



**Magaiwa v JLOO (A Minor suing through the father and next friend David Ayienda Ondieki)
(Civil Appeal E097 of 2021) [2024] KEHC 8302 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 8302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E097 OF 2021
RPV WENDOH, J
JANUARY 19, 2024**

BETWEEN

SAMSON RIOBA MAGAIWA APPELLANT

AND

**JLOO (A MINOR SUING THROUGH THE FATHER AND NEXT FRIEND
DAVID AYIENDA ONDIEKI) 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. 15 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 fit 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 791A and KBD 184T along the Migori - Isebania Road. The respondent pleaded that the 1st appellant was the registered owner of the motor vehicle registration number KCA 791A 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 184T when the alleged road traffic accident occurred.



3. The appellants filed a statement of defence dated 23/7/2019. They 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. The documents were:-
 1. PEX No. 1 - Police Abstract.
 2. PEX No. 2 - Copy of Motor Vehicle Search Records.
 3. PEX No. 3 - Treatment Notes.
 4. PEX No. 4 - Demand Letter.
 5. PEX No. 5 (a) - Medical Report by Dr. Moregu Peter. 5(b) - Receipt of Kshs. 6,500/=
 6. PEX No. 6 - P3 Form.
 7. DEX No. 1 - Medical Report dated 10/9/2020.
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. 400,000/=, but there was no award of special damages. The learned Magistrate also awarded the respondent costs and interests of the suit from the date of judgement until payment in full.
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.
7. 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 circumstances.
 - 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.
8. 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 awardable.
9. This being the first appellate court, 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.
10. 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.”
11. 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:-
- a. Whether the trial court applied the correct principles in assessment of damages.
 - b. Whether the trial court arrived at the right conclusion in not awarding special damages.
12. 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 the second medical report prepared by Dr. J.A.S Kumenda affirmed the injuries sustained by the respondent had healed well without permanent disability. 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. 280,000/= and urged the court to uphold the decision. The respondent also asked this court to consider the out special damages amounting to Kshs. 7,050/= that were omitted.
13. The medical report by Dr. Morebu Peter Momanyi dated 10/9/2019, indicated that the respondent had suffered a fracture of the left tibia and fibula. The doctor opined that the respondent had pain in the left lower limb, is unable to walk without support, is walking using crutches, with a limping gait



and had tenderness on the left leg. It was the doctor's further opinion that the respondent required physiotherapy with occupational therapy and permanent disability assessed at 20%. On the other hand, the second medical examination report by Dr. J.A.S. Kumenda on 10/9/2020 observed that the respondent walked without limping; that he suffered soft tissue injuries and fractures on the right leg but healed well without permanent disability. The P3 form from the Isebania Police Station also acknowledged that the respondent suffered compound fractures of the right lower limb and the injuries sustained was classified as serious.

14. 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 respondent was of the view that the trial Magistrate reached a proper finding in relying on the case of *Daniel Otieno Owino & Anor. v Elizabeth Atieno Owour* (2020) eKLR where the plaintiff sustained fracture on the right leg, chest injuries, injuries on the eye bridge, injury on the left leg, left eye and the court awarded Kshs. 400,000/=. The injuries suffered by the respondent herein were more severe than those suffered by the respondent in *Daniel Gatana* (*supra*). The injuries sustained by the respondent in the aforementioned case were soft tissue injuries in nature. In the present case, the common denominator in all the medical reports is that the respondent suffered two fractures which are more serious.
15. The injuries sustained in the case of *Daniel Otieno* (*supra*) which the trial court considered comprised of compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut on the nose, blunt chest injury and soft tissue injury on the left lower limb involving the high and ankle region. The appellate court revised the award of Kshs. 600,000/= to Kshs. 400,000/= in a judgement delivered on 29/5/2020. At the time of the hearing of the instant case, the respondent had fully recovered. There is no recommendation from either of the medical reports that the respondent would have to undergo further medical procedures to correct defects which arose as a result of the accident. I find that the injuries suffered in *Daniel Otieno* (*supra*) case are more comparable to the instant case. I find that the trial Magistrate considered and followed the correct principles in awarding the general damages of Kshs. 400,000/=. Taking into account the rate of inflation from when the *Daniel Otieno* (*supra*) case was delivered, the award on quantum of damages is hereby upheld subject to liability in the ratio of 70:30 in favour of the respondent.
16. On the special damages, the trial Magistrate declined to grant the same and found as follows:-

“That said, no special damages were specifically pleaded in the plaint. Simply stating that ‘the details would be provided later with the leave of court’ was unacceptable in law. pleadings must not be ambiguous. None were pleaded by the plaintiff herein. It therefore follows that none shall be awarded.”
17. The respondent in his plaint under the particulars of special damages pleaded that the details will be provided later with leave of court. The respondent, in his prayers, asked to be awarded special damages. In this appeal, the respondent has asked the court to award a sum of Kshs. 7,050/= as special damages specifically proved. It is not in doubt that the respondent suffered injuries for which he was treated as evidenced by the medical reports. 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.



18. 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.
19. 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.

