated 10/9/2020 observed that the respondent suffered soft tissue injuries on the head and chest which he had healed well without any permanent disability. The P3 form from the Isebania Police Station stated that the respondent had bleeding of the gums and pain across the chest. The same observation was made by the treatment facility where the respondent was treated.
13. I have considered the cases relied upon by each party. The appellants asked this court to consider the case of *Daniel Gatana Ndungu & Another v Harrison Angore Katana* (2020) eKLR where the respondent suffered injuries of cuts on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. On appeal, the court reviewed the award from Kshs. 350,000/= to Kshs. 140,000/=. The appellant also submitted that in the cases of *Ndugu Dennis v Wangari Ndirangu & Another* (2016) eKLR and *Maimuna Kilyungya v Notrex Transporters Limited*



- (2019) eKLR the courts awarded the sum of Kshs. 100,000/= and Kshs. 150,000/= respectively for soft tissue injuries. The respondent was of the view that the trial Magistrate reached a proper finding in relying on the case of *Veronicah Mkanjala Mnyapara v Charles Kinanga Babu* (2020) eKLR and noted that save for the cut wounds and dislocation, the injuries sustained by the respondent were similar to those suffered by the plaintiff therein and the court awarded Kshs. 300,000/=.
14. In her judgement, the learned Magistrate agreed with the decisions which the appellants had relied on being the cases of *Ndungu Denis* (*supra*) and *Maimuna Kilyungya* (*supra*) where the plaintiffs suffered soft tissue injuries and were awarded the sum of Kshs. 100,000/= and Kshs. 150,000/= respectively. The learned Magistrate went on to further consider the case of *Robert Cheserek v Jackline Jepkoech Jimmy* (2019) eKLR where the appellate court upheld the lower court award of Kshs. 200,000/= for soft tissue injuries. I find no reason to disturb the findings of the learned Magistrate as she evidently considered the submissions of both parties and the binding decisions before making her findings. Besides, the cases relied on by the appellants were decided in the year 2018 and 2019 respectively. Taking into account the incidence of inflation, the award of Kshs. 250,000/= was proper. The award on quantum of damages is hereby upheld subject to liability in the ratio of 70:30 in favour of the respondent.
 15. On the special damages, the trial Magistrate awarded Kshs. 16,000/= which was specifically pleaded and proved but declined to grant the sum of Kshs. 6,500/= which was produced as PEX -7 and Kshs. 550/= which was produced as PEXH - 2, on the grounds that neither were specifically pleaded in the plaint.
 16. The respondent in his plaint under the particulars of special damages pleaded the particulars of medical expenses only as Kshs. 16,000/=. The respondent also went ahead to pray that he be awarded the special damages in his prayers. In this appeal, the respondent has asked the court to award a sum of Kshs. 7,050/= as the special damages specifically proven. It is now well settled in law, that a claim for special damages must be pleaded and strictly proven. Special damages are those losses that a party incurs and actually loses; and it is expected that he ought to be put back in the position that he would have been had the loss not occurred. In making an award for special damages two conditions have to be met which are interdependent on each other, they must be specifically pleaded and proved.
 17. It is trite that each party is bound by their own pleadings. The respondent could not have purported to have proved special damages of Kshs. 6,500 and 550/= if the same were not pleaded. It follows that the same could not have been awarded. The court was correct in declining to award the respondent Kshs. 7,050/= as special damages to the respondent.
 18. In the end, I find that the appeal has no merit and it is hereby dismissed. The judgement and decree of the Hon. A.N. Karimi (RM) dated and delivered on 3/6/2021 is hereby upheld. Interest on the decretal amount shall be at court rates from the date of judgment. The respondent is also awarded the costs of the suit and this appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF JANUARY, 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of

Ms. Wadango for the Appellant.

Mr. Keing for the Respondent.

Nyauke Court Assistant.

